CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/13

In the matter between:

LICINIO LOUREIRO	First Applicant
VENESSA LOUREIRO	Second Applicant
LUCA-FILIPE LOUREIRO	Third Applicant
JEAN-ENRIQUE LOUREIRO	Fourth Applicant

and

IMVULA QUALITY PROTECTION (PTY) LTD	Respondent

Neutral citation:	*Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Heard on:	6 November 2013
Decided on:	20 March 2014
Summary:	Constitutional issue – wrongfulness – role of private security industry Contract for guarding services – breach of contract – express prohibition – strict liability – liability of security companies

Delict – wrongfulness – negligence – vicarious liability of security companies

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. Leave to appeal is granted.

2. The appeal is upheld.

3. The order of the Supreme Court of Appeal is set aside and the order of the High Court is replaced with the following order:

   (a) The respondent is declared liable in contract to the first applicant for whatever damages may be proved.

   (b) The respondent is declared liable in delict to the second, third and fourth applicants for whatever damages may be proved.

4. The respondent is ordered to pay the applicants' costs in this Court, the Supreme Court of Appeal and the High Court including, where applicable, the costs of two counsel.

JUDGMENT

VAN DER WESTHUIZEN J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Nkabinde J and Zondo J concurring):

Introduction

[1] The founding values of our Constitution include human dignity, the advancement of human rights and freedoms and the rule of law.[1] The Bill of Rights recognises the rights to life, freedom and security of the person, freedom from all forms of violence, privacy and not to be arbitrarily deprived of property.[2] And the Preamble of the Constitution calls for our people to be protected.[3] Our police service is mandated—

> "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[4]

[2] Yet, there is a disturbingly dark side to the often-stated miracle of our constitutional democracy. South Africa is plagued by crime – often viciously violent, sometimes sophisticated and organised, often ridiculously random, but always audacious and contemptuous of the values we are supposed to believe in and the human rights enshrined in our Constitution – perhaps not unlike other young democracies. More than 16 000 murders were reported to have taken place in the

[1] Section 1 of the Constitution.

[2] Sections 11, 12, 14 and 25 of the Constitution.

[3] The Preamble states: "May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

[4] Section 205(3) of the Constitution.

2012/2013 year – almost 45 a day – and almost 106 000 armed robberies.[5] Many of our people live behind high walls and electrified fences; others rely on the communities around them for security; and many are mercilessly exposed to the cruelty of crime.

[3] The South African Police Service is not always perceived to be capable of meeting its constitutional mandate. Hence, the private security industry is a large and powerful feature of South Africa's crime-control terrain. While it should and could not be a substitute for state services, it fulfils functions that once fell within the exclusive domain of the police.[6] This is in part because of our history. From the late 1970s and throughout the 1980s the apartheid regime concentrated policing activities on state security and maintaining political control, and so the private security industry increasingly played a role in protecting private individuals' safety and security.[7]

[4] The industry continues to do so. It is suggested to have been the fastest-growing South African industry since the early 1990s.[8] Indeed, security officers employed in the private industry greatly outnumber the members of the South African

[5] The latest available crime statistics released by the South African Police Service reveal that in the 2012/2013 period, 617 239 contact crimes were reported. These include 16 259 murders, 16 363 attempted murders, 66 387 total sexual offences (including rapes), 185 893 assaults with the intent to inflict grievous bodily harm, 172 909 common assaults, 105 888 robberies with aggravating circumstances and 53 540 common robberies. Commentators indicate that the total number of crimes, including those which are never reported, is far higher.

[6] According to commentators like Irish "Policing for Profit: The Future of South Africa's Private Security Industry" (United Nations Development Programme, New York 1999) and Berg "The Private Security Industry in South Africa: A Review of Applicable Legislation" (2003) 16 *SACJ* 178 at 178.

[7] Irish above n 6.

[8] Clarno and Murray "Policing in Johannesburg after Apartheid" (2013) 39 *Social Dynamics* 210 at 213.

Police Service.[9] Many of those with the resources to do so turn to the private security industry for the protection of their rights. The Loureiro family, the applicants, did just that.

[5] The respondent, iMvula Quality Protection (Pty) Ltd, a private security company, was contracted to provide a 24-hour armed guard at the Loureiro home. On a night in January 2009 robbers masquerading as police officers drove up the Loureiros' driveway and demanded entry. iMvula's employee on duty opened the pedestrian gate, allowing the robbers to apprehend him and gain access to the home. They accosted the Loureiros and their household staff and stole goods worth millions. The Loureiros successfully asked the High Court to hold iMvula liable in both contract and delict. That judgment was overturned by the Supreme Court of Appeal. The Loureiros approach this Court for leave to appeal against the decision of the Supreme Court of Appeal.

Issues

[6] The issues for determination are:

(a) Should leave to appeal be granted?

(b) Is iMvula liable for breach of contract?

(c) Is iMvula liable in delict for the Loureiros' loss?

[9] Id at 222.

Factual background

[7] In late November 2008, after having been robbed at gunpoint in their previous home, the Loureiro family moved to a new house in Melrose, Johannesburg. Mr Loureiro arranged for an extensive security system to be installed at the house, including electrified fencing, perimeter beams, multiple alarm systems, a guard house and an intercom system with closed-circuit television.

[8] At the entrance to the house are two gates: a vehicle entryway and an armoured pedestrian gate. The pedestrian gate has a peephole. An intercom, which communicates with the guardhouse, is mounted on a gooseneck next to the driveway. The guardhouse, with a full view of the driveway through a bulletproof glass window, is to the right of both gates.

[9] Mr Loureiro contracted iMvula, in an oral agreement, to provide a 24-hour service of armed guards to be placed at his home.[10] As pleaded in the High Court, the terms of this agreement initially included that—

> "6.5.1 [iMvula] would take all reasonable steps to prevent persons gaining unauthorised access and/or entry to the [Loureiro family's] premises;
>
> 6.5.2 [iMvula] would take all reasonable steps to protect the persons and property of [the Loureiro family];
>
> . . .
>
> 6.7 [iMvula] would take all reasonable steps to ensure that no persons gained unlawful access to the [Loureiro family's] premises".[11]

[10] In the High Court and in the Supreme Court of Appeal iMvula raised the argument that the contract was concluded with Mr Loureiro's nephew. Both courts rejected this argument and iMvula has not seriously pursued it in this Court.

[10] A few days after the guarding service commenced, a guard on duty admitted Mr Loureiro's brother onto the property without first obtaining Mr Loureiro's permission. In early December 2008, concerned about guards allowing access to visitors without prior authorisation, Mr Loureiro instructed that the intercom be partially disabled so that the guards would be unable to open and close the main driveway gate, and so would have to contact the main house to let anyone onto the premises.

[11] This affected the guards' ability to change shifts. To address this problem, Mr Loureiro provided a key to the pedestrian gate and expressly prohibited the use of the key for any purpose other than to enable guards to change shifts. He emphasised to Mr Green, a supervisor employed by iMvula, that the key should not be used to open the gate to allow access to anyone without prior authorisation.

[12] Throughout the litigation, the Loureiro family has argued that this express prohibition had the effect of amending the contract. In their particulars of claim, they cast the term as clause 6.8:[12]

> "[iMvula] was not entitled to permit any person to gain access to the [Loureiro family's] residence other than [Mr and Mrs Loureiro] and their two minor sons,

[11] For ease of reference, I call these terms clauses 6.5.1, 6.5.2 and 6.7 respectively, as this is how they were pleaded by the Loureiros in the High Court.

[12] iMvula's contention that the Loureiros' counsel only raised clause 6.8 for the first time in their argument in the Supreme Court of Appeal is not sustainable, as this point was pleaded in the High Court.

> unless [iMvula] had obtained such prior authorisation from [Mr Loureiro] alternatively [Mrs Loureiro] to allow such persons access".

[13] iMvula agrees that Mr Loureiro prohibited the guards from using the key to open the gate to allow access to anyone without prior authorisation. However, it disputes that this prohibition amended the oral agreement so as to impose a strict-liability obligation on iMvula.

[14] On 22 January 2009, just over a month after the express prohibition, Mr and Mrs Loureiro left their home to attend a school function, leaving their children in the care of three members of their household staff. iMvula's guard on duty that night was Mr Mahlangu, a qualified Grade-A security guard. Mr Mahlangu had never been told about Mr Loureiro's instructions to Mr Green, nor had he received a job description or instructions from iMvula about the specific services that the Loureiros required. He had also not been properly informed regarding the entry of police officers onto private property,[13] or how to identify police officers. Mr Mahlangu had no means of

[13] See, for example, section 25 of the Criminal Procedure Act 51 of 1977, headed "Power of police to enter premises in connection with State security or any offence":

> "(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—
>
> (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or
>
> (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,
>
> he may issue a warrant authorising a police official to enter the premises in question at any reasonable time for the purpose—
>
> (i) of carrying out such investigations and of taking such steps as such police official may consider necessary . . .;

communicating with iMvula other than his personal cellphone, which had no airtime. He was not armed on the night.

[15] At 19h47 an unmarked white BMW car with a flashing blue light on the dashboard pulled up to the Loureiro family's driveway. A man alighted from the front passenger seat, wearing dark blue clothing, a reflective vest marked "Police" and a cap bearing a logo resembling a police logo. He walked towards the bulletproof glass of the guardhouse and flashed an identity card in Mr Mahlangu's direction, without giving him a chance to examine it. When Mr Mahlangu tried to speak to the man through the intercom, he received no answer. He assumed that the intercom must have been broken. He attempted neither to gesture the man back to the intercom or guardhouse window, nor to contact the main house or iMvula. Instead, he picked up the key to the pedestrian gate, exited the guardhouse and walked over to the pedestrian gate. Without attempting to speak to the man through the gate or the peephole, he used the key to open the gate.

[16] As soon as Mr Mahlangu opened the gate, the man pointed a gun at him. Accomplices then emerged from the car and forced Mr Mahlangu into the guardhouse.

(ii) of searching the premises or any person in or upon the premises for any article . . . which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article.

(2) A warrant under subsection (1) may be issued . . . .

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes—

(a) that a warrant will be issued to him . . . and

(b) that the delay in obtaining such warrant would defeat the object thereof."

After this, the robbers were easily able to enter the house. They accosted the household staff and children, holding them captive while the robbery took place. When Mr and Mrs Loureiro returned to their home just before 21h00, the robbers confronted them in their garage. Mrs Loureiro was tied up with her children and the staff, while Mr Loureiro was ordered to accompany the robbers to where valuables were hidden in the house and to provide keys to the safes. The robbers stole belongings allegedly worth more than R11 million.

High Court

[17] In April 2009 the Loureiros instituted proceedings against iMvula in the High Court, relying on two causes of action. The first claim, brought by Mr Loureiro only, was for damages caused by iMvula's alleged breach of the contract.[14] The second claim was brought in delict by Mrs Loureiro and her two minor sons, who alleged that iMvula negligently and wrongfully caused them patrimonial loss as well as pain and suffering. The parties agreed to separate the issue of liability from the issue of the amount (quantum) of the loss.[15]

[18] The High Court found that iMvula's liability, whether in contract or delict, essentially turns on the question of negligence.[16] Satchwell J found that iMvula was negligent: a reasonable security company would have foreseen the possibility of

[14] Only Mr Loureiro was party to the contract with iMvula. iMvula raised a special plea challenging Mr Loureiro's standing to bring the claims, on the basis that Mr Loureiro had ceded part of the claim to an insurance company after the robbery. This argument failed in both the High Court and the Supreme Court of Appeal. iMvula has not pursued it in this Court.

[15] Quantum was thus not argued in either the High Court or the Supreme Court of Appeal and is not relevant to the proceedings in this Court.

[16] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2011] ZAGPJHC 140 (High Court judgment).

intruders attempting to gain access to the premises using disguise; that the only point of access (the pedestrian gate) required special surveillance and management; that the intercom (which was the only means of communication from the guardhouse to the family home) had to be checked; that clear instructions had to be given to its employees; and that a guard needed a reliable means to contact supervisors. In all these respects iMvula failed to take the reasonably appropriate steps to eliminate or reduce harm and so was in breach of its contract and also delictually liable for failing to meet the standard required of a security company and to discharge its duty of care.

[19] The High Court also held that Mr Mahlangu was negligent and that iMvula was vicariously liable in delict. Although the judgment stated that Mr Mahlangu "cannot be criticised for assuming that this was a police patrol and a policeman",[17] it held that in opening the pedestrian gate he "failed to take reasonably appropriate steps to prevent the anticipated harm".[18] A reasonable security guard would have made sure that he had a chance to verify the identity card; called the man back to the intercom when he received no response; made enquiries through the pedestrian gate before opening it; and attempted to contact the main house for information and authorisation to let him in.

[20] The High Court concluded that iMvula was liable in contract to Mr Loureiro and in delict to Mrs Loureiro and their two sons. It ordered iMvula to pay costs.

[17] Id at para 65.

[18] Id at para 66.

Supreme Court of Appeal

[21] iMvula appealed to the Supreme Court of Appeal.[19] The majority (per Mhlantla JA with whom Mthiyane DP, Bosielo JA and Mbha AJA concurred) found that the reasonableness of Mr Mahlangu's conduct was pivotal to both claims. On the contractual question, it held that clause 6.8, which provided that iMvula was not entitled to permit any person to gain access to the residence without the prior authorisation of Mr or Mrs Loureiro, cannot be read in isolation. Understood against the backdrop of the contract as a whole, which includes clauses requiring that reasonable steps be taken, clause 6.8 does not impose strict liability – in other words liability without fault in the form of intent or, in this case, negligence.

[22] In addition, the Court held that the clause has to be read as being subject to a tacit term excluding the police from the group of people who are not allowed access to the premises, so as to comply with section 25(3) of the Criminal Procedure Act.[20] Accordingly, in opening the pedestrian gate, Mr Mahlangu did not breach the contract, as, first, the contract did not impose a strict prohibition on allowing persons onto the premises without prior authorisation, and second, clause 6.8 could not have been intended to apply to police officers performing official duties.

[23] On whether Mr Mahlangu acted negligently, the Court found that he was not unreasonable in believing that the imposter was a police officer. The flashing blue

[19] *Imvula Quality Protection (Pty) Ltd v Loureiro and Others* [2013] ZASCA 12; 2013 (3) SA 407 (SCA) (Supreme Court of Appeal judgment).

[20] The section is quoted above n 13.

light of the car indicated urgency and Mr Mahlangu opened the gate, believing it necessary to do so in order to make enquiries. Mr Mahlangu was thus not negligent in unlocking the pedestrian gate, failing to call his superior, or in being duped by the robbers. A court should not approach the case as an armchair critic, with after-the-fact wisdom. The majority concluded that the contract was not breached because Mr Mahlangu had acted reasonably.

[24] Regarding the delictual claim, the Court held that iMvula was not liable. For the same reasons that Mr Mahlangu was not negligent for the purposes of breach of contract, he also was not negligent in delict. In addition, the Court found that wrongfulness was not established. Security guards have an obligation to act in accordance with the Code of Conduct for Security Service Providers, 2003 (Code of Conduct), which requires that they render all reasonable assistance to members of the security services.[21] Mr Mahlangu could not lawfully resist opening the gate to a policeman's legitimate demand for entry. At all times he acted in good faith, believing that he was helping the police. The Loureiros did not prove that Mr Mahlangu acted wrongfully, and so their delictual claim failed.

[21] The Code of Conduct, prescribed under the Private Security Industry Regulation Act 56 of 2001, was issued by the Minister of Safety and Security in 2003. Clause 7 of the Code of Conduct, headed "General obligations towards the Security Services and organs of State" provides:

> "(1) A security service provider must, within his or her ability, render all reasonable assistance and co-operation to the members and employees of the Security Services to enable them to perform any function which they may lawfully perform.
>
> (2) A security service provider may not interfere with, resist, obstruct, hinder or delay a member or an employee of a Security Service or an organ of State in the performance of a function which such person may lawfully perform.
>
> (3) A security service provider must, without undue delay, furnish all the information and documentation to a member or employee of a Security Service or an organ of State which such member or employee may lawfully require."

[25] The Supreme Court of Appeal upheld iMvula's appeal with costs.

[26] In a dissenting judgment Cloete JA held that Mr Loureiro's account, which was uncontroverted, shows that clause 6.8 was an express, strict-liability term of the contract. On the night of the robbery, Mr Mahlangu opened the gate without authorisation and for a purpose other than shift changes. He therefore breached the contract.

[27] The dissenting judgment emphasised that reasonableness is irrelevant to the contractual claim. This is because, unlike the other clauses pleaded, iMvula's obligations in terms of clause 6.8 were not qualified by a reasonableness standard.

[28] On the delictual claim, the minority would have held that Mr Mahlangu was negligent. He was a trained security guard employed specifically to ensure that unauthorised persons would not be admitted to the premises. There were simple and effective measures he could have taken to avoid the entry and the resulting robbery.

[29] The minority also concluded that Mr Mahlangu's conduct was wrongful. Although he could not justifiably resist opening the gate to a lawful demand of a police officer, the man at the gate was "no policeman and he made no lawful demand."[22] The minority noted that the reasonableness of Mr Mahlangu's conduct

[22] Supreme Court of Appeal judgment above n 19 at para 51.

and his subjective state of mind are irrelevant to the wrongfulness enquiry. Instead, wrongfulness goes to whether it is reasonable to impose liability. The minority had no hesitation in finding that public policy requires a security company to be liable for its guard's negligence.

[30] The minority would thus have found for the Loureiros, both in contract and in delict.

Leave to appeal

[31] For leave to appeal to be granted, this Court must have jurisdiction. The Loureiros urge this Court to overturn the findings of the Supreme Court of Appeal. They argue that a constitutional issue is raised, namely the extent to which common-law actions in contract and delict give effect to the rights to security of the person, privacy and property. Alternatively, they submit that this Court has jurisdiction under the recently amended section 167 of the Constitution,[23] as the matter raises an arguable point of law of general public importance. Although the Loureiros' application to this Court was filed before the amendment came into force, they argue that the amendment applies because the general presumption against retrospectivity of law is rebutted when the law in question is procedural and does not affect a party's substantive rights.[24]

[23] This section was amended by the Constitution Seventeenth Amendment Act of 2012, which came into force on 23 August 2013. The amended section 167 empowers the Court to decide non-constitutional matters if "the matter raises an arguable point of law of general public importance which ought to be considered" by it.

[24] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at paras 26 and 28. See also *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 and 313.

[32] iMvula denies that there is a constitutional issue. It argues that there is no need to develop the common law and that the Loureiro family raises constitutional arguments for the first time on appeal to this Court. iMvula also rejects the notion that the amendment can apply retrospectively and argues that even if it were to apply, the Loureiro family has not identified an arguable point of law of general public importance.

[33] The Loureiro family relies on the law of contract and the law of delict to protect their constitutionally recognised rights. It is well-established that the law of contract and of delict give effect to, and provide remedies for violations of, constitutional rights.[25] However, the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law[26] and not merely involve the application of an uncontroversial legal test to the facts.[27]

[25] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 28-30 and 35 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 58.

[26] In *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106; 2007 (3) BCLR 287 (CC) at para 23 this Court held that when determining whether an argument raises a constitutional issue, the question is whether the Court is forced to consider constitutional rights or values, even if the argument ultimately fails. Similarly, in *Barkhuizen* above n 25 this Court assumed jurisdiction even though it later concluded that the common-law rule did not need to be altered.

[27] See, for example, *Mbatha v University of Zululand* [2013] ZACC 43 at paras 194 (Cameron J) and 217 (Madlanga J) and authorities cited there.

[34] This Court has held that an appeal against a finding on wrongfulness on the basis that it failed to have regard to the normative imperatives of the Bill of Rights does ordinarily raise a constitutional issue.[28] This is because of the nature of the wrongfulness element in delict. An enquiry into wrongfulness is determined by weighing competing norms and competing interests.[29] Since the landmark *Ewels* judgment, whether conduct is wrongful is tested against the legal convictions of the community.[30] These now take on constitutional contours: the convictions of the community are by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution.[31] In this case the wrongfulness enquiry – canvassed more fully later – invokes the convictions of a community plagued by crime on the crucial issue of respect for the police, its role and its interaction with the ever-growing private security industry.

[35] The Supreme Court of Appeal held that Mr Mahlangu's conduct in giving access to police officers or people who claim to be police officers was not wrongful. The question arises whether the Supreme Court of Appeal, in coming to this conclusion, had sufficient regard to how constitutional considerations bear upon

[28] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 19 found that when an aggrieved party seeks an appeal against a court's finding on wrongfulness, we are seized with the matter. *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 23 also found that when a court is criticised for an alleged failure to have regard to the spirit, purport and objects of the Bill of Rights in applying the test for wrongfulness, this Court will have jurisdiction over the appeal.

[29] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 21.

[30] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-C.

[31] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 56; *Van Duivenboden* above n 29 at para 17; and *Olitzki Property Holdings v State Tender Board and Another* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) at para 12.

community mores. If the decision stands, the harm-causing conduct of security companies and their employees who mistake robbers for police would not be wrongful and thus not attract delictual liability. Whether this Court should overturn the decision of the Supreme Court of Appeal poses questions about the interpretation and development of the common law.

[36] A constitutional matter is therefore raised. Mr Mahlangu's negligence and the interpretation of the contract are – in this case – issues connected to the required decision on a constitutional issue. There is no need to consider the Loureiro family's arguments based on the recent amendment to section 167 of the Constitution.

[37] Is it in the interests of justice to grant leave to appeal?[32] The Loureiros have prospects of success for their claims in both contract and delict. The substantial differences in the approaches of the majority and minority judgments in the Supreme Court of Appeal (as well as the High Court judgment) provide a further reason for its being in the interests of justice to address the issues.[33] Legal certainty on the correct approach to security companies' liability will benefit the public.[34] This is particularly critical given the public role that security companies play in giving effect to fundamental rights. Resolving the legal dispute between the Loureiros and iMvula

[32] See, for example, *Food and Allied Workers Union v Ngcobo NO and Another* [2013] ZACC 36; 2013 (12) BCLR 1343 (CC) at para 24 and *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 13.

[33] See *F v Minister of Safety and Security and Others* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) at para 38.

[34] See, for example, *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

has repercussions beyond the sphere of private affairs. Leave to appeal must be granted.[35]

Contract

[38] Mr Loureiro contends that the Supreme Court of Appeal erred in interpreting the contract, by reading clause 6.8 as subject to a tacit qualification that Mr Mahlangu only had to take reasonable steps to decide whether or not to permit access to the premises. Instead, clause 6.8 is a strict-liability term. An interpretation to the contrary is inconsistent with the intention of the parties, he submits.

[39] In this Court, iMvula continues to argue that Mr Loureiro failed to prove that the contract was amended to include clause 6.8. Even if the contract were so amended, iMvula posits that the clause cannot be interpreted to apply strictly: to do so would ignore the other terms which impose a standard of reasonableness. iMvula argues that neither it nor Mr Mahlangu had breached this standard of reasonableness.

[40] To determine whether iMvula is liable to Mr Loureiro, three issues must be decided: first, whether Mr Loureiro's express prohibition against opening the pedestrian gate without prior authorisation amended the terms of the contract; second,

[35] It is true that the Loureiros first expressed their legal claims in constitutional language in this Court. But it does not follow that it is not in the interests of justice to decide the matter. The substance of the Loureiros' case is unchanged, namely that the contract between the parties, correctly interpreted and applied, was breached by iMvula's employee, who had also acted wrongfully and negligently. The relevant facts were canvassed in the High Court and the key legal points in dispute were apparent and ventilated in both previous judgments. There is no prejudice to iMvula and this Court does not have to sit as a court of first instance.

whether this prohibition should be interpreted as imposing strict liability or instead as including a reasonableness qualifier; and third, whether the contract was breached.

[41] It is common cause that Mr Loureiro instructed that the intercom be partially disabled so that guards could not open and close the main driveway gate. He provided a key to the pedestrian gate with the strict instruction that the key should only be used for guards to change shift. It is also common cause that he prohibited the guards from permitting anyone access to the premises without prior authorisation and that this prohibition was accepted by iMvula. Given this unambiguous expression of the parties' intention, it is clear that the prohibition amended the contract. It is this term that Mr Loureiro aimed to capture in his pleaded clause 6.8 (the express prohibition).[36] iMvula's argument that the oral contract was not amended by the addition of this term is improbable based on the evidence established in and relied upon by the courts below.

[42] In the absence of a contrary stipulation, the law of contract does not require fault (even in the form of negligence) for breach.[37] The parties expressly agreed to a strict-liability prohibition. Further, the express prohibition cannot be said to impose a reasonableness proviso, tacitly or otherwise, for a number of reasons.

[36] Clause 6.8 appears earlier at [12].

[37] *Thoroughbred Breeders' Association v Price Waterhouse* [2001] ZASCA 82; 2001 (4) SA 551 (SCA) at para 66 and *Administrator, Natal v Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A) at 597E-F.

[43] First, contractual obligations are determined by the intention of the parties.[38] The intention articulated by Mr Loureiro in his prohibition was unequivocal. The need for the prohibition to be express was triggered by the unauthorised admission of Mr Loureiro's brother onto the property. It is also in line with the very reason for having guards at the gate, that is, to make the property more secure and act as a barrier to further entry, stationed to prevent anyone from gaining access without authorisation and to alert those in the home to persons at the gate. This is a strong reason to conclude that the prohibition does not, in fact, require fault for breach.[39]

[44] Second, iMvula argued that the prohibition should be understood to include a reasonableness standard because other obligations in the contract do include that standard. The argument must fail.[40] Although the contract was oral, the evidence put forward by the parties on the nature of the obligations was fairly comprehensive. It establishes that the parties specifically agreed that the express prohibition would not be qualified. While contractual terms must be understood in context, this is no reason to think that all the terms must impose the same fault standard. And in this case, other obligations explicitly imposed a reasonableness standard and the prohibition

[38] *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] ZASCA 158 at para 5 and *Total South Africa (Pty) Ltd v Bekker NO* [1991] ZASCA 183; 1992 (1) SA 617 (A) at 624F-G and 625A-B.

[39] It also cannot be said that a reasonableness standard was tacitly imposed, given that Mr Loureiro unambiguously intended that such a standard should not apply. The rule *expressum facit cessare tacitum* militates against including a tacit term that would either conflict with the express terms or which purports to deal with a matter on which the parties have already expressed themselves. See *Penderis and Gutman NNO v Liquidators, Short-Term Business, AA Mutual Insurance Association Ltd* [1992] ZASCA 178; 1992 (4) SA 836 (A) at 842I; *Rashid v Durban City Council* 1975 (3) SA 920 (D) at 924-5; and *Glennie, Egan & Sikkel v Du Toit's Kloof Development Co (Pty) Ltd* 1953 (2) SA 85 (C) at 94.

[40] While other terms of the contract (such as pleaded clauses 6.5.1, 6.5.2 and 6.7, quoted above at [9]) qualify iMvula's obligations by requiring that it take "all reasonable steps", clause 6.8 did not include such a standard.

deliberately omitted that standard. Exactly because of this, the conclusion that strict liability was imposed is compelling.

[45] Third, some of the terms imposing obligations that do include a reasonableness qualification[41] impose obligations of a different nature from the prohibition. These other terms govern active measures that iMvula and its employees must take to prevent third parties from gaining access to the premises. The prohibition, on the other hand, imposes a negative obligation not to admit third parties without prior authorisation. It makes sense that parties would contract to require a reasonableness standard for a positive obligation to do something, while not for a negative obligation not to do something – especially not to open the gate, which was at the very heart of iMvula's contractual obligations.[42]

[46] Were these obligations breached and, if so, does contractual liability follow? Mr Mahlangu used the key to open the pedestrian gate for the imposters, without prior authorisation. This amounts to a breach of the contract. Whether or not he was negligent is irrelevant. iMvula is liable.

[47] iMvula is furthermore not saved by the argument that Mr Mahlangu was compelled by law to allow the imposter access to the premises because the security

[41] See, in particular, clauses 6.5.1 and 6.7, quoted above at [9].

[42] Generally breaching a negative obligation is viewed more severely than failing to fulfil a positive obligation, even when the same results occur. Honoré "Are Omissions Less Culpable?" in *Responsibility and Fault* (Hart Publishing, Oxford 1999) at 60 and 65-6.

guard was under an obligation to obey a lawful demand by a police officer.[43] The demand was not lawfully made by a police officer.

[48] Even if iMvula's relevant contractual obligations were qualified by a reasonableness standard, it would in any event be liable, since this standard was breached. This is a consequence of the view I take on the delictual claim, which I now turn to consider.

Delict

[49] Delictual – in this case *Aquilian* – liability generally results from wrongful and negligent conduct which causes patrimonial damage. iMvula's liability could be based on its own conduct, and thus be direct, or vicarious as a result of Mr Mahlangu's conduct.

[50] I start with whether iMvula is liable vicariously, in view of how the matter was litigated and the focus of the lower courts. For delictual liability to be vicariously imposed: Mr Mahlangu must have committed a delict; an employer-employee relationship must have existed between him and iMvula when the delict was committed; and the delict must have been committed by Mr Mahlangu while acting within the course and scope of his employment.[44] iMvula did not dispute that, if

[43] See section 25 of the Criminal Procedure Act above n 13.

[44] *F* above n 33 at para 40 and *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 21. See also Neethling, Potgieter and Visser *Law of Delict* 6 ed (LexisNexis, Durban 2010) at 365-8.

Mr Mahlangu had committed a delict against Mrs Loureiro and her children, it would be vicariously liable.[45]

[51] The Loureiros argue that wrongfulness is established, because public policy requires that security companies be held liable for negligent conduct and thus be incentivised to take adequate care to avoid causing harm to others. They also submit that Mr Mahlangu and iMvula acted negligently as the loss was foreseeable and simple steps to prevent it were not taken.

[52] iMvula disputes that the conduct was wrongful. While Mr Mahlangu owed the Loureiros a legal duty, he acted in good faith under the impression that he was assisting the police, in accordance with the Code of Conduct. His actions could not be considered wrongful. iMvula also argues that Mr Mahlangu did not act negligently. The High Court and Supreme Court of Appeal found that he could not be criticised for believing that the man at the gate was a police officer. To find Mr Mahlangu negligent would be to assume the role of an armchair critic with knowledge after the fact. iMvula, too, cannot be said to have been negligent, as Mr Mahlangu had been properly trained and no evidence of prevailing practices in the security industry was led.

[45] iMvula did, however, argue that the conduct was not the legal cause of the loss suffered by the Loureiros. It suggested in its written argument that the deactivated driveway alarm beam and unlocked backdoor amounted to new intervening factors (*nova acta interveniens*) and so interrupted the causal chain between the wrongful conduct and the resultant loss. It did not persist with this in oral argument. It is thus not in dispute that Mr Mahlangu's conduct caused damage to the Loureiros.

[53] Did Mr Mahlangu act wrongfully and negligently? The enquiries into wrongfulness and negligence should not be conflated.[46] To the extent that the majority judgment of the Supreme Court of Appeal did not distinguish between these, it is incorrect. The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.[47] Mr Mahlangu's subjective state of mind is not the focus of the wrongfulness enquiry.[48] Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault.[49]

[54] I begin with the enquiry into wrongfulness, because "[n]egligent conduct giving rise to damages is not . . . actionable *per se*. It is only actionable if the law recognises it as unlawful".[50] If Mr Mahlangu's conduct is not wrongful – for example if those he

[46] *Van Duivenboden* above n 29 at para 12.

[47] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 53; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 122; *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) (*Two Oceans*) at para 11; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 13; and Fagan "Rethinking Wrongfulness in the Law of Delict" (2005) 122 *SALJ* 90 at 109.

[48] It is recognised, however, that there are cases where conduct that would not be wrongful if negligent, may be wrongful if intentional, where this subjective state of mind may thus be relevant to the wrongfulness enquiry. See, for example, *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) at para 86 and the authorities cited there; Visser "Delict" in *Wille's Principles of South African Law* 9 ed (Juta & Co Ltd, Cape Town 2007) at 1187; and Boberg *The Law of Delict* (Juta & Co Ltd, Cape Town 1989) at 33.

[49] See, for example, Neethling, Potgieter and Visser above n 44 at 131.

[50] *Two Oceans* above n 47 at para 10. Courts have ruled that deciding which enquiry should come first is a matter of convenience. See, for example, *Hawekwa Youth Camp and Another v Byrne* [2009] ZASCA 156; 2010 (6) SA 83 (SCA) at para 24; *Gouda Boerdery BK v Transnet Ltd* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) at para 12; and *Local Transitional Council of Delmas and Another v Boschoff* [2005] ZASCA 57; 2005 (5) SA 514 (SCA) at para 20. See also Brand "Reflections on Wrongfulness in the Law of Delict" (2007) 124

let in were indeed police officers acting lawfully – his carelessness or negligence regarding the procedures he was supposed to follow would be irrelevant for delictual purposes.

[55] I do not agree with the Supreme Court of Appeal that Mr Mahlangu was obliged to open the gate because of his duty to cooperate with the police.[51] The intruders were as a matter of fact robbers, not police officers. The community expects security guards not to give criminals access to guarded property. It is wrongful to do so. What Mr Mahlangu believed and how his insight and conduct may compare with that of a reasonable person in his position is not determinative of the wrongfulness enquiry. It belongs to the negligence enquiry.

[56] There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations. There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of

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SALJ 76 at 79; Nugent "Yes, it is always a bad thing for the law: a reply to Professor Neethling" (2006) 123 *SALJ* 557 at 559-62; and Fagan above n 47 at 141.

[51] See clause 7 of the Code of Conduct above n 21 which provides that security guards have obligations to provide assistance to police with regard to tasks police officers "may lawfully perform" and to provide information that police officers "may lawfully require". Opening the gate without more does not fall within the ambit of these obligations, because even had the man at the gate been a police officer, he had not made a lawful demand.

the purposes of imposing delictual liability.[52] The convictions of the community as to policy and law clearly motivate for liability to be imposed.

[57] Mr Mahlangu's conduct was therefore wrongful. Was he negligent?

[58] The test for negligence set out in *Kruger v Coetzee*[53] remains authoritative.[54] The questions in this case are whether (i) a reasonable person in the position of Mr Mahlangu would have foreseen the reasonable possibility of his conduct injuring another's person or property and causing loss; (ii) a reasonable person in the position of Mr Mahlangu would have taken reasonable steps to guard against that loss; and (iii) Mr Mahlangu failed to take those steps.

[59] The High Court and the Supreme Court of Appeal concluded that Mr Mahlangu could not be faulted for assuming that the robber at the gate was in fact a police officer. iMvula suggested that the question whether conduct is reasonable is a factual one, which should not be considered on appeal. I disagree. The question involves the application of legal principles to facts.[55] It is generally understood in our law that the enquiry into negligence is at least partly normative.[56] It is open to us to determine

[52] Although the law of delict has many purposes including corrective justice, one aim identified by scholars is "giving people incentives to take account of the costs they impose on others". Hershovitz "Harry Potter and the Purposes of Tort Law" (2010) 63 *Stanford Law Review* 67 at 69. See similar reasons playing a role in the context of vicarious liability in *K* above n 44 at para 21.

[53] 1966 (2) SA 428 (A) at 430E-F.

[54] *Lee* above n 47 at para 18 and *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 48.

[55] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 60.

[56] Neethling, Potgieter and Visser above n 44 at 131 and Boberg above n 48 at 268.

whether the conclusion is correct. In my view, it is not. The correct question is not whether Mr Mahlangu believed that the imposter was a police officer; rather, it is whether it was reasonably foreseeable that the imposter was not.

[60] A reasonable person would have foreseen the possibility that the man at the gate was an imposter. The robbers drove up in an unmarked car. While the car had a flashing blue light, the light was fixed to the dashboard of the car, not to its roof. Underneath his reflective vest, the man who walked up the driveway was dressed in a blazer of a type that an on-duty police officer would not usually wear. He did not announce his identity or his business. According to Mr Mahlangu's evidence, the man only "flashed" the identity card at him, giving him no opportunity to compare the card's picture with the man bearing it.

[61] Mr Mahlangu was stationed at the entrance of the Loureiros' home for the express purpose of ensuring that unauthorised persons did not gain access. That required him to make sure that all persons who seek access are entitled to do so. And a reasonable person in his position as a security guard on duty would have foreseen the possibility that an unauthorised person might try to gain access by purporting to be someone that he is not – including, or indeed especially, a police officer. It is exactly because police officers are clothed in authority that it is foreseeable that an imposter may exploit this apparent authority. Robbers seldom disclose their identity and announce their intention to rob when they seek access to their target.

[62] Given that it was reasonably foreseeable that loss could arise, what steps would a reasonable person have taken to prevent harm? To determine the reasonableness of guarding against the risk of the harm, a number of considerations are relevant. These include the degree or extent of the risk created by the conduct in question; the gravity of the consequences if the harm occurs; and the burden of eliminating the risk of harm.[57]

[63] Here, the risk created by providing access to a person without first verifying who he is or what he wants was great, as was the gravity of possible consequences. The burden of eliminating this risk was slight. A reasonable person would have taken steps to ascertain the identity of the man at the gate including, for example, determining whether the card flashed was a legitimate police identity card and at least enquiring why the man sought access to the premises. Even if one were to believe that he was a police officer, a reasonable person would have still checked that he was making a lawful demand.[58] If he could not satisfy these enquiries, a reasonable person would not have opened the gate. A reasonable person also would have attempted to make contact with the main house or his employer to find out if the police were expected. Mr Mahlangu failed to take any of these fairly easy precautions. When one is tasked with protecting a property against intruders, it is simply not reasonable to open a door for a stranger without adequately verifying who that person is or what he or she wants. Mr Mahlangu's conduct fell short of that of a reasonable person.

[57] *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A) at 776H-I.

[58] This is in line with the requirements of section 25 of the Criminal Procedure Act, quoted above n 13, as amplified by the language of clause 7 of the Code of Conduct above n 21, requiring that security guards provide assistance to police with regard to tasks police officers "may lawfully perform" and to provide information that police officers "may lawfully require".

[64] In addition, it is worth mentioning that Mr Mahlangu is an experienced security guard with a Grade-A qualification, and so perhaps it would be appropriate to raise the negligence standard to that of a reasonable security guard in his position to be commensurate with this expertise.[59] The expected standard is the general level of skill and diligence possessed and exercised by professionals in that field.[60] The more specialised a person is, the greater the general level of expected care and skill will be.[61]

[65] iMvula submitted that, in the absence of expert evidence on security-industry standards, this Court could not determine what a reasonable security guard would have done. I disagree. While courts sometimes do call on expert evidence for assistance in determining an industry-specific negligence standard,[62] there is no absolute requirement that they do so. Ultimately, the negligence enquiry is one that must be determined by the court in question itself.[63] If a court, on the facts, is able to determine what the reasonableness standard is it does not have to rely on expert evidence. Here, we are able to do so. Security guards are trained to provide guarded protection and to detect nefarious ways in which opportunists may try to penetrate that

[59] The negligence standard is adjusted when someone possesses or professes to possess specialised skills or knowledge in a particular field. See *Charter Hi (Pty) Ltd and Others v Minister of Transport* [2011] ZASCA 89 at para 32 and Neethling, Potgieter and Visser above n 44 at 136.

[60] *Van Wyk v Lewis* 1924 AD 438 at 444.

[61] Midgley and Van der Walt "Delict" in Joubert et al (eds) *LAWSA* second reissue (2005) vol 8(1) at para 125.

[62] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* [2001] ZASCA 12; 2001 (3) SA 1188 (SCA) (*Michael*) at paras 34-40.

[63] Id at para 34 and *Van Wyk* above n 60 at 448, cited approvingly in *Durr v ABSA Bank Ltd and Another* [1997] ZASCA 44; 1997 (3) SA 448 (SCA) at 460H-461B.

protection. That is the core of their mandate. This can clearly be ascertained without recourse to expert testimony. In providing the robber with access to the property without attempting to ascertain his identity or business, Mr Mahlangu's conduct thus in any event failed to meet the standard of a reasonable security guard.

[66] Against these findings, it is not necessary to consider whether iMvula is directly liable for any conduct of its own.

Conclusion

[67] The contract between Mr Loureiro and iMvula was breached when Mr Mahlangu gave the robbers access contrary to an express oral agreement not to allow anyone onto the premises without prior authorisation. iMvula is vicariously liable in delict because its employee acted wrongfully by opening a gate to robbers and negligently by failing to foresee the reasonable possibility of harm and to take the steps a reasonable person in his position would have taken to guard against it.

Costs

[68] There seems to be no reason to depart from the general principle.[64] Costs must follow the outcome.

Order

[69] The following order is made:

[64] *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) BCLR 1 (CC) at paras 91-3.

1. Leave to appeal is granted.

2. The appeal is upheld.

3. The order of the Supreme Court of Appeal is set aside and the order of the High Court is replaced with the following order:

   (a) The respondent is declared liable in contract to the first applicant for whatever damages may be proved.

   (b) The respondent is declared liable in delict to the second, third and fourth applicants for whatever damages may be proved.

4. The respondent is ordered to pay the applicants' costs in this Court, the Supreme Court of Appeal and the High Court including, where applicable, the costs of two counsel.

For the Applicants:	Advocate G Marcus SC and Advocate N Ferreira instructed by Cliffe Dekker Hofmeyr Inc.
For the Respondent:	Advocate W van der Linde SC, Advocate D Turner and Advocate K Serafino-Dooley instructed by Norton Rose Fulbright.