

SOUTH AFRICA / JUDGMENT

# Goldfields Security Ltd. v Ermelo Mine Services (Pty) Ltd. (531/87)

## [1989] ZASCA 25 (23 March 1989)

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## COURT

Supreme Court of Appeal

## BEFORE

Hoexter, Nestadt, Milne, Kumleben, Nicholas

## CASE / FILE NUMBER

531/87

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Case no 531/87

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

Between

GOLDFIELDS SECURITY LIMITED ... Appellant

(Defendant a quo)

- and -ERMELO MINE SERVICES (PTY) LIMITED Respondent

(Plaintiff a quo)

CORAM: HOEXTER, NESTADT, MILNE, KUMLEBEN JJA et

NICHOLAS AJA.

HEARD: 20 FEBRUARY 1989.DELIVERED: 23 MARCH 1989.

## JUDGMENT

NICHOLAS AJA:-

On the night of 28/29 August 1980, thieves entered

the property of Ermelo coal mine through a hole cut in the security fence. They made their way to the mine general offices. There they removed a small window at the back and entered the building. Using heavy-duty electric drills,

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they broke a hole through the strongroom wall, which was constructed of brick. They made away with over R300 000 which had been drawn from an Ermelo bank the previous morning. The theft was an inside job - it was executed on the basis of information furnished to the thieves by one Ben Mabuza, who was employed on the mine as a constable (radio operator) in the mine security force, and who received a share of the proceeds. Arising out of the theft an action was instituted against Goldfields Security Limited ("GFS"). There were originally four plaintiffs:- Ermelo Mine Services (Pty) Ltd ("EMS"), which was responsible for operating the mine on behalf of a joint venture, and the three companies who were the joint venturers. The claim was for payment of R199 457-13 (R134 132-60 of the stolen money had been recovered) as damages for alleged breach of contract by GFS. At the beginning of the trial before KRIEGLER J in the Witwatersrand Local Division on 29 April 1987, the other three plaintiffs withdrew, and EMS proceeded as the sole plaintiff.

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On 8 May 1987 KRIEGLER J: granted judgment in favour of EMS in the amount prayed together with interest and costs. Subsequently the learned trial judge granted GFS leave to appeal to this court, and directed that the costs of the application for leave be costs in the appeal.

The following is a brief history, taken from a compilation by GFS, of security in the mining industry:-

"A. With the resumption of mining operations in 1902, after the Anglo-Boer War, the Commissioner of the Transvaal Police approached the Chamber of Mines regarding 'Proposed arrangements for the prevention of illicit liquor and illicit gold traffic on the Rand'.

B. As a result of this approach various mines

established their own system of mine policing. After several years' operation, it became apparent that there were many advantages in centralising the command and control of this rather unique police force on an industry basis rather than for individual mines to evolve their own policies.

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C. In 1910 two separate mines' police forces were formed to serve the mining industry. The one force known as the 'Mines Police Organisation' served the mines administered by Consolidated Gold Fields, Johannesburg Consolidated Investment and Goerz and Co. (later to become Union Corporation). This force was administered by the Consolidated Gold Fields Mines Police Department. Later the service was expanded to cater for the security needs of Anglo-Vaal, General Mining and various other mining clients. The second force served the mines in the Rand Mines Group.

D. In 1969 the Mines Police Department was transformed into a company known as Gold Fields Mines and Industrial Security Services (Pty) Limited (GFMISS) which also assumed command and control of the 'Mines Police Organisation'. In 1974 the 'Rand Mines Security Department' joined forces with GFMISS to establish one force which today caters for the security needs of virtually the whole mining industry and is the Mines Security Force.

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5. E. The name of the company was changed to Gold Fields Security Limited (GFS) in 1979."

Under the contract on the breach of which EMS

relied in the action, GFS undertook to provide security services at the Ermelo mine. The contract, it was common cause, was constituted by two letters. One, dated 28 June 1976 (Annexure A"), was from GFS to EMS, and it contained a "security proposal for your consideration". The other, dated 19 July 1976 (Annexure "B"), was from EMS to GFS, and was an acceptance of "the terms contained in your letter of the 28th June, 1976". It is clear, however, that the two letters did not set out all the terms of the contract between the parties, and there was a dispute on the pleadings as to what the additional terms were. More specifically, EMS alleged in paragraph 10 of its particulars of claim (which allegations were denied by GFS in its plea) :-

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"10. It was an express, alternatively, an implied, alternatively a tacit term of the said agreement that -

10.1 the defendant would exercise due care, skill and diligence in preventing the theft of monies from the said mine; 10.2 the defendant would exercise due care and diligence in the selection of personnel to carry out its obligations under the said agreement; 10.3 the defendant would not select or employ persons with criminal records or entrust the execution of any of its obligations under the agreement to such persons."

Annexures "A" and "B" were the culmination of correspondence which began with a letter dated 12 March 1975 from Mr David John Vos (then the manager of GFS, who gave evidence, somewhat reluctantly, on behalf of EMS) to Mr Clark (the general manager of the Coal Division of General Mining and Finance Corporation Limited - "GENCOR"). To that letter were attached "some notes on a proposed security system for

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the coal mines" ("the Notes"). In the Notes (of which

Vos was the author) it was stated that GFS "at present

provides a security service to all the major gold and

platinum mines except (mines belonging to certain named groups)", and that "it is obvious that it is necessary to extend the operations of this company to include a security service to the coalfields in both Natal and the Transvaal". After some discussion on mine security generally, the Notes dealt in paragraph 9 with "Costing and Basic Principles", and concluded with paragraphs 10 and 11, namely,

"10. This security service is offered under the same terms and conditions as the service provided to the gold mines

11. Should your group be interested in the above service I will be pleased to discuss the matter in more detail at your convenience."

Apparently GENCOR was interested: in a letter from GFS to GENCOR dated 12 January 1976 Vos said that "as requested" he

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was listing below "the duties of the security staff".

From the context it is clear that the words "the security staff" were used with reference to "the security officer

employed on a mine". The letter set out thirteen "duties" performed by the officer including :-

"3. Provides management with a domestic police force which carries out investigations, screenings etc. and

10. Responsible for training, discipline, efficiency and administration of both the black security constables as well as the security dogs."

The next letter was dated 30 March 1976. In it Mr Shuttleworth, the then manager of EMS (which was associated with GENCOR) stated:-

"We are starting up a new mine 20 km from Ermelo on the Bethal Road and require security services from the beginning. 9 /.....

9. Our requirements and problems have been discussed with your Mr de Bruin. Could you arrange to have the matter investigated as soon as possible please. Your report, together with proposals and costs could then be discussed with us and decided on...."

This was followed by another letter from Shuttleworth in which he referred to discussions which had taken place and stated thatf "As agreed .... we would like your company to take over the security services from 1st July, 1976 ...."

On 28 June 1976 GFS wrote Annexure "A". It dealt with a

number of security proposals including security staff, salaries and labour charges, accommodation, uniforms etc, and provided in para 9 that :-

"A head office administration fee of R250 per month will be charged for the above service .... (sc. the security service)"

Annexure "B", dated 19 July 1976, then concluded the correspondence.

In answer to a request by GFS for particulars as

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10. to the full terms of the part of the contract which was not recorded in Annexures "A" and "B", EMS stated :-

"...the Defendant would for remuneration provide a comprehensive, effective and efficient security service to (the plaintiff) at its Ermelo Mine on the same terms and conditions as the Defendant's security service provided to the Gold Mines .... The nature and extent of the service to be provided by the Defendant included inter alia the duties set out in the following documents discovered by the Defendant "

There were then listed a number of documents, including the said "Notes on a proposed security system for coal mines dated 5 March 1975"; the said letter dated 12 January 1976; and two compilations issued by GFS, namely, a "Training Pamphlet" and a "Security Manual" in three "volumes". Vos was the main witness for EMS regarding the terms of the contract. He was mánager of GFS and the Mines'

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Security Force during the years 1974-1984. He acted on behalf of GFS in the correspondence to which reference is made above. In his judgment KRIEGLER J said that although Vos was ill at ease at having to give evidence in a case

involving a conflict between his erstwhile employer (GFS) and a subsidiary of the GENCOR Group, for whom he now acted as a security adviser, KRIEGLER J was struck by his scrupulous fairness and candour :-

"He is patently a man of competence in his field and, more importantly in the present context, a man of undoubted integrity. I have no hesitation in accepting his evidence in toto, nor do I have any reservation about his expertise in general and his knowledge of this particular contract."

Vos described the history and development of security in the mining industry, and the organisation, policy and administration of the mines security service. He said that the Security Manual and the Training Pamphlet set out the functions and duties of the various components of the security service, from the Mines' Security Force, which was

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12. the operational unit of GFS and of which he was head, through area managers, down to security officers on the respective mines. These compilations represented the security wisdom accumulated by Goldfields over more than 70 years, and Vos confirmed that he regarded them as correctly setting out the position during the years 1974-1984. In addition GFS communicated instructions to the security officer on each mine by way of circular letters, which laid down "procedures which should be followed and policy and so on. They were kept in a special file and that was the basis for the operation of (GFS), or changes to the operation of (GFS) were contained in these circular letters." Vos confirmed what was stated in the Notes, namely, that the security service was offered under the same terms and conditions as the service provided to the goldmines. He said that "we were to provide an all-embracing security service in exactly the same way as we provided a service to the gold mining industry which had evolved over the 70-odd

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13. years ....". Counsel for GFS argued that the documents referred to in the further particulars could not be relied upon as defining the contractual obligations between the parties. I agree that these documents were not themselves part of the contract between EMS and GFS - EMS had no knowledge of them at the time of the contract and, indeed, it does not appear to have learned of them until they were disclosed in GFS's discovery affidavit. I agree too that the manual does not purport to define GFS's obligations to its clients, and that the Training Pamphlet cannot be construed as listing particular obligations undertaken by GFS. Nevertheless, these are documents which were created by GFS for the information of members of the Mines Security Force, and as such they describe the security service which GFS provided to the gold mines. There can be no doubt that GFS's undertaking to the gold mines was to provide them with an efficient and

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14. efficacious security service. The Security Manual dealt in Volume 1 with "Policy and Responsibilities". It stated that the objective of the Mines' Security Force (MSF)

"is to ensure that the mining industry has effective and efficient security and that in achieving this goal costs are kept to a minimum."

In the chapter entitled "Duties and Responsibilities of Chief Security Officers" the Security Manual stated :-

"1. INTRODUCTION

The responsibility of the chief security officer on a station (sc. a mine) and his staff is to provide the GFS client with an efficient and effective security service

## 2. AIM

The aim of this document is to set out the framework of the tasks which the chief of security and his staff must carry out to meet their responsibility."

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In the Training Pamphlet it is stated that :-

"... this company (i.e. GFS) is responsible for providing security staff, expertise and to ensure that all aspects of security are adequate and meet the requirements defined in the group's security policy."

And in the Security Manual, it is said that one of the functions of the Mine Security Force manager is :-

"supervising the activities of the security department to ensure that an efficient and effective service is maintained."

GFS provided each client mine with a framework or blue-print according to which there was formed a mine security department under a white security officer (called the chief of security) seconded to the mine by GFS, whose function it was to organize and administer that department.

GFS's publications emphasized that the ultimate

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responsibility for the security of a mine rested with the mine manager, who had the right to determine his needs in this regard. The mine security department fell directly under his control and was treated in the same way as any other department on the mine. The chief of security was appointed by GFS, by whom he was recruited, employed and paid. His salary was debited to the account of the mine. He was responsible for co-ordinating all the mine's security functions. At the same time he fell under the direct control of the mine manager to whom he reported, and he was treated as if he were a mine employee. The security functions on a mine included the protection of assets (cash and other); control of vulnerable and vital areas; screening of personnel; and the training, supervision and administration of the mine's security force.

The black security guards (or constables) were

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17 mine employees, who were recruited and paid by the mine, but were placed under the direct control of the security department for operations, security administration, discipline and training. More specifically of relevance to the present case, the Security Manual provided that the chief security officer had the following responsibilities :-

"3 Ensure that in the day-to-day discharge of his functions, he -

- (d) Exercises supervision. (e) Carries out visits to guard posts and conducts his own patrol of the property from time-to-time during the complete 24-hour shift period ..."

"A Cash

- a. Protection of all cash movement required by the mine including regular reviews of routes, timings and procedures.
- b. Recommend to mine management that safes, strongrooms and pay-offices meet

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the required standards laid down by GFS: weakness must be reported in writing to GFS." (On 1 August 1978 GFS issued a circular entitled "Payroll Procedures". It was stated that:-

"A recent survey has revealed that cash handling in general, is extremely vulnerable and inefficient from a security point of view.

In view of the large amounts of cash involved and an ever-increasing threat of payroll robberies, it is essential that every precaution should be taken to protect the personnel and payroll."

One of the recommendations made was that

"Information regarding the amount of cash carried, movement schedules, etc should be kept secret, known only to the very few people involved.")

"G Mine Offices

a Protection of the general offices complex

in accordance with the overall mine

security plan. b Safes, strongrooms and record rooms are

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adequate and correctly positioned and controlled

e Access into offices must be strictly

controlled after normal working hours and over weekends and holidays."

One of the duties and functions of the mine

security staff was to screen black employees in "positions involving trust". This applied pre-eminently to black persons employed in the security department.

(The screening process for such employees was described by Mr Van der Heyde, who was chief of security on the Ermelo mine at the time of the theft. In the case of an applicant for a job in the security department, his previous employer was referred to; the applicant was asked if he had a criminal record, and his fingerprints were taken. These were sent to GFS head office and thence to the South African Criminal Bureau for classification. A record was kept of fingerprints despatched and the results of classifications received.)

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Despite what is set out above, GFS's counsel persisted in contending that the contractual duties and obligations of GFS were limited to what it had stated at the pre-trial conference:-

".... the Defendant advised that the Defendant at all material times carried on business as consultants and advisors in security matters to mines and makes trained security officers available to such mines to assist the managers in carrying out their security requirements. The Defendant furthermore provides security training services for staff employed by mines."

In other words, it would seem, GFS's stance was that it undertook to provide the Ermelo mine not with a security service, but with a trained security officer. The implicit suggestion that GFS was functus officio with the appointment of a chief of security is a travesty of what is shown in the above quotations from the Security Manual and the Training

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21 Pamphlet, with their detailed instructions directed inter alia to GFS's employees on the mines. It was argued that when he was on the mine the white security officer fell directly under the control of the mine manager and not GFS, which would not, it was submitted, have undertaken responsibility for his actions, without at least having the power to control his functions. The factual basis for the argument is correct. De facto the white security officer was a mine employee. The following is stated in the Security Manual :-

"(White) security officers are recruited and employed by GFS to ensure common conditions of service and professional standards throughout the industry. They fall under direct control of the mine manager and for all practical purposes must be treated like any other mine employee and NOT as 'outside contractors'. It is essential that the chief of security is treated as a head of department and has direct communication with and regularly reports to the mine manager. All black,

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coloured or Asian members of the security staff are employed by the mine and are placed under direct control of the security department for operations, discipline, training and security administration."

The question does not however relate to control of the security officer. It concerns the contractual obligations undertaken by GFS vis-à-vis EMS. And it is clear in my opinion that the security officer occupies a dual position. He serves two masters: while he is de facto a mine employee, he

is at the same time in the employment of GFS, which has imposed upon him the duty of performing on its behalf the functions and obligations which GFS has undertaken to perform vis-à-vis the mine. Any liability of GFS to EMS is contractual, not delictual. It is based on a failure by its appointed representative on the mine to properly perform on GFS's behalf the functions which GFS undertook. Thus, it is said in the Security Manual :-

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The responsibility of the chief security officer on a station (i.e. a mine) and his staff is to provide the GFS client with an efficient and effective security service."

Then it was argued that a remuneration of R250 per month is not the remuneration which would have been required if GFS itself were responsible for providing a comprehensive security service. The issue, however, is not whether GFS undertook to provide a comprehensive security service (whatever that may comprise); it is whether GFS undertook the obligations alleged in paragraph 10 of the plaintiff's particulars of claim. The R250 per month is not a remuneration: it is described as a "head office administration fee". GFS itself says that it "operates as a 'service company' to the mining industry. It pursues a policy aimed at cost recovery rather than profit generation". Actions for damages for breach of contract apart, the only costs in providing a mine with a security service are those

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connected with head office administration. KRIEGLER J formed a clear view that, whatever the outer limits of GFS's obligations under the contract, GFS undoubtedly undertook to provide a service which would be reasonably efficacious; and that, in the light of the letters dated 5 March 1975 and 12 January 1976 (referred to above) read in conjunction with the Security Manual, there could be little doubt that GFS undertook at least what is alleged in paragraph 10 of the particulars of claim. In my opinion there can be no doubt that KRIEGLER J was correct. In regard to the alleged breach of the contract, the case for EMS was that GFS was guilty in two main respects: (1) in employing or recommending the employment without proper screening of BEN MABUZA (who had a criminal record) as a security constable and radio operator in the mine's security force and in failing to ascertain that he had a criminal record and to obtain references from his

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previous employers; and (2) in failing, by the exercise of due care, skill and diligence, to prevent the theft on the night 28/29 August 1980. Mabuza was called by EMS to give evidence. Even though he was a self-confessed liar and thief, KRIEGLER J accepted the substance of his evidence. He said that he was engaged as a mine employee on 19 February 1980 and was referred to the security department. He was interviewed by Mr Van der Heyde, who was the chief of security at the time. He told Van der Heyde that he had been employed by Olivetti in Nelspruit. He was not asked if he had a criminal record and his fingerprints were not taken until after the theft. He did not disclose that he had been convicted of theft (two counts) on 26 March 1979 and sentenced to 12 months imprisonment. He had been released on parole on 26 September 1979 and was

unemployed until he joined the Ermelo mine. He was given employment as a security

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constable, and after two months he was appointed as a radio operator and was then employed in the security department's office. This was the nerve-centre of the mine security force, and from this vantage point he was able to get information about pay-roll movements. Van der Heyde, who also gave evidence on behalf of EMS, said that he interviewed Mabuza before employing him in the security department. He had been recommended by the hostel manager, and by his brother-in-law who was employed on the mine as hostel-induna. Van der Heyde asked him if he had previous convictions and the answer was negative. He communicated with his former employer, Olivetti in Nelspruit, who said he was a good worker and recommended him. Mabuza received in-service training (performing patrols with a senior sergeant and later working with a trained radio operator for a period). He was appointed as a radio operator on 7 May 1980. As a radio operator he had access

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to certain confidential documents coming into the security office and acquired knowledge about when money was being drawn for wages, and where that money was locked up. On the night of the theft, Van der Heyde said, there was one guard posted to cover the general area of the general offices, the mine stores and the training centre. He did not have the staff to post a special guard on the strongroom, but he gave instructions that the guard should concentrate on the general offices. Unknown to Van der Heyde, the guard who was there was called away by another mine official to supervise the unloading of a vehicle. No patrols visited the strongroom until after the theft had been carried out and the thieves had departed. In his judgment KRIEGLER J said that it was unnecessary, in the view which he took of the alleged breach which I have numbered (1) above, to come to any final conclusion regarding liability for the events of the night

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28 of 28/29 August 1980. In regard to (1), it is manifest that Van der Heyde did not exercise reasonable care in screening Mabuza. If, as he said, he did make enquiry of Olivetti, it could only have been cursory and superficial. Any proper enquiry must have revealed that Mabuza had not been in the employment of Olivetti since March 1979 at the latest, and that nearly a year of his life had to be accounted for and that further investigation was necessary. If his fingerprints were taken, they were not submitted to the SACB. If the screening had been properly done, Mabuza's criminal record would certainly have been revealed. It was argued on behalf of GFS that it had not been proved that any failure in the screening process on the part of Van der Heyde was the causa causans of the loss: there was a series of co-causes. The primary and proximate cause of the theft and ensuing loss was the action of the

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thieves in breaking into the strongroom and stealing the money. A related cause was that the security or guard who had been posted there to guard the building was called away to the mine store. Another related cause was that the strongroom was constructed of bricks and not reinforced concrete, thus facilitating entry by the thieves. The learned trial judge had no difficulty in rejecting this argument. In his judgment he said with his customary force and clarity:-

"Mr Serrurier, once again quite rightly, submitted that it was the thieves who stole the money and thus directly caused the loss. That is an over-simplification. Mabuza was one of the thieves. He was, by virtue of his criminal record, a patent security risk. He should not have been employed and would not have been employed if defendant's screening system had been reasonably effective in design or had been reasonably implemented by Van der Heyde, defendant's deputed expert. Without having been adequately screened by

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defendant, Mabuza was admitted to the inner sanctum of the mine's security system, where he had ready access to secret information. It may be so that Mabuza or someone else who had not been so favourably treated, could possibly have gleaned information about the movements and whereabouts of the payroll, but that is beside the point. It was the defendant who caused him to be given free passage to all the information the thieves required. He was able to reconnoitre the administration building and take one of his co-conspirators on a tour of inspection at their leisure. He knew the precise location of the money. He probably knew the routine patrolling procedures, the routes taken by the guards, their checkpoints and, of course, the weaknesses in the system. He was a lynchpin in the scheme to gain entry into the mine property, to break into the admin. building, to gain access to the strongroom, to take the money and to escape undetected. He was qualified with the requisite knowledge by the defendant and was put in the position where he could be on the qui vive for his confederates. The very purpose of a security system is to prevent those with inimical intent from gaining access to sensitive points. The payroll was an obvious and soft target. The

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security system devised by the defendant and implemented by its representative, Van der Heyde, directly resulted in Mabuza playing the crucial role that he did."

In Hart & Honoré, *Causation in the Law*, 2nd ed. the learned authors point out (p 321) that there are situations in contract in which a defendant is liable for negligently providing the opportunity for another person or thing to cause harm to plaintiff. See also pp 194-195:-

"There are a number of situations in the law of negligence .... (and indeed in the law of contract) where a defendant is liable for providing or not removing the opportunity for another to do harm or for a natural event to cause it. The 'causal connection' between a defendant's act and the harm may be succinctly described by saying that he has occasioned it."

The principle is illustrated by *Stansbie v Troman* (1948)

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2 KB 48 (CA). The defendant, a decorator, having been left alone in a house, left it to go to a neighbouring shop to buy a roll of wallpaper, but did not lock the door behind him. During his absence a thief entered the house and stole property, the value of which the householder claimed from the decorator. It was held that the decorator had committed a breach of his contractual duty, as a direct result of which the thief had entered the house and stolen the property, because the breach of duty consisted in a failure to guard against the very loss which in fact occurred. In my opinion the present case is in principle indistinguishable. By employing Mabuza without proper screening, GFS provided the thieves with the opportunity to commit the theft, and was in breach of its duty to guard against the very sort of intervention which did occur. The removal of the guard and the fact that the strongroom was built of brick may have been concomitant

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causes. But they were not such as to constitute *novae causae intervenientes*. Without GFS's negligence the loss could and would not have occurred. Then it was argued that the damages claimed were too remote within the rules in *Hadley v Baxendale*. KRIEGLER J said in his judgment :-

"The damage suffered .... was, moreover, not only foreseeable, but the most obvious consequence, or at least in the first rank of obvious consequences, of failing to screen out criminals from the rank of security guards. It is a loss flowing obviously and naturally from the breach."

Counsel for GFS posed the question: "Had damages of the order of the amount claimed been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it, would not the defendant have stipulated for a larger remuneration so as to provide it with the reservoir of funds with which to meet such claims

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or would it not have stipulated for an indemnity or security provision?" No doubt the parties did not contemplate a possible loss of the magnitude of R300 000. But an attempt to steal the payroll must have been within their contemplation, and if loss or damage of the kind which occurred is within the presumed contemplation of the parties, recovery is not to be limited because the magnitude of the loss could not have been expected. Cf *McGregor on Damages*, 14th ed, secs 192-194; and see *Parson's (Livestock) Ltd v Uttley, Ingham & Co* (1978) QB 791 at 804, 805, 813. Another contention on behalf of GFS at the trial which was rejected by the learned trial judge,

was that EMS was not entitled to recover the damages claimed because the loss was the loss not of EMS but of the joint venturers. Although the point was raised in GFS's heads of argument, counsel informed the court at the hearing of

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35 the appeal that he would not argue it, although he did not abandon it. Unless EMS sustained actual loss it could not claim damages from GFS, since our law does not allow a claim for damages in case of breach of contract not resulting in patrimonial loss to the aggrieved party. See *Dominion Earthworks (Pty) Ltd v M J Greef Electrical Contractors (Pty) Ltd* 1970(1) SA 228(A) at 234 F-G, and cases there cited. EMS is a corporate shell with no assets of its own. It operates the Ermelo mine on behalf of the joint venturers in terms of an "Operating Agreement", which contains provisions relating to the day-to-day conduct of the mining business, accounting in respect thereof, payment of costs, liabilities and expenses resulting from operations and payment to the joint venturers of their shares of the proceeds. It is clear that EMS was no more than an agent,

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with no beneficial interest in any of the assets or property of the mine. Moreover, the Operating Agreement expressly provided that the operator should not be liable for any loss or damage except where such loss or damage was caused by gross negligence on the part of the operator. The undisputed evidence was that the R300 000, which was for payment of black mine-workers' wages, was drawn from a bank account in the name of EMS with Volkskas, Ermelo by way of an EMS cheque. Plainly EMS had the dominium in the money. It was no doubt trust money, and EMS had no beneficial interest in it, and when it was stolen without negligence on its part, EMS was under no liability to the joint venturers in respect of it. It is also true that as against the joint venturers EMS could not have been heard to say that it could spend the money as though no trust existed. Quoad the rest of the world, however, it could claim that the money belonged to it. (Cf. *S v Gathercole*

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1964(1) SA 21 (A) at 25 G). And when the money was stolen in consequence of breach of contract by GFS, it was, as the dominus, entitled to claim the amount of the loss from GFS. Compare *The Winkfield* 1902 P 42 (CA). The Court of Appeal there held that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. COLLINS MR said at 54-55 :-

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *ius tertii* unless he claims under it, is well established in our law, and really concludes the case against the respondents I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all

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purposes quite irrespective of the rights and obligations as between him and the bailor."

The present case is not different in principle. EMS sued for damages for loss of the money. It was the owner of the money although it had no beneficial interest in it. It would have had a good answer to an action by the joint venturers, who were beneficially entitled to the money, for damages for its loss. GFS cannot set up the *jus tertii*; it is quite unconcerned with what the rights are as between the joint venturers and EMS. My conclusion is that KRIEGLER J was clearly right in holding that EMS, and only EMS, suffered the loss and was entitled in law to recover it from GFS. The appeal fails on all points, and it is dismissed with costs.

H.C. NICHOLAS AJA. HOEXTER JA)

KUMLEBEN JA)

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CASE PAGE              <https://chat.esheria.ai/case-law/south-africa/goldfields-security-ltd-v-ermelo-unknown-topic-asca-1989>

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