

If residents are attacked in a security estate, can they sue the HOA or the security company?

Most people, who live in residential estates, believe that they are safe. But is this really true?

And also, who is liable for damages or pain and suffering suffered by the residents if they are attacked in the estate? Is it the body corporate or home owners' association of the estate? Or is it the security company? Or both?

In the matter of *Van der Bijl & Another v Featherbrooke Estate Home Owners Association (NPC) 2019 (1) SA 642 GJ* the following happened. Van der Bijl brought an action against Featherbrooke Estate Home Owners Association ("the Association") and Fidelity Security Services ("Fidelity"). Mrs Van der Bijl was assaulted and sustained injuries. Both Mr and Mrs Van der Bijl suffered mental trauma because of the attack. Mr Van der Bijl was shot and suffered a wound to his abdomen.

Mr and Mrs Van der Bijl alleged that the Association and Fidelity were wrongfully in breach of their duty to care and with gross negligence failed to protect the residents of the Estate. They are basing their claim on delict and state that their rights in Chapter 2 of the Constitution of the Republic of South Africa were infringed.

Fidelity filed a plea and stated that they do not have the duty to protect the Van der Bijls from being attacked in their home and as such no wrongfulness should be attributed to the Association. If the Law of Delict does not provide a cause of action, there is no warrant to develop the Common Law to do so, nor to recognize a cause of action predicated upon the infringement of constitutional rights.

The central issue in this case is whether the Association owed the same duty as Fidelity simply because the Association had employed Fidelity to provide security services for the Estate. The Court held that the mere fact that the Association employed Fidelity to provide security for the Estate did not establish that the Association, as employer, owed the same duty to the residents of the Estate as

that assumed by Fidelity. Nor can a duty to protect be derived from the averment that Fidelity acted in the course and scope of its employment with the Association.

The question was then whether the Association has a duty to protect residents simply because it is the association of the homeowners of the Estate and the Estate is a secured residential estate. The Court held that the Association would need to determine contractually what liability they would incur in specific instances and such a duty could not be imposed upon them as an incident of delictual liability.

The actions of Fidelity may have been taken pursuant to its legal duty to protect, but again it does not follow that by taking these actions Fidelity's legal duty somehow becomes attributable to the Association. The Association must have had a duty to protect that is established independently of what the Association employed or authorized Fidelity to do.

For these reasons, the Court found that Van der Bijls' particulars of claim did not disclose a cause of action that the Association had a duty to protect and consequently failed to provide a basis for the allegation that the Association acted wrongfully.

Motheo Moatshe, Van Velden-Duffey Inc.