

SOUTH AFRICA / JUDGMENT

Anabella Resources CC v Genric Insurance Company Limited (A5025/2019) [2020] ZAGPJHC 163 (2 July 2020) [2020] ZAGPJHC 163

COURT

South Gauteng High Court, Johannesburg

BEFORE

A A Crutchfield, C G Lamont, A Maier-Frawley

CASE / FILE NUMBER

A5025/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO: A5025/2019

In

the matter between:

ANABELLA
RESOURCES CC
Appellant/Plaintiff
and
GENRIC INSURANCE
COMPANY LIMITED
Respondent/Defendant

JUDGMENT

CRUTCHFIELD AJ:

Insurance – Indemnifiable event – Insurance policy provided for armed robbery, theft and hijacking as indemnifiable events – Policy did not contain a definition of armed robbery – Policy’s definition of theft and hijacking required ‘actual lawful control’ of seized property – Victim of force had effective remote control of seized property – Force and unlawful seizure occurred at different places – Link between force and unlawful seizure established – Robbery occurred at more than one place – Events constituted armed robbery and theft / hijacking as defined –

Defendant liable to indemnify plaintiff as claimed.

[1] This appeal comes before us with leave of the Court a quo. The parties, for the sake of convenience, are referred to herein as they were at the trial. At the conclusion of the trial the, plaintiff's claim was dismissed with costs. The plaintiff was aggrieved and launched appeal proceedings against the entirety of that judgment, including the costs order.

[2] Neither party wished to make oral submissions at the appeal hearing and the matter was determined on the papers in terms of paragraph 3.2 of the Judge President of the Gauteng Division's Consolidated Practice Directive date 11 May 2020.

[3] The parties concluded an insurance contract during March 2013, (the 'contract'), in terms whereof the defendant undertook to indemnify the plaintiff for loss or damage which it suffered in the event of the occurrence of an indemnifiable event. The contract comprised the policy schedule and the wording of the policy.

[4] The plaintiff alleged it had suffered a loss arising out of the occurrence of an indemnifiable event which occurred on 26 January

2017 (hereafter referred to as the "event") and claimed indemnification from the defendant in an amount of R2 400 000.00,

interest thereon and costs.

[5] The contract was in full force as at 26 January 2017.

[6] The sole issue for determination on appeal was whether the event constituted an 'indemnifiable event' as contemplated by the terms of the contract.

[7] The facts of the plaintiff's claim were not disputed at the trial. Briefly stated, they comprised the following:

7.1 The plaintiff traded in gold, cash and diamonds from its business premises located at Suite 701 DC Jewel City, 225 Main Street, Johannesburg (the 'premises'). The gold, cash and diamonds were secured and stored in a safe on the premises.

7.2 Mr Hadife was the plaintiff's Financial Manager and Ms Mathebula, a member and the manager of the plaintiff. The latter's duties included accessing the cash in the safe in order to pay the plaintiff's suppliers of scrap gold jewellery.

7.3 Ms Mathebula controlled the safe and gained entry to it by way of two keys and the combination to the lock. Ms Mathebula kept the keys in her possession or hidden in a place known only to her and the plaintiff's majority member, one Mr Chammas.

7.4 Mr Hadife also had access to and control of the safe and the cash stored within it in two ways. He could ask Ms Mathebula for the keys and the combination which Ms Mathebula would give him or he could ask her to open the safe and remove what he required.

7.5 If he asked her to open the safe and remove cash he would do so verbally, either by way of an intercom announcement at the plaintiff's premises, or telephonically, or, via WhatsApp voice note. He would, on occasion, use a text message. This practice was regarded as acceptable and was the standard manner in which he obtained access to cash within the safe.

7.6 On the day the event occurred, Mr. Hadife was driving to work when he was pulled over by a man in a Metro Police vehicle. Whilst the driver of the Metro Police vehicle inspected Mr Hadife's driver's licence, three men (the 'men'), appeared from another car that had stopped in front of Mr Hadife's vehicle. They approached Mr Hadife, threatened him with a firearm, forcefully removed him from his vehicle, placed him in their vehicle and drove to an unknown destination where they held him captive.

7.7 The men were familiar with the plaintiff's business practices. In particular, they knew what Mr Hadife had to do to gain access to the contents of the safe.

7.8 They threatened to kill Mr Hadife unless he contacted Ms Mathebula via WhatsApp and ascertained how much money was in the safe.

7.9 Mr Hadife did so. He was told that there was cash amounting to R2 424 700.47 in the safe.

7.10 The men instructed Mr Hadife to inform Ms Mathebula to remove R2 400 000.00 from the safe, to place it in two boxes and instruct Mr Phakoago, an employee of the plaintiff, to take the two boxes to the parking lot and give them to a man he would find there in a silver BMW 5 Series motor vehicle.

7.11 It was acceptable practice for the plaintiff both to receive instructions in this manner as also to take large amounts of cash and hand it over to customers parked in the parking lot. This had occurred previously and neither Ms Mathebula nor Mr Phakoago considered the instructions untoward.

7.12 The cash was duly removed from the safe, taken to the parking lot and placed in the boot of a silver BMW 5 Series vehicle that was waiting there. The driver of the vehicle informed Mr Phakoago that he had been sent by Mr Hadife. All appeared normal.

7.13 Subsequently Mr Hadife was released and he explained what had happened. Only then did it become apparent that the cash had been taken unlawfully.

[8] The force applied by the wrongdoers to Mr Hadife to coerce him to perform the acts leading to the loss of the cash, was not applied at the premises. That force was directed to cause Mr Hadife to act in such a way as to lead the plaintiff's employees, who were at the plaintiff's premises, to believe that he was acting freely and voluntarily and that he intended them to act as if they were following a lawful instruction received in accordance with the usual practice.

- [9] The plaintiff duly notified the insurer of the event as required under the contract, describing it as ‘hijack / kidnap / ransom employee was stopped and kidnapped held ransom. Money then stolen from safe by threatening employee life. Employees forced to hand over 2.4 million’.
- [10] The police docket characterised the event as ‘kidnapping and car hijacking’.
- [11] The defendant rejected the plaintiff’s claim.
- [12] The relevant terms of the contract provide that:
- 12.1 The defendant would indemnify or compensate the plaintiff by payment, or, at the option of the plaintiff, by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance up to the sums insured and subject to the limits of indemnity compensation and subject to the terms and conditions of the contract.
- 12.2 The subject matter was cash, gold and diamonds (the ‘property’).
- 12.3 Cover was limited to the risk of fire, accidental damage, hijacking, theft and armed robbery whilst the property was in the custody and care of the insured and/or its authorised employee or approved security provider, subject to the terms and conditions of the contract.
- 12.4 The property, was insured only whilst it was in the static vault at the premises.
- 12.5 The limit of indemnity was R4 million.
- 12.6 There is no definition in the policy, for armed robbery.
- 12.7 Theft and hijacking was defined in the vault and static cover section of the policy as the ‘seizure of the insured property whilst stored and secured on the premises ... where such seizure is accompanied by unlawful removal of the Insured property; or accomplished by means of violence or threat of violence on or against the person or persons who are employed by the Insured / or the Insured whom, at the time of such seizure, are in actual lawful control of such insured property’.
- [13] It was common cause at the trial that the wording of the contract was clear and unambiguous, and was to be afforded its ordinary grammatical meaning, regard being had to the context and purpose of the contract. This is in any event the test which is to be applied.
[1]
- [14] The plaintiff alleged that the conduct of the wrongdoers during the event constituted theft and / or armed robbery and amounted to an indemnifiable event.
- [15] The parties agreed that the general principles of onus relevant to insurance contracts[2] applied in the matter. The plaintiff bore the onus to prove that its claim fell within the primary risk covered under the contract.

- [16] The issue to be determined, so it was submitted, was whether the wording of the clause limited indemnifiable events to events, the components of which all had to take place at the premises or whether an indemnifiable event could incorporate events, some of which occurred on the premises and some of which occurred off the premises.
- [17] The defendant submitted that all the acts that had occurred at the premises were believed by the employees to be lawful. An instruction believed to be lawful and in keeping with the plaintiff's business practice had been received and acted upon. That the instruction had been given in consequence of force applied was unknown to the employees at the premises. Hence the armed robbery did not occur at the premises. The employees at the premises were in control of the cash. There was no seizure of the cash at the premises pursuant to violence or the threat of violence directed towards the employees at the premises. The violence had been directed towards the employee off the premises.
- [18] The Court a quo found that the definition of theft and hijacking in terms of the contract required that the violence was directed towards an employee in 'actual control' of the seized property. The employee who was in actual control of the property was the employee at the premises. As no threat had been directed to her, the plaintiff was non-suited.
- [19] The learned Judge a quo referred to the meaning of 'seizure' as connoting 'an element of physical force in taking'.^[3]
- [20] Accordingly, the court a quo held that the violence or threats thereof, had to be perpetrated at the premises from which the property was removed, against an employee who was in 'actual control' of the property at the time of the removal of the property from the premises.
- [21] The approach to interpretation is to be found in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[4] namely that consideration be given to the context and language, including the meaning of all the words used in a contract.
- [22] It is the role of the court, and not the witnesses, to interpret a document. The evidence of the defendant's witness, Mr Snyder, as to the context and purpose of various portions of the contract, was irrelevant and inadmissible.
- [23] In my view, the plain meaning of the words of the contract were clear, ascertainable and without ambiguity.

Armed Robbery

- [24] Given the absence of a definition of 'armed robbery' in the contract, the ordinary meaning of armed robbery under the common law applies.
- [25] The common law definition of robbery^[5] provides that:

“.....Robbery is the theft of property by unlawfully and intentionally using violence or threats of violence to take the property from someone else. The elements of robbery are: the theft of property; through violence or threats of violence; unlawfulness; and intent..”

It is customary to describe the crime briefly as ‘theft by violence’. Though incomplete, such a description does reflect

the essence of the crime.’[6]

[26] According to Burchell[7] ‘Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from the person of another or in his presence.’

[27] The common law definition of robbery is not place specific. The force applied to the victim need not be applied in the same place as the place where the taking of the property occurs. What is required is only that the link between the application of force and the taking be established. The property taken during a robbery need not be uplifted from the person of the victim of the violence, or, even in the presence of the victim.[8]

[28] It suffices for the purpose of robbery, if the removal of the goods is not from the person of the victim, or, that it occurs elsewhere and not in the presence of the victim.

[29] Accordingly, the force may be exercised remotely, away from the place where the goods are removed. The robbery occurs at two places, the place where the violence occurs and the place where the taking of the property occurs. The robbery constituting the event occurred where the employee was threatened, at the plaintiff’s premises where the cash was removed from the safe and at the parking lot where the cash was handed over to the wrongdoers. All the constituent components of the robbery were governed by the threat of violence to the employee.

[30] Thus, the event constituted a robbery. The wrongdoers were armed with a firearm. The robbery was accordingly an armed robbery. The robbery was an indemnifiable event.

[31] As a robbery a fortiori comprises both theft and assault, the plaintiff established both a robbery and a theft of the cash taken during the event.

[32] The cash was stored on the premises in a safe. The cash was seized and removed from the premises in consequence of violence directed towards an employee. The employees of the plaintiff were both in control of the property as Mr Hadife was able to lawfully give directions to Ms Mathebula who was obliged to execute them in accordance with usual business practice. The removal was unlawful as it was obtained by force and against the will of the plaintiff represented by Mr Hadife.

[33] Accordingly, the events met the common law definition of robbery, and, pursuant to the wrongdoers’ use of a firearm for the purposes of executing violence against Mr Hadife, or threatening to do so, the events constitute an armed robbery - an indemnifiable

event in terms of the contract.

[34] The defendant, in my view, was liable to indemnify the plaintiff on the basis of armed robbery.

Theft and Hijacking

[35] An analysis of the definition of ‘Theft & Hijacking’ provided in the contract demonstrates the requirements necessary to comply with that definition, as being:

35.1 The seizing of the insured property;

35.2 Whilst the property was stored and secured on the premises;

35.3 Where such seizing was:

35.3.1 Accompanied by the unlawful removal of the property; or

35.3.2 Accomplished by means of violence or the threat of violence on or against the person/s employed by the insured;

35.3.2.1. Who, at the time of such occurrence;

35.3.2.2. Were in actual lawful control of the insured property.

[36] Paragraph 35.3.2 is referred to herein as ‘the alternative’.

[37] Two options existed under the definition of theft and hijacking; firstly, where the seizing was accompanied by the force used to cause it; and secondly, where the seizing was accomplished by violence against the person/s employed by the insured.

[38] The ordinary grammatical meaning of ‘accompany’ is ‘to supplement’ or ‘to go with’ or ‘be put with’; whilst that of ‘accomplished’ is to ‘succeed in doing’.[9]

[39] Accordingly, in order for the unlawful seizing of the property to fall within the definition of theft and hijacking:

39.1 The seizing of the property and the violence used to effect the seizing both had to occur at the premises where the property was located; alternatively,

39.2 The seizing of the property had to be achieved by way of violence against an employee/s of the plaintiff, who was in ‘actual lawful control’ of the property at the time of the seizing thereof.

[40] The alternative did not require that the force or threat thereof occur at the premises where the seizing of the goods occurred. It sufficed if the force occurred at a location remote from where the taking of the property occurred.

[41] It follows that the alternative accorded with the common law definition of robbery. Neither required that the violence occur at the premises from where the seizing of the property occurred.

- [42] The alternative required, however, that the employee victim be in ‘actual lawful control’ of the property at the time of the seizing.
- [43] ‘Actual lawful control’ was interpreted by the Court a quo as meaning ‘actual physical control’ of the property, such control to be exercised at the premises.
- [44] The defendant argued that properly understood in the context of the purpose of the contract, ‘actual control’ was required, being real or concrete control in terms of controlling access to the premises in which the safe was housed, and to the safe itself. Such control was achieved by access to the key to the safe, and, being in charge of the safe (at the premises) at the time of the seizure.
- [45] The plaintiff referred to the dictionary meaning of ‘control’ as having ‘power over’, and, of ‘actual’ as ‘existing, in fact or in reality’. To these meanings I would add, as I do, ‘effective’.
- [46] The plaintiff contended that it sufficed for the purposes of an indemnifiable event under the alternative if the employee was in ‘actual’ control (as opposed to ‘physical control’), of the property at the time of the seizing.
- [47] The evidence indicated that Mr Hadife had control of and access to the safe in which the cash was secured, by various means, as alluded to afore, including by instructing Ms Mathebula, using WhatsApp voice notes or text messages, to pay plaintiff’s suppliers of scrap gold jewellery from the cash secured in the safe.
- [48] Accordingly, notwithstanding Mr Hadife’s absence from the plaintiff’s premises at any given time, he retained effective control of, and access to, the cash in the safe, be it telephonically or by way of the WhatsApp mobile application.
- [49] As a result, Ms Mathebula and her colleague Mr Phakoago, complied with Mr Hadife’s WhatsApp instructions to remove cash of R2 400 000.00 from the safe and hand it to the wrongdoers waiting in the parking lot.
- [50] The facts reflected that Mr Hadife was in effective control, or, ‘actual lawful control’ of the property albeit remotely.
- [51] In so far as the defendant contended that an indemnifiable event required that the force against the employee occur at the premises where the property was secured, and, from where it was removed, the relevant provisions did not provide for such a requirement.
- [52] The obligation lies with the insurer, the author of the contract, to give certainty to the risks it wishes to exclude from the cover. Absent such certainty, the relevant provision/s will be construed in favour of the insured in accordance with the maxim *verba fortius accipiuntur contra proferentem*, (the ‘contra proferentem rule’).[10]

[53] In the circumstances, the events comprised armed robbery and / or theft or hijacking as defined for the purposes of indemnification

under the contract, and the defendant was liable to the plaintiff accordingly.

[54] The plaintiff served summons on the defendant pursuant to the latter's rejection of the claim, on 5 September 2017.

[55] It follows that the appeal must be upheld with costs including the costs of the application for leave to appeal and an order granted as claimed for by the plaintiff in the Court a quo.

[56] Accordingly, I grant the following order:

1. The appeal is upheld with costs including the costs of the application for leave to appeal.

2. The order of the Court a quo is set aside and substituted with the following:

2.1. Judgment is granted against the defendant for:

2.1.1. Payment of the amount of R2 400 000.00;

2.1.2. Interest on the amount of R2 400 000.00 at the rate of 10.5% per annum from 5 September 2017 to date of final payment, both dates inclusive;

2.1.3. Costs of suit.

A A CRUTCHFIELD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG.

I agree

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

A MAIER-FRAWLEY

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Date of the appeal: 1 June 2020.

Date of the judgment: 2 July 2020.

- [1] Coopers & Lybrand and Others v Bryant [1995] ZASCA 64; 1995
- (3) SA 761 (A) at 767E; The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019
- (3) SA 398 (SCA) at para 61.
- [2] Walker v Santam Ltd and Others 2009 (6) SA 224 (SCA) at para 16.
- [3]

Judgment

a quo 18 line 3. [4] 2012

- (4) SA 593 (SCA) ('Endumeni') at para 18.
- [3]

Judgment

a quo 18 line 3.

- [4] 2012
- (4) SA 593 (SCA) ('Endumeni') at para 18.
- [5] Minister of Justice and Constitutional Development and Another v Masingili and Others 2014
- (1) BCLR 101 (CC) at para 34.
- [6] CR Snyman Criminal Law 6 Ed (2014) at 508-512.
- [7] J Burchell Principles of Criminal Law 3 Ed (2005) at 817-825.
- [8] Ex parte Minister van Justisie: in re S v Seekoei
- [1984] ZASCA 89; 1984 (4) SA 690 (A); S v Dlamini and Another 1975 (2) SA 524 (D).
- [9] The Concise Oxford Dictionary of Current English 6th ed J.R Sykes (1976).
- [10] Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 (AD) at 38 D-E.

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