

SOUTH AFRICA / JUDGMENT

Cohen v Mutual and Federal Insurance Company Ltd (44749/13) [2017] ZAGPJHC 231 (18 August 2017) [2017] ZAGPJHC 231

COURT

South Gauteng High Court, Johannesburg

BEFORE

W H Trengove

CASE / FILE NUMBER

44749/13

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 44749/13
Not reportable
Not of interest to other judges
Revised.
18 August 2017
In the matter

between:

JOAN
CECILIA
COHEN Plaintiff
and
MUTUAL
AND FEDERAL INSURANCE COMPANY
LTD Defendant

JUDGMENT

INTRODUCTION

1. The plaintiff, Ms Joan Cohen, claims compensation from the defendant, Mutual & Federal Insurance Company Limited, under a personal

insurance policy. She claims an amount of R497 973 which, she says, was the value of jewellery stolen from her flat on 4 June 2012 or thereabouts. The defendant denies that the theft occurred at all or, if it did, pleads that the plaintiff's

claim is subject to various limitations under the policy. The parties agreed and I directed that two issues be determined at the outset and that the determination of all the other issues stand over for later determination. The first issue is whether the plaintiff's jewellery, listed in annexure POC3 to her particulars of claim, was stolen as alleged in paragraph 6 of her

particulars of claim. The second issue is whether the plaintiff's claim, if any, is subject to the limitations raised in paragraph 8 of the defendant's plea.

2. The plaintiff was the only witness who gave evidence in support of her claim. She says that she discovered on 5 July 2012 that her jewellery was gone. She suspects that it was stolen by three plumbers who had worked in her flat about a month earlier on 4 and 5 June 2012.
3. The plumbers were from MT Water Wise Plumbing. They were Mr Michael Sibanda, his business partner, Mr Themba Zuma Dube, and their employee, Mr Siphamandla Ndlovu. Mr Sibanda and Mr Dube gave evidence. They denied that they or Mr Ndlovu had taken the plaintiff's jewellery.
4. The core dispute is accordingly between the plaintiff on the one hand and Mr Sibanda and Mr Dube on the other. She says they had opportunity to take her jewellery and must have done so because nobody else had opportunity to do so. They deny these accusations.
5. The defendant also called an independent loss adjustor, Ms Magda Harmse, and a member of the defendant's internal special investigation unit, Mr Hannes Meyer, who had both participated in the investigation of the plaintiff's claim. They did not give any direct evidence on the core issue but testified to contradictory statements the plaintiff had made to them about the alleged loss of her jewellery.

OUTLINE OF THE PLAINTIFF'S ACCOUNT

6. The plaintiff is a widow. She lives in a flat in Dunkeld in Johannesburg. At the time of the loss, she shared the flat with a partner, Professor Michael Standton. The flat has two bedrooms. She used the one and he the other. There were two metal security boxes in his room, one blue and the other black. Both were bolted to the floor inside a cupboard. The plaintiff kept documents in the blue box and cash and jewellery in the black box. Both boxes were locked. She kept the keys in one of the wardrobes in her room. Her wardrobes were

locked with padlocks. She carried two sets of the padlock keys on her person.

7. She employed the plumbers to do the plumbing for the installation of a shower and washbasin in her bedroom. To do so, they laid waterpipes from the bathroom along the passage and into her bedroom. They did so on 4 and 5 July 2012. She was at home while they were there but did not supervise them. She moved about the flat and on occasion went outside into the garden.
8. On 4 June 2012, that is, on the first day the plumbers were there, they told her they required certain components which they asked her to buy. She went out to buy the components from Premier Plumbing Supplies. She locked the plumbers out of the flat while she was away.
9. Later in June 2012, the plaintiff decided to update the insurance of her jewellery under her policy with the defendant. She obtained a valuation of her jewellery from Charles Greig Jewellers on 19 June
2012. The certification of valuation said that the valuation was “updated using a previous valuation certificate” without sight of the jewellery itself. The plaintiff sent the valuation to her brokers and requested them to update her policy.

The brokers caused a new and updated policy schedule to be issued with effect from 25 June 2012. It increased the insured

values of some items and added new items previously uninsured.

10. Days later, on 5 July 2012, the plaintiff says she needed cash and went to the black box to get some. To her dismay, however, she discovered that all her cash and almost all her jewellery were gone. She was very distraught by this discovery. She cried and had a migraine for three days.
11. The plaintiff reported the theft to the Bramley police on 6 July 2012. She gave them a handwritten statement. They also took down an affidavit to which she deposed. The affidavit was based on the handwritten statement supplemented by the plaintiff in her interview with the police officer who took down the affidavit. In both her handwritten statement and affidavit, the plaintiff blamed the plumbers for her loss. She said in effect that they must have stolen her jewellery when her back was turned.
12. The plaintiff said, in both her handwritten statement and in her affidavit, that the plumbers had worked at her flat on 28 June 2012, that is, a mere week before she discovered the loss, when in fact they had been there on 4 and 5 June 2012, a month before the discovery. The plaintiff said this was an innocent mistake. I shall later consider this explanation and its significance.
13. The plaintiff also reported the loss to her brokers on 6 July 2012. She later completed a claim form dated 16 July 2012 and submitted a copy of her handwritten statement in support of her claim to her brokers.

14. The defendant appointed a claims assessor, Ms Harmse. Its own internal special investigation unit also investigated the plaintiff's

claim. The investigator was Mr Francis. He was on occasion assisted by his colleague, Mr Meyer. Ms Harmse and the two investigators interviewed the plaintiff at her home on four occasions. First, Ms Harmse interviewed her on 20 July 2012. Second, Mr Francis and Mr Meyer interviewed her on 5 August 2012. Third, Ms Harmse, Mr Francis and Mr Meyer jointly interviewed her on 4 December 2012. Fourth, Mr Francis interviewed the plaintiff once more on 10 January 2013.

15. Pursuant to the investigations, the defendant's claims department addressed a letter to the plaintiff on 14 December 2012 raising queries about her account of the loss. The plaintiff responded to the queries in a letter dated 21 December 2012.

16. Mr Francis rendered a report to the defendant on 25 January 2013. The defendant rejected the plaintiff's claim on 1 February

2013. Ms Harmse reported to the defendant on 4 February 2013.

THE PLUMBERS ARE THE ONLY SUSPECTS

17. The plaintiff has consistently accused the plumbers of the theft of her jewellery. She has never suggested that anybody else might have stolen the jewellery.

18. The plaintiff made a detailed case against the plumbers in both her handwritten statement and her police affidavit the day after her discovery of the loss:

18.1. She said that, on 28 June 2012, the plumbers were at her home to install a new shower and washbasin in her bedroom.

18.2. As they started working, she locked her wardrobe with a chain and a small padlock for which she had two sets of keys. While they were working, she went into the garden where she lost one of the sets of keys. She thought it must have fallen out of her pocket in the garden. She looked all over but could not find it.

18.3. The plumbers must have seen the two boxes in the cupboard in the other bedroom. They moreover saw her retrieve keys for other

cupboards from her wardrobe. They accordingly knew that she kept keys in her wardrobe. Although she did not spell it out, the point she made was that, if the plumbers discovered the wardrobe key she had lost in the garden, it would have given them access to her wardrobe where, they knew, she kept her keys including the keys to the security boxes in the other bedroom.

18.4. She was very upset because the plumbers put their rubble in the other bedroom while they were working. The point she made was that the plumbers had gone into the other bedroom and must have seen the security boxes in the cupboard in that room.

18.5. After she had been away to purchase the components the plumbers required, they acted suspiciously. She saw Mr Dube “talking very quietly in the bedroom to somebody”. Later Mr Sibanda arrived. She saw him sitting on his haunches in the passage doing something which, the plaintiff thought, was “a bit odd” but she could not see what he was doing. Soon after that, she saw him “putting something in the back of his truck and off he went”.

18.6. She concluded by saying that “I suspect the plumbers to have stolen my jewellery and cash as there was no breaking in my house”.

19. The plaintiff repeated her accusation against the plumbers in her claim form of 16 July 2012, to Ms Harmse on 20 July 2012, to Mr Francis and Mr Meyer on 15 August 2012, in her letter to the defendant on 21 December 2012 and again in her evidence in this trial.
20. The plaintiff accused the plumbers of the theft only because it could not have been anybody else. But the plumbers were not the only people at the plaintiff’s home during the period of the alleged loss. The plaintiff testified that there were also other workmen at her home at the time. They included electricians, someone who installed the curtain rod and another one who attended to an Xpelair device. The plaintiff never suggested that any of these people might have stolen her jewellery. She did not suggest that any of them had an opportunity to do so. On the contrary, after the defendant’s investigators had established that the plumbers had not been there on 28 June 2012, as the plaintiff had alleged, the plaintiff solicited the assistance of the electricians to prove that the plumbers had worked at her home on 4 June 2012. Under cover of a letter of 20 March 2013, the plaintiff sent the defendant affidavits by the electricians who said that, when they had worked at the plaintiff’s home on 4 and 5 June 2012, the plumbers were also there. The plaintiff would not have enlisted the help of the electricians if there was any possibility that they might have been the real culprits. There is indeed no evidence that any of the other tradesmen who were at the plaintiff’s home at the relevant time, might have committed the theft because they had an opportunity to do so. The plumbers are thus the plaintiff’s only suspects.

HER MISTAKE ABOUT THE DATE

21. The plaintiff said in both her handwritten statement and her affidavit of 6 July 2012 that the plumbers had worked at her home on 28 June
2012. This turned out to be wrong. They had worked there on 4 and 5 and not on 28 June 2012.
22. The plaintiff sought to explain this discrepancy. She said that she could in fact not remember the date at the time but that one of the police officers, who had come to take fingerprints at her home on 6 July 2012, had told her that she had to specify the date in her statement. This explanation is implausible and cannot be true. The plaintiff repeated the allegation, that the plumbers had been there on 28 June 2012, in her insurance claim lodged with her brokers on 16 July 2012, to Ms Harmse on 20 July 2012 and to Mr Francis and Mr Meyer on 15 August 2012. The defendant challenged the plaintiff on the date in their letter of 14 December 2012. The plaintiff reiterated, in her reply of 21 December 2012, that the plumbers had been there

on 28 June 2012. She furnished the defendant with an affidavit by Professor Standton confirming that he had also seen the plumbers at their home on 28 June 2012. The plaintiff's explanation for her mistake thus cannot be true.

23. The plaintiff was badly wrong about the date. She said that the plumbers had been there a week before she discovered the theft when in fact they had been there a month before the discovery. It is hard to understand how she could honestly have made such a mistake, to say that the plumbers had been there a week ago when in fact they had been there a month earlier.

24 The plaintiff had a motive to give a false date. She was under-insured on 4 June 2012 until she updated her insurance on 25

June 2012. A loss after the update would accordingly have been more profitable than before. It might explain why the plaintiff initially alleged that the plumbers had been there (and the loss had thus occurred) on 28 June 2012.

25. I conclude that the plaintiff's original statement, that the plumbers had been there on 28 June 2012, and her subsequent

explanation for that error, reflect poorly on her credibility.

THE BLUE BOX OR THE BLACK BOX

26. The plaintiff testified that her jewellery was kept in and stolen from the black box and not the blue box. Nobody can honestly confuse the two. They differ markedly in colour, size and design. The plaintiff is adamant that she always said that the jewellery had been stolen from the black box and that she had never even mentioned the blue box. Ms Harmse and Mr Meyer however testified that she had originally told them that the theft had been from the blue box.

27. The plaintiff's own handwritten statement of 6 July 2012 was ambiguous and contradictory on this score. She described her discovery of the theft as follows:

"On the night of the 5th of July I went to get some money out of one of the boxes. I found the money gone and all my jewellery. I have not yet

opened the black box. I opened the black box. All the fingerprints were at this box and the lid of the blue box."

28. Ms Harmse testified that, when she first interviewed the plaintiff on 20 July 2012, she said that the theft had been from the blue box. Ms Harmse recorded the statement in her report of 4 February 2013.
29. Mr Meyer also testified that, when he and Mr Francis first interviewed the plaintiff on 15 August 2012, she also told them that the theft had been from the blue box. Mr Francis similarly reported this statement in his report of 25 January 2013.

30. Ms Harmse and Mr Meyer both testified that, at their joint interview of the plaintiff on 4 December 2012, the plaintiff said that the theft had been from the black box. They confronted her with the fact that she had previously told them that the theft had been from the blue box. The plaintiff did not deny that she had previously said so but explained that she might have been mistaken.
31. In its letter of 14 December 2012, the defendant asked the plaintiff to explain why she had initially said that the theft had been from the blue box and more recently that it had been from the black box. In her response of 21 December 2012, the plaintiff did not deny that she had contradicted herself on this score. She merely reiterated that the jewellery “was always stored in the black box and the SAP took fingerprints from both boxes”.
32. The evidence of Ms Harmse and Mr Meyer, that the plaintiff first said that the theft had been from the blue box and later that it had been from the black box, and the plaintiff’s failure to deny that she had so contradicted herself, seem to make it plain that she did. This contradiction seriously undermines her credibility because it is not an error an honest witness would have made.

HOW THE THIEVES GAINED ACCESS

33. The plaintiff initially gave an elaborate explanation of how she lost a set of keys to her wardrobe when the plumbers were there. Her theory at the time was that the plumbers must have discovered the lost keys to the wardrobe and so gained access to her wardrobe from where they must have retrieved the keys for the boxes that allowed them to steal the jewellery in the black box. The plaintiff advanced this theory in her original handwritten statement and in her police affidavit and repeated it to Ms Harmse on 20 July 2012 and to Mr Francis and Mr Meyer on 15 August 2012.
34. This is a most implausible story. It suggests, on the plaintiff’s own version, that the plumbers discovered the lost key in the garden, that they figured out that it was a key to the plaintiff’s wardrobe, and that, while the plaintiff was with them in the flat, they unlocked her wardrobe, retrieved the key to the black box, went to the other bedroom, unlocked the black box and stole its content. The part of the theory that surmises that the plumbers would have connected the key to her wardrobe and her wardrobe to the keys of the two security boxes, just seems too fanciful to be true.
35. This theory would have it that the plumbers had the key to the black box and unlocked it to steal the cash and jewellery. It implies that the black box was still intact and did not show any sign of having been forcibly opened. The plaintiff indeed gave an explanation along these lines in a letter to one Sven on 29 April 2013:

“At first I never noticed that the black box had been forcibly opened because of the damage to the lower part of the box under the lid. Where the thief’s had broke the box open. I put the key in and open the box. I was devastated to find my jewels stolen as they were air looms for my children. I first did not know how they broke the black box open so I thought they had found the keys but later discovered they broke into the box. I at that time only touched the lid where there was no damage. So the way I at that time of the thief did not know they broke the black box.”

36. At the trial, the plaintiff produced the black box to show how obviously it had been damaged by being forced open. That is indeed so. The box is today seriously and obviously damaged as it would be if it were forced open. The parties agreed that the box is now so distorted that it is very hard to open. One man alone struggles to wrest it open. It takes two men to do so. That much was vividly illustrated by the attempts to open and close the box in court.
37. Ms Harmse and Mr Meyer say that the box was not so damaged when Ms Harmse took pictures of it at the time of her first interview of the plaintiff on 20 July 2012. But their evidence on this score is based on a comparison of Ms Harmse’s photograph with the box before the court. The photograph is however of such poor quality and shows so little detail that it does not make for a reliable comparison. I accordingly do not attach any weight to this evidence.
38. I assume in the plaintiff’s favour that the box was indeed in its current condition when she first discovered the loss on 5 July 2012. But if that was so, it must have been immediately apparent to her that the box had been forced open. She would not have been able to open the box herself. Even if she were able to do so, it would have been obvious to her that the box had been damaged and was skew and out of alignment. It would in those circumstances have been absurd to develop the theory she did of how the plumbers had got hold of the key to the box and so opened it.
39. The plaintiff’s evidence about the way in which the theft is alleged to have occurred, is accordingly also inconsistent and

fanciful.

THE PLAINTIFF’S DEMEANOUR

40. The plaintiff was poor witness. She seemed incapable or unwilling to respond directly to questions put to her. She was evasive and determinedly long-winded. She thus made a poor impression as a witness.
41. I allow, however, for the possibility that these features of the plaintiff’s evidence might have been due to the stress of

giving evidence in a foreign environment. I accordingly do not attach any real significance to the plaintiff’s unconvincing

demeanour.

THE PLUMBERS' EVIDENCE

42. Two of the plumbers gave evidence --- Mr Sibanda and Mr Dube. They denied that they set foot in the second bedroom, that they ever saw the two security boxes in that bedroom or that they stole anything from them.
43. Mr Sibanda was in charge of the work done at the plaintiff's flat. He also worked there but was called away from time to time to attend to other matters. He was accordingly not on site all the time. But he repeatedly made the point that they could never have stolen the jewellery because they worked within sight of the plaintiff at all times. She sat on a chair in the kitchen from where she could see them at all times while they were working in her flat. This evidence of Mr Sibanda was not challenged in cross-examination.
44. Mr Sibanda was an impressive witness. He appeared to be direct and honest. He was clearly indignant about the accusation of theft but did not seem to be vindictive about it at all. I cannot find any reason not to accept his evidence.
45. Mr Dube confirmed Mr Sibanda's evidence in all material respects. He also denied that any of them ever set foot in the second bedroom or took anything from it. He gave evidence through an interpreter and it is thus not so easy to assess his demeanour. He was however clearly far more inhibited and soft spoken than Mr Sibanda but also seemed a perfectly honest witness.
46. The plumbers have, to some extent been vindicated by the police who took their fingerprints and compared them with such fingerprints as might have been found on the two boxes. The parties are agreed that none of those fingerprints matched those of the plumbers.

CONCLUSIONS

47. I conclude that the plaintiff has not discharged the onus of proving that her jewellery was stolen. Her own evidence is seriously

flawed. It is contradicted by the plumbers whose evidence seems perfectly honest. The plumbers are moreover, to some extent, vindicated by the police fingerprint findings.

48. I accordingly make the following order:

The action is dismissed with costs.

W H TRENGOVE

ACTING JUDGE OF THE HIGH COURT

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COUNSEL FOR THE DEFENDANT I POSTHUMUS

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DATES OF HEARING 8-11/08/2017 & 15/08/2017

DATE OF JUDGMENT 18 AUGUST 2017

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