

SOUTH AFRICA / JUDGMENT

Technogistics (Pty) Limited v ABSA Insurance Risk Management Services t/a AIRMS (A5029/2018) [2019] ZAGPJHC 349 (19 September 2019) [2019] ZAGPJHC 349

COURT

South Gauteng High Court, Johannesburg

BEFORE

K E Matojane, C Lamont, WHG Van der Linde

CASE / FILE NUMBER

A5029/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: A5029/2018

COURT

A QUO CASE NO: 36952/2015

In

the matter between:

TECHNOGISTICS

(PTY) LIMITED

Appellant

and

ABSA

INSURANCE RISK MANAGEMENT SERVICES t/a AIRMS

Respondent

JUDGMENT

MATOJANE J

Introduction

- [1] The appellant unsuccessfully sued the respondent for an amount of R1 751 596.08 under the ‘Fidelity Cover’ portion of the insurance agreement concluded between the appellant and the respondent. Leave to appeal was granted by the trial court (Makume J). The outcome of this appeal depends upon the proper interpretation of the policy in question.
- [2] The appellant obtained a policy of insurance from the respondent. The Fidelity Cover portion of the policy insures the appellant for loss of money and other property belonging to the appellant or for which the appellant is responsible, stolen by the employees of the appellant.
- [3] The appellant alleges that during the period 13 September 2013 to 15 November 2013, its employees were identified and implicated in the theft of stock belonging to a third party, Phoenix Distribution (‘Phoenix’), for which it provided warehousing and distribution services. The appellant’s employees were the only ones who had both access to the stock and the opportunity to steal it.
- [4] The respondent denies that the theft occurred or that the appellant is entitled to indemnity, arguing that the appellant has not shown that its claim falls within the terms of the policy.
- [5] The trial court granted absolution from the instance against the appellant after finding that the appellant could not show the exact dates of the losses and precisely what was stolen, and the names of the specific employees who had stolen the goods.

Background

- [6] The appellant is a logistics company, which provided warehousing and distribution services to Phoenix in terms of a Supplier Chain Services Outsourcing Agreement. In terms of the agreement, the appellant received, stored and eventually delivered Microsoft products for and on behalf of Phoenix. Phoenix is an official distributor of Microsoft products. The appellant bore the risk in the goods of Phoenix while the goods were in possession of the appellant.
- [7] On 15 November 2013, a client of Phoenix required certain items; namely, Microsoft Office Professional 2013, to be delivered to it from the warehouse of the appellant. Notwithstanding the fact that the applicant's Freight Inventory Management System reflected enough stock on hand to fulfil the order, there was not enough of the item in the warehouse. The appellant conducted a thorough investigation of the stock movement of all Microsoft Office 2013 Home and Office items, which confirmed that the items were missing. The appellant checked all documentation and ruled out that the discrepancy was as a result

of an administrative error.

- [8] To address this problem, the appellant posted a guard in the warehouse to patrol the warehouse and identify any possible areas of weakness. On 24 January 2014, an employee of the appellant by the name of Thapelo Manoko ('Manoko') was apprehended by this guard while in the act of stealing 20 boxes of Microsoft Office Professional 2013. Manoko implicated five other employees who subsequently dismissed.
- [9] Phoenix held the appellant liable for the stolen stock and invoiced it for a total of 592 Microsoft Office 2013 products to the value of R1 311 912.73. Phoenix recovered the amount from the appellant through a set-off. The appellant submitted a claim to the respondent on 12 June 2014. The respondent refused to indemnify the appellant, and as a result, the present action commenced.

The

issues

- [10] The terms of the insurance agreement and the repudiation of the appellant's claim by the respondent are common cause. The section of the insurance policy dealing with the Fidelity Cover provides:

10.1 Loss of money and/or other property belonging to the Insured, or for which they were responsible, stolen by an Insured employee during the currency of this section;

10.2 Direct financial loss sustained by the Insured as a result of fraud or dishonesty of an Insured employee, all of which occurs during the currency of this section which results in dishonest personal financial gain for the employee concerned ('the indemnity').

- [11] The following two issues remain to be decided: (a) Were all the items, in respect of which the appellant is claiming indemnification under the policy, actually stolen by its employees? And, (b) if so, is the respondent absolved from indemnifying the appellant because the respondent did not give written consent to the appellant to accept liability and reimburse Phoenix for the stolen stock?

Legal framework

- [12] There is no just reason for applying any different construction to a contract of insurance from that of the contract of any other kind. The appellant must make out, from the terms of the contract, a right to be indemnified and the respondent must likewise make out any defence based upon the contract. In *Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa*[1] the Supreme Court of Appeal said:

“According to our law . . . a policy of insurance must be construed like any other written contract so as to give effect to the intention of the parties as expressed in the terms of the policy, considered as a whole. The terms are to be understood in their plain, ordinary and popular sense unless it is evident from the context that the parties intended them to have a different meaning,

or unless they have by known usage of trade, or the like, acquired a peculiar sense distinct from their popular meaning.If the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more... It must also be borne in mind that:

‘Very few words . . . bear a single meaning, and the ‘ordinary’ meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract’.

....It is essential to have regard to the context in which the word or phrase is used with its interrelation to the contract as a whole,

including the nature and purpose of the contract....”

[13] The onus is on the appellant to allege and prove that the facts of the claim fall within the operative clause. In *Eagle Star Insurance Co Ltd v Willey*,^[2] the Appellate Division said that the insured must frame his case in such a manner so as to ‘bring his claim within the four corners of the promises made to him’.

[14] Where ambiguity is found, or in a case of real doubt, the contract has to be construed most strongly against the drafter of the contract (the insurer in this case); it frames the contract and inserted the excluded terms. In *Fedgen Insurance Ltd v Leyds*,^[3] the Appellate Division held that—

‘Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted...

for it is the insurer's duty to make clear what particular risks it wishes to exclude... A policy normally evidences the contract

and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against [the] drafter of the policy....’

[15] Counsel for the respondent submits that the appellant, on a balance of probabilities, failed to prove that its employees stole the stock. Counsel argues that as a result of a single incident on 24 January 2014, where Manoko was caught with stolen goods, the appellant retrospectively concluded that the events of 15 November 2013 (when it was discovered that there was insufficient stock) could only be blamed on theft by its employees.

[16] The respondent made a number of arguments which fall to be considered. First, it argued that the appellant’s primary witnesses, Mr Van der Velde and Mr Naidoo, contradicted each other regarding the status of the stock on 15 November 2013. Mr Van der Velde had testified that there was no stock, whereas Mr Naidoo had contended that there was ‘insufficient’ stock. Despite the contradiction, it is not in dispute that there was not enough stock to fulfil

the client's order in circumstances where the stock records showed that there should have been sufficient stock. The contradiction is immaterial to say the least.

- [17] Second, the respondent argued that the appellant did not investigate its erstwhile client, Tevo, who shared the premises with the appellant in respect of the losses. Tevo, along with its employees, had left the shared premises at the end of September 2013. As I will show below, it was not necessary for the appellant to investigate Tevo and its employees. Third, the respondent contended that the appellant had not investigated the independent security company and its employees to determine whether they were involved in the theft. Lastly, the respondent stated that nothing pertaining to the losses could be picked from the CCTV.
- [18] The unchallenged evidence of Mr Van der Velde is that appellant has a fingerprint system that allows the employees access to the products. If visitors came, they were accompanied by the employees of the appellant. The exit doors would be locked and only warehouse workers were able to move freely and access to relevant products.
- [19] The court a quo erred in finding that the appellant was obliged to conclusively exclude the possibility that either the security guards or Tevo employees could have stolen the goods. The appellant has excluded the possibility of such employees committing the theft by showing, on the balance of probabilities, that Tevo and its employees were contained in a segregated area, and that the security guards were restricted to the outside of the warehouse. The guard posted inside the warehouse is the one who caught Manoko stealing and could not have been the thief.
- [20] The respondent appointed its assessors, Censeo Assessment & Verification ('Censeo') to assess and investigate the loss. Censeo confirmed that a loss occurred and that the claim was capable of adjustment. However, Censeo advised the respondent that the claim be rejected, due to the fact that the appellant had not confirmed theft by its employees, and further, that the appellant was unable to accurately confirm what was stolen. Censeo subsequently confirmed that it did not doubt the losses and that it did not dispute that the losses did occur. This admission by Censeo conclusively confirms that the loss could only be as a result of theft by employees for which the appellant was held liable by Phoenix.
- [21] Contrary to the findings of the court a quo, the appellant has shown on the balance of probabilities that goods were systematically stolen over an extended period of time by unidentified employees of the appellant. They were the only ones who had access to the stock and the only ones with the opportunity to steal it. The incident with Manoko, and the admission by another employee (Gift), that he was involved in theft, conclusively shows that there was theft by employees of the appellant.

Whether the respondent is absolved from indemnifying the appellant because of the alleged breach of the policy

- [22] Mr Van der Velde, in his evidence, testified that the appellant had permission to admit the two invoices by Phoenix.[4] He testified as follows under cross-examination:

ADV DE BEER: ...I put it to you that the term of this contract concluded between Technogistics and the insurance company, the defendant, was breached by Technogistics.

COURT: Was breached by?

ADV DE BEER: Technogistics, M'ord, the plaintiff.

COURT: By the plaintiff?

ADV DE BEER: Yes, M'ord.

COURT: What is your comment?

VAN DER VELDE: We received specific permission from the broker that we dealt with, ABSA, the insurer to go ahead and pay Phoenix. Phoenix were only, deducted the amount in May, later in May. So there was plenty of time for anyone to raise these concerns if they were genuine concerns.

[24] In *Resisto Dairy v Auto Protection Insurance Co Ltd*,^[5] the Appellate Division stated that it has generally been held that '...if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach.' See also *Paterson v Aegis Insurance Co Ltd* 1989 (3) SA 478 (C).

[23] The respondent has not led any evidence at all in this regard, and has failed to prove that no such consent was given by the respondent. It also failed to demonstrate that if such consent had not been given, that the respondent suffered material prejudice. In any event, the acceptance of liability by the appellant to Phoenix is subject to the rights of the respondent, and as such, the conduct of the appellant does not constitute a breach of the agreement.

In the circumstances, the following order is made:

1. The appeal succeeds with costs;
2. The order of the court a quo is set aside. It is substituted with the following order:
 - (a) The defendant is liable to indemnify the plaintiff for the value of the Microsoft products that were stolen by its employees, the value of which individual units stand to be determined at a later stage.
 - (b) The defendant must pay the plaintiff's costs.

K E MATOJANE

JUDGE OF THE HIGH COURT

I agree

C LAMONT

WHG VAN DER LINDE

Date of hearing:

28 August 2019

Date of judgment:

19 September 2019

Appearances:

Counsel for the Appellant:

AJ Venter

Appellant's Attorneys:

Whalley & Van der Lith Inc

Counsel for the Respondent:

WA de Beer

Respondent's Attorneys:

D M Bakker Attorneys

[1] Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa 2004 (5) SA 520 (SCA) para 10 with reference to Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd 1983

(1) SA 120 (A) at 126H - 127A and Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A) at 646B.

[2] Eagle Star Insurance Co Ltd v Willey 1956 (1) SA 330 (A) at 334B.

[3] Fedgen Insurance Ltd v Leyds 1995

(3) SA 33 (A) at 38B-E.

[4] Transcript page 963, line 20.

[5] Resisto Dairy v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A) at 645H-A.

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