



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no: 749/2013

Not Reportable

In the matter between:

PILLAY, MAGANDHERAN

APPELLANT

and

THE HOLLARD INSURANCE COMPANY LIMITED

RESPONDENT

Neutral citation: *Pillay v The Hollard Insurance Company Ltd* (749/13) [2014] ZASCA 175 (19 November 2014)

Coram: Mpati P, Cachalia, Bosielo, Majiedt and Mbha JJA

Heard: 19 November 2014

Delivered 19 November 2014

Summary: Insurance – short term – whether policy indemnifies insured for loss or damage caused by theft in absence of physical damage – policy requires physical damage caused by break-in or theft to be visible.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Kathree-Setiloane J sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MPATI P (Cachalia, Bosielo, Majiedt and Mbha JJA concurring):

[1] The issue in this appeal is whether losses suffered by the appellant as a result of theft are covered by an insurance contract he had concluded with the respondent company and, if so, whether the appellant has proved his losses or whether he forfeited his claim because of failure to comply with the requirements for a valid claim. It is common cause that on 29 July 2006 the appellant and the respondent concluded a written agreement (insurance policy) consisting of various sections, among which were a 'household contents section' and an 'all risk section'. Under the household contents section the respondent undertook to indemnify the appellant for all loss or damage to household goods, personal possessions and equipment which are inside the dwelling or outbuildings at the risk address (which is his premises). The relevant part of clause 2.2 of the household section provides:

'We cover the Insured Property against loss or damage caused by:

...

2.2.5 Break-in or theft provided that We will only compensate You if We can see physical damage caused by the break-in or theft;

....'

Clause 4.4 of the All Risk section requires jewellery to be kept in a securely locked receptacle whilst not in use, 'failing which there will be no cover for such items of jewellery not kept in the receptacle'. The clause provides further that loss or damage due to burglary or theft 'is subject to visible forcible violent entry or exit from such receptacle'.

[2] During December 2007 the appellant issued summons against the defendant out of the Johannesburg High Court (now South Gauteng High Court) for payment of the sum of R114 699,94, being the balance of the value of goods that were allegedly stolen from his private residence, with interest and costs of suit. It was alleged in the particulars of claim that during or about December 2006 various items of clothing, a puzzle and a blanket, belonging to the appellant and members of his family, as well as jewellery, to the total value of R130 699, 94 were stolen from his home. It was further alleged that the defendant 'elected to enforce the contract (and not raise any non-compliance with the time periods prescribed by its claim procedure)' inter alia by 'making payment in respect of goods to the value of R20 800,00 in replacement of certain of those that were stolen from [him]'.

[3] The respondent denied liability and pleaded, inter alia, that in the event that the appellant proved the alleged theft of the items listed in the particulars of claim as stolen:

'7.3.1 The alleged event [theft] did not cause visible physical damage as required by clause 2.2.5 of the Household Contents Section of the agreement of insurance;

7.3.2 There was no violent or forcible entry into or exit from a securely locked receptacle in which the jewellery allegedly stolen was kept as required by clause 4.4 of the All Risk Section of the agreement of insurance.'

While admitting payment of the amount of R20 800,00 as alleged by the appellant the respondent pleaded that the payment 'was made in error, the [respondent] not having been obliged and/or liable to make any payment to the [appellant]'. The respondent pleaded further that goods to the value of R28 699, 98 'were recovered by the SAPS and were tendered back to the [appellant] . . . which tender was rejected' and that consequently 'the recovered goods ought not to form part of the [appellant's] claim, and fall to be subtracted from the . . . claim as formulated'.

[4] The matter proceeded to trial where the court below (Kathree-Setiloane J), after hearing evidence, dismissed the appellant's action with costs. This appeal is with its leave.

[5] It is not in dispute that during November 2006 the appellant discovered that certain items of clothing were missing from his cupboards. In December 2006 he confronted his domestic employee and later found a number of his items of clothing as well as those of members of his family in her room. She confessed to having stolen them and she was subsequently arrested following a report to the police. The appellant submitted a claim to the respondent and, after the parties' unsuccessful attempts at settlement, issued summons claiming compensation in respect of the loss suffered by him and members of his family.

[6] In dismissing the appellant's claim the court below found that the 'goods situated within the risk address are covered under the Household Contents section only, and not under the All Risk section'. I doubt whether this finding is correct, but whether or not it is correct is really of no consequence. I say this because in terms of clause 2.2.5 of the Household Contents section of the policy an insured will be compensated in respect of loss or damage caused by a break-

in or theft only if physical damage caused by such break-in or theft can be seen; while in terms of clause 4.4 of the All Risk section loss or damage suffered due to theft of jewellery will be compensated only if there is 'visible forcible violent entry into or exit from the receptacle' in which it is required to be kept. It was conceded that the jewellery was not kept in a securely locked receptacle. The appellant's case that the jewellery was not jewellery proper, but rather costume jewellery, cannot be sustained. The policy makes no differentiation between different types of jewellery. That portion of the claim must fail.

[7] In interpreting clause 2.2.5 of the insurance policy the court below held that 'the policy only covers insured property against loss or damage caused by a break-in or theft, if physical damage caused by the break-in or theft is visible to the insurer'. Counsel for the appellant submitted, however, that physical damage could, in the instance of theft and break-in, also be evidenced by the absence of such items from the insured premises. Physical damage occasioned by theft requires no more, so the argument proceeded, than that the items be shown to be missing from the shelf, as it applied in this case. It seems this submission was advanced before the court below because the learned judge said the following:

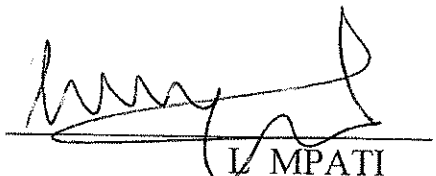
'Theft by stealth or pilferage, as occurred in this case, is simply not covered. I am therefore of the view that there is no merit in the submission of the plaintiff that the physical damage caused by the theft, by way of pilferage over a period of time, is evident from the theft of the clothing items ie their absence from the insured premises.

I am of the view that this interpretation of the words "*provided we can see physical damage caused by the break-in or theft*" is far too strained and contrived.'

I agree. There is no ambiguity in the language used in the relevant clauses of the policy. It is not the owner or possessor of the stolen goods who must see the

physical damage for him or her to be compensated for the loss or damage, but the insurer, who would not have known what was or was not on the shelf before the theft.

[8] It follows that there is no reason for this court to interfere with the conclusion reached by the court below. In the result, a consideration of the other defences raised by the respondent becomes unnecessary. The appeal is dismissed with costs.



L. MPATI
PRESIDENT

APPEARANCES

For Appellant:

D Vetten

Instructed by:

Cyril Ziman & Associates Inc,

Johannesburg

E G Cooper & Majiedt Inc, Bloemfontein

For Respondent:

A J Lamplough

Instructed by:

Norton Rose Fulbright, Sandton

Webbers, Bloemfontein