

## SUPREME COURT OF SEYCHELLES

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**Reportable**

[2019] SCSC 296

CA 15/2018

In the matter between:

**RAJAN CHETTY CHOLARAJAN**

**Appellant**

*(rep by Ms. Lucy Pool )*

and

**MAU (SEYCHELLES) INSURANCE**

**Respondent**

*(rep by Rene Durup)*

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**Neutral Citation:** *Cholarajan Ranjan Chetty v MAU (Seychelles) Insurance (CA 15/2018)*  
[2019] SCSC 296 (9 April 2019).

**Before:** Andre J

**Summary:** Appeal – Insurance law warranty

**Heard:** 28<sup>th</sup> November 2018

**Delivered:** 9<sup>th</sup> April 2019

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### **ORDER**

**Appeal dismissed**

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### **JUDGMENT**

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#### **ANDRE J**

- [1] This Judgment arises out of an appeal from a Magistrate’s Court decision of the 5<sup>th</sup> April 2018 (“the Judgment”) wherein the plaint of the Appellant was dismissed.
- [2] For the purpose of this Judgement, the following are the salient factual and procedural background thereof.
- [3] The Appellant filed a plaint before the Magistrates Court claiming breach of an insurance contract by the Respondent in the sum of Seychelles Rupees Three Hundred

and Fifty Thousand (SR 350, 000/-) for losses and damages arising out of an insurance contract with the Respondent of the 13<sup>th</sup> April 2015 and which contract arose out of his renting of a shop at Takamaka, in which he operated a retail business under the name “Kot Rajan”.

[4] It was averred in the plaint that the Respondent insured the Appellant a sum of Seychelles Rupees Three Hundred and Fifty Thousand (SR. 350,000/-) against any loss and damages resulting from fire. The insurance agreement was effective from 20<sup>th</sup> March 2015 to 19<sup>th</sup> March 2016.

[5] On 30<sup>th</sup> June 2015, the Appellant’s shop caught fire and goods to the value of Seychelles Rupees Five Hundred Thousand (SR 500, 000/-) were destroyed in the fire. As a result, the Appellant submitted he was entitled to be paid the sum of Seychelles Rupees Five Hundred Thousand (SR 350, 000/-) by the Respondent in respect of his losses and damages resulting from the fire.

[6] The Appellant notified the Respondent of the loss and damages as a result of the fire in a letter dated 14<sup>th</sup> January 2016 and the Respondent refused to pay *citing that trade books had to be provided to ascertain the value of what was lost*. The Appellant filed a plaint at the Magistrate Court for the matter to be determined.

[7] The Learned Magistrate dismissed the case as per impugned Judgment holding therein that, *“this court is not satisfied, that the Plaintiff has proved his case against the Defendant on a balance of probabilities.”* Reason behind was based on a term in the insurance contract which required the Appellant to keep its trade books and in this case, none were presented but receipts which the Court found not to be sufficient.

[8] Consequently, the Appellant being aggrieved by the Judgment appealed. The Appellant has raised three grounds of appeal namely, firstly, that the finding of the Learned Magistrate that the Appellants did not produce records to establish loss and damages is erroneous and not based on the evidence adduced; secondly, that the authorities referred to in the Judgment do not support his findings that there was a breach of condition; and thirdly, that the Learned Magistrate failed to consider the whole of the evidence placed before him, had he done so he would have come to a different conclusion. And the Appellant prays this Honourable Court to reverse the

decision of the Learned Magistrate and hold that the Appellant should have been compensated for his loss.

- [9] Having illustrated the salient evidence pertinent to this matter, I shall now move on to the applicable law and its analysis thereto in line with the records presented to the Court as per brief in this appeal.
- [10] It is to be noted at this juncture, that both Learned Counsels filed written submissions and due consideration have been given thereto.
- [11] Moving to the first ground of appeal (*supra*), it is submitted in essence by the Appellant that that there was sufficient records to establish loss and damages before the Learned Magistrate and that the production of the receipts was for all intent and purposes sufficient. The Appellant submitted that trade books comprised of receipts and invoices from importers and suppliers in the course of trade. Reference to Article 8 (1) of the Commercial Code Cap 38 was made and which article provides that “*Merchants shall keep books or accounts and it can consist of receipts, invoices, letters received or copies of letters, they form an integral part of books and accounts.*” It is thus contended by the Appellant that the Learned Senior Magistrate did not consider the meaning of trade books under the said Code. Appellant relied on the case of **(Leon Builders (Pty) Ltd & Ors v MUA (Seychelles) Ltd CC02/2017 page 9)**, paragraph 38 wherein the Chief Justice held that “*lack of production of receipts to support a claim may be policy but are not terms of the agreement and are not enforceable,*” in support.
- [12] The Respondent on its part submitted that there was a condition precedent in the Policy of Insurance whereby the Appellant had to produce trade books kept in a fire resisting safe. This was what was required to satisfy loss and damage. As there were no trade books produced in breach of the policy, the amount they claimed was therefore, unsubstantiated. In the light of no evidence, the Respondents submitted that they had considered providing an ‘ex gratia payment’ which is non-contractual as per the policy of Insurance, and an offer of Seychelles Rupees Twenty Seven Thousand (SR 27, 000/) was denied by the Appellant.

- [13] The Respondent provided a distinction between the case at hand and that of **Leon Builders case**, wherein the Respondent averred that in the **Leon Builders case**, the insured had already provided a specific list of movables to be insured whereas in this case, there is no specific list of movables and recovery is based on movables lost in the fire. The second distinction provided is that in the **Leon Builders case**, the claim was based on theft, the claim in this case is based on a fire, the policies of insurance are thus different. Thirdly, that the defence in the **Leon Builders case** was based on ‘genuineness of the claim’ which the Court equated to ‘fraud’ and the defence lost due to a combination of procedure and evidential reasons. The defence in this case is very different as it is based on a ‘condition precedent’ clause in the contract.
- [14] Now, in this case, I find that the production of receipt by the various witnesses who were called would have been sufficient had the Policy only required that as a pre-condition. The testimonies of the Appellant and the witnesses who were called to provide receipts indicate a total sum of approximately Seychelles Rupees One Hundred and Fifty Thousand (SR 150, 000/-), yet the claim is for Seychelles Rupees Three Hundred and Fifty Thousand (SCR 350, 000/-), which has not been substantiated. In the case of (**Mahe Trading v Savy SLR 1974**), it is held that, *insurance is basically a contract of indemnity and can never become a source of profit to the insured*. Additionally, I find that the **Leon Builders case** does not apply to the facts of this case, hence irreconcilable.
- [15] A *warranty* is a policy term setting out an obligation that the insured must comply with, either to do something, or refrain from doing something, or stating that some condition will be fulfilled. A warranty can also be a statement affirming the existence of certain facts. In this particular case, the policy required that the insured ought to keep trade books in a secure location such that the insured would be able to provide the books when making a claim in respect of any disaster such as the one in this case. As per (*Exhibit D1*) which is supposedly filled in by the insured, a question is asked, *are trade books kept in a fire resisting safe on your premises? Applicants answer is yes*. Underneath the question is the following: *N. B For insurance of contents and stocks, the following documents are essential; records of stocks, fixed assets register, purchases, sales and bank transactions, records, journals and any other documentary evidence to support the above records*.

- [16] The agent in this case had the duty to draw the attention of the insured to the obligations imposed by the policy. It is the insured's responsibility to ensure compliance.
- [17] As it was held in the case of (**Silverstar Automobiles Limited v Fidelity Shield Insurance Co. Ltd [2014] eKLR**), *'the inability of the Plaintiff to produce any record of a physical stock taking made prior to the burglary, as well as records of purchases and sales, amounted to a breach of Condition No. 4 (a) of the Policy. Although the Plaintiff was able to produce sales figures for the period from the 1<sup>st</sup> October 2006 up to the date of the burglary, there was no relation between those figures and the actual stock on the shelves. I also find that the Plaintiff was in breach of its warranty as contained in the Proposal and Declaration. As regards clause 3 of the Policy – "the Safe and Books Clause", I find that the Plaintiff did not keep a complete set of Books, Accounts and all business transactions as well as full details of stock in hand. There was no evidence of the keeping of stock bin cards or a physical stock take made every month to reconcile the computer system with the actual physical position. As a result, I hold that the Plaintiff was in breach of this Clause'*. (See also **AC Ward & Sons Ltd v Catlin (Five) Ltd (2008) EWHC 3585**).
- [18] Thus it follows, that breach of policy by the Appellant is clearly illustrated in evidence and hence the first ground of appeal fails accordingly.
- [19] With respect to the second ground of appeal in that the authorities referred to by the Learned Senior Magistrate do not apply to the facts of the Appellant's case. It is averred that the production of trade books was not a warranty or condition precedent to the contract of insurance and therefore does not render the policy void or absolve the liability of the insurer. It is submitted further that if there was a finding that the Appellant had caused the fire, he would be unable to recover under the policy but such evidence was not there. Again under this ground, the Appellant relies on the **Leon Builders case** in which the Chief Justice state, *"a contract in terms of which a person, in return for a premium undertakes to provide policy benefits where an event contemplated in the contract as a risk other than a risk more specifically contemplated in another definition in this section relating to the use, ownership, loss of or damage to movable or immovable property occurs."*

- [20] It is submitted that the Appellant entered into an insurance contract for fire and alleged perils and paid a premium to the Respondent for insurance cover for one year from the 20<sup>th</sup> March 2015 to 19<sup>th</sup> March 2016. He suffered loss but received no benefit. The Respondent it is submitted is therefore in breach of the above provision of the Policy. With that said, it is the Appellants submission that the Learned Senior Magistrate was wrong to find that there was a breach of a condition by the Appellant. Reference made by the Learned Magistrate to the case of **(H Savy Insurance v Krishnamart Co SLR 19 of 1999)** was wrong where it held that, “*it was for the Appellant (Insurer) to aver that a condition precedent has not been performed by the Respondent (Insured) and to repudiate liability on that ground.*”
- [21] The Respondent submits that the Learned Magistrate was on firm ground when he relied upon the ***H Savy case*** as it was relevant and consistent with his adjudication. In the ***Krishnamart case***, *there was an insurance contract containing a warranty clause for the plaintiff to undertake certain actions including, to provide a certificate of installation for an intruder alarm system. The Plaintiffs’ building was seriously damaged by fire. The Court held that 1: the clause was a condition precedent to the contract, that is to say, a fundamental condition that, if breached, could entitle the appellant (i.e. the insurance company) to repudiate liability; 2. The burden of proof is on the insurer, (the insurance company) to prove that the warranty was broken.*
- [22] The Respondent submits that it had proved that the warranty was broken upon the Appellant’s own admission that the trade books were not kept in a fire resisting safe as per condition 23 (b) of the Insurance Policy Cover.
- [23] I find upon the evidence on record that the Appellant had a duty to keep the trade books as required by the policy. Having established the liability of the Appellant to keep proper books of accounts more particularly in relation to sales and stock transactions, I turn to the question as to whether the Appellant properly did so or whether it had committed breaches of the terms and conditions of the Policy sufficient to give a good reason to the Respondent to repudiate liability thereunder. In this regards, I take cognizance of the text of **(MacGillivray on Insurance Law 11th Edition at page 235 of Chapter 10 of the volume)** that reads:

*“an insurance Law warranty is a term of the contract of insurance in the nature of a condition precedent to the liability of the insurer”.*

- [24] As the Learned author goes on to state, *an insurance law warranty is, typically, a promissory term whereby the insured promises either that a given state of affairs existed prior to the inception of the policy or that it will continue to exist during the currency of the same and that the breach of such warranty discharges the insurer’s liability thereunder.* The Learned author goes on to state that the essential characteristics of a warranty are: *“(i) it must be a term of the contract; (ii) the matter warranted need not be material to the risk; (iii) it must be exactly complied with; and (iv) a breach discharges the insurer from liability of the contract notwithstanding that the loss has no connection with the breach or that the breach has been remedied before the time of loss.”*
- [25] I find, based on the above guidelines as read with evidence on records, that the insured had breached the warranty and consequently the second ground of appeal is without merits and as such stands dismissed.
- [26] With respect to the third ground of appeal, it is submitted that the Learned Magistrate failed to consider the whole of the evidence placed before him, had he done so, he would have come to a different conclusion. The Appellant submitted that it has to be borne in mind that insurance policies are contracts which the applicants have no choice but to accept the terms as written by the insurance company. The Appellant submits that the Court should balance the unequal bargaining power by interpreting any ambiguous terms in the policy against the Insurer in order to ensure fair treatment to policy holders. The Learned Magistrate therefore failed to assess the evidence from the perspective of the Appellant in order to come to a just conclusion.
- [27] The Respondent submits that the Appellant’s submission under the third ground of appeal does not hold good in that the policy of Insurance is a clear agreement between the Appellant and the Respondent. The condition precedent is clear and there is no ambiguity about it. In the proposal form, it appears that the Appellant had ticked yes of availability of trade books.

[28] Clearly the policy spelt out the warranty term and emphasized in the application form found in (*Exhibit D1*) and that the Appellant cannot claim that the term was ambiguous. I concur with the submissions of the Respondent in that regards and therefore find that the third ground of appeal lacks merit and is also dismissed accordingly.

[29] It follows thus upon the above analysis and conclusions that this Appeal stands dismissed for reasons given with costs to the Respondent.

Signed, dated and delivered at Ile du Port on 9<sup>th</sup> April 2019.

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**ANDRE J**