

ASSESSMENT

1. Dispute Identification

Complainant	: 201610-0010101
Nature of dispute	: Loss/Theft of consumer's goods
Adjudicator	: M F Mbedzi
Date	: 05 December 2016

2. Summary of the complaint

In August 2015, the Complainant took in his wife's wedding ring, a 9ct white gold wedding ring, for repairs at M Watchmaker & Manufacturing Jewellers .

The repairs were quoted at a price of R 5 540.00 which the complainant duly accepted and paid an amount of R 2000.00.

The ring was repaired in May 2016 however the complainant could only take possession of the ring upon payment of the outstanding balance.

On Tuesday, 26 July 2016, the complainant contacted the supplier to advise them that he would be settling the outstanding amount by the end of July 2016. A representative of the supplier could however at the time not confirm the location of the ring.

On the 30 July 2016, the complainant visited the supplier to settle the outstanding balance and collect the ring however the ring could not be located. The supplier advised the complainant that he would revert back to the complainant on the 01st of August 2016. Attempts by the complainant and his wife to obtain information regarding the matter were unsuccessful.

The supplier eventually advised the complainant in writing that the ring could not be found and the complainant should refer the matter to their insurance as they could not be held responsible for loss, theft or damage.

3. The response of the supplier

The Supplier advised that they do not take responsibility for theft, loss or damage. They advised the complainant to claim for the loss from his insurance company.

They are of the view that a customer's items are to be insured when given in. Life happens and theft is so much a part of the current day and time we live in. They furthermore submitted that they can pay 50 % of the money back on the amount the complainant has paid.

Legal considerations

Applicable provisions of the CPA:

Freedom of contract has been severely limited by section 51 of the Consumer Protection Act:

(1) A supplier must not make a transaction or agreement subject to any term or condition if—

(a) its general purpose or effect is to—

- (i) defeat the purposes and policy of this Act;
- (ii) mislead or deceive the consumer; or
- (iii) subject the consumer to fraudulent conduct;

(b) it directly or indirectly purports to—

- (i) waive or deprive a consumer of a right in terms of this Act;
- (ii) avoid a supplier's obligation or duty in terms of this Act;
- (iii) set aside or override the effect of any provision of this Act; or
- (iv) authorise the supplier to—
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;

(c) it purports to—

- (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;

There is a section of the CPA that deals directly with how a supplier must deal with a consumer's property and gives the consumer specific rights:

65(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier—

...

(b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and

(c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a).

4. Consideration of facts and law

Certain rules already exist in terms of our common law when dealing with the liability of a person who has received goods belonging to another (*depositum*). These rules provide that the depositary must exercise due care and diligence taking care of such goods and will be liable to the depositor if it failed to do so. A depositary will therefore be liable for damages resulting from the loss of damage to the thing through its negligence while in its custody. It has become customary for depositaries to exclude or severely restrict the rights of depositors in their standard terms and conditions. Such clauses will now fall foul of the provisions of the CPA dealing with the validity of standard terms- especially Section 51(1)(b) which prohibits terms that directly or indirectly waive consumers of a right in terms of the CPA or avoids the supplier's obligations in terms of the Act.

In terms of Section 65 a supplier is required to recognise the ownership or controlling rights of the consumer when dealing with movable property delivered to the supplier. A supplier must take reasonable care of such property according to the way in which a reasonable person in the same position would deal with it.

In this instance it seems that the supplier failed to take care and keep safe valuable items brought to them for repairs. Having regard to the value of jewellery one would expect a supplier to keep such items in a safe and secure place to prevent it from getting stolen or lost.

As already mentioned this protection is afforded in terms of the CPA and the supplier will not be entitled to exclude their liability in their standard terms. The supplier's defense that the complainant should have insured the goods therefore does not hold any water.

In *Kwamashu Bakery Ltd v Standard Bank Commercial Law Report (1994) 156 (D & CLD) at 178* it was also made clear that a business that undertakes a business venture voluntarily cannot complain and say it should not be held to a duty of care because it would cost too much or be disruptive of its practice (paraphrased).

6. Conclusion & Suggested Resolution

Based on the information provided by the parties, the supplier is liable to the complainant for any loss resulting from a failure to take proper care of their property while in their possession.

We therefore suggest that the supplier replace the ring or compensate the complainant for the value of the ring.