



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd (508/2020) [2022] ZASCA 7 (18 January 2022)

Today the Supreme Court of Appeal (SCA) upheld the appeal by Schenker South Africa (Pty) Ltd (Schenker), the appellant, against a judgment of the Gauteng Division of the High Court, Johannesburg (high court).

The appeal concerned the question whether on a proper construction of the agreement that was concluded between Schenker and Fujitsu Services Core (Pty) Ltd (Fujitsu), the respondent, in particular clause 17 read with 40 and 41 of the Standard Trading Terms and Conditions (STC), Schenker's liability was exempted or limited. The background was that Schenker's employee did not deliver the goods which were supposed to be delivered to Fujitsu but stole them.

The gist of Schenker's argument, before the high court, was that in terms of the contractual relationship between the parties a delictual claim based on theft was excluded and therefore, it was not liable for Fujitsu's loss. The countervailing argument by Fujitsu was that, on a proper construction, the agreement did not exclude or limit liability for the theft of goods.

The high court found that the employee did not execute the contract when he attended to South African Airways Cargo warehouse to steal Fujitsu's goods and that the theft was an act outside the performance of the agreement. It held that the exemption clauses 17 read with 40 and 41 of the STC, relied upon by Schenker to escape liability, did not apply to the theft in issue because the claim did not arise pursuant to or during the services rendered by Schenker or while the goods were in its custody or control.

On appeal, the Supreme Court of Appeal held that apparent from the clear language of clause 17, a claim against Schenker in respect of valuable goods, as in this case, was governed by the provisions of clauses 40 and 41. Sub-clause 40.1 expressly excluded Schenker's liability. It was held that a delict could arise through intentional or negligent acts. The exclusion of liability under clause 40.1 included loss, damage or expense arising from or in any way connected with the non-delivery or mis-delivery of any goods. It was further held that where the language of the exemption clause exempts the *proferens* from liability in

express and unambiguous terms, as here, effect must be given to it. To hold otherwise would render the clauses nugatory and not in keeping with sound commercial principles and good business sense. Fujitsu's cause of action was one which fell within the ambit of the disclaimer. Accordingly, the appeal succeeded with costs.

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