



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

Not Reportable
Case No: 508/2020

In the matter between:

SCHENKER SOUTH AFRICA (PTY) LTD

APPELLANT

and

FUJITSU SERVICES CORE (PTY) LTD

RESPONDENT

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

Coram: DAMBUZA, GORVEN, MOTHLE JJA and SMITH and PHATSHOANE AJJA

Heard: 09 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 18 January 2022.

Summary: Delict – damages – contract – exemption clause – whether the respondent's cause of action founded on delict fell within the ambit of the exemption clause contained in the contract concluded between the parties – whether the high court was correct in

finding that liability for a delictual claim for damages was not excluded on the basis of the exemption clause – construction of the exemption clause – the respondent's cause of action fell within the ambit of the clause – appellant's liability for the claim excluded.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J, sitting as the court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order made by the high court is set aside and in its place is substituted the following:

‘The plaintiff’s claim is dismissed with costs.’

JUDGMENT

Phatshoane AJA (Dambuza, Gorven, Mothle JJA and Smith AJA concurring)

[1] This is an appeal, with leave of the Gauteng Division of the High Court, Johannesburg (Adams J, the high court), against its judgment, in terms of which the appellant, Schenker South Africa (Pty) Limited (Schenker), was ordered to pay the respondent, Fujitsu Services Core (Pty) Limited (Fujitsu), an amount of US\$516 877 as damages for theft of goods from the South African Airways (SAA) cargo warehouse at the OR Tambo International Airport (ORTIA), in Johannesburg.

[2] Schenker conducts business as a warehouse operator, distributor, clearing and forwarding agent. On 10 July 2009, Schenker and Fujitsu concluded a written ‘National Distribution Agreement’ (the agreement) the material terms of which were that Schenker would, from time to time, at Fujitsu’s special instance and request, on behalf of Fujitsu and for reward, make use of Schenker’s mentioned services. All business undertaken or advice, information or services provided by Schenker to Fujitsu, whether gratuitous or not,

was subject to the Standard Trading Terms and Conditions (STC) of the South African Association of Freight Forwarders.¹

[3] Between 19 and 23 June 2012, the SAA carried three consignments of computers and related accessories, pursuant to three master airway bills, from Munich, Germany, to ORTIA. Fujitsu, having imported these goods, engaged Schenker's services for logistics, warehousing, clearing, and forwarding thereof.

[4] Mr Lerama was employed as a drawing clerk by Schenker and was by all accounts an exemplary employee who had passed the criminal vetting process. He was no stranger to the SAA cargo warehouse employees. He had been drawing cargo for Schenker for a period of one year when he was instructed to collect Fujitsu's goods from the incoming air shipments at ORTIA and to transport them to Schenker's warehouse in Pomona. Ordinarily, on the arrival of the cargo at ORTIA it would be checked by Freight Surveillance International (FSI) on the instruction of Schenker. Schenker would provide Mr Lerama with the identity verification system (IVS) card, the master airway bills, and custom clearance documents, which he would produce at the SAA cargo warehouse in order to lift the cargo.

[5] On Thursday 21 June 2012, only a Unit Load Device (one pallet of the cargo) arrived at the SAA cargo warehouse. Having signed the necessary documents, the cargo was released to Mr Lerama but was later returned to the SAA cargo warehouse as there was no truck available to load them. The next day, Friday 22 June 2012, the rest of the pallets arrived. The cargo was not collected. This was not unusual. On Saturday 23 June 2012, Mr Lerama furnished the necessary custom release documents to SAA cargo employees and loaded the consignment in an unmarked truck. He signed the SAA cargo delivery slip and left. He never delivered the goods and effectively stole them.

[6] Consequently, Fujitsu instituted a delictual action for damages against Schenker in relation to the theft. Schenker conceded in the high court that, at the time of theft,

¹ Clause 3 of the South African Association of Freight Forwarders Trading Terms and Conditions (STC).

Mr Lerama had acted within the course and scope of his employment and that, unless liability was excluded in terms of the contract, Schenker was vicariously liable for the loss suffered as a result of Mr Lerama's deviant conduct.² The quantum was not contested.

[7] The gist of Schenker's argument 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 the goods.

[8] The exemption clauses 17 and 40 of the STC were in contention. They read as follows:

'17. **GOODS REQUIRING SPECIAL ARRANGEMENTS**

Except under special arrangements previously made in writing [Schenker] will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should [Fujitsu] nevertheless deliver such goods to [Schenker] or cause [Schenker] to handle or deal with any such goods otherwise than under special arrangements previously made in writing [Schenker] shall incur no liability whatsoever in respect of such goods, and in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods. A claim, if any, against [Schenker] in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 40 and 41.

...

40. **LIMITATION OF [SCHENKER'S] LIABILITY**

40.1 Subject to the provisions of clause 40.2 and clause 41, [Schenker] shall not be liable for any claim of whatsoever nature (whether in contract or in delict) and whether for damages or otherwise, howsoever arising including but without limiting the generality of the aforesaid -

40.1.1 any negligent act or omission or statement by [Schenker] or its servants, agents and nominees; and/or

...

² See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) paras 44-45; *Stallion Security (Pty) Ltd v Van Staden* [2019] ZASCA 127; 2020 (1) SA 64 (SCA) para 32.

40.1.3 any loss, damage or expense arising from or in any way connected with the marking, labelling, numbering, non-delivery or mis-delivery of any goods; and or

...

Unless -

- a) such claim arises from a grossly negligent act or omission on the part of [Schenker] or its servants; and
- b) such claim arises at a time when the goods in question are in the actual custody of [Schenker] and under its actual control; and

...

40.2 Notwithstanding anything to the contrary contained in these trading terms and conditions, [Schenker] shall not be liable for any indirect and consequential loss arising from any act or omission or statement by [Schenker], its agents, servants or nominees, whether negligent or otherwise.'

Clause 41 concerns the monetary limitation of liability and operates only where Schenker's liability is established in terms of clause 17 read with 40.

[9] The other term which it was contended was relevant is clause 1.3.3 which defines 'goods' as follows:

'... [A]ny goods handled, transported or dealt with by or on behalf of or at the instance of [Schenker] or which come under the control of [Schenker] or its agents, servants or nominees on the instructions of [Fujitsu], and includes any container, transportable tank, flat pallet, package or any other form of covering, packaging, container or equipment used in connection with or in relation to such goods.'

[10] The high court found that Mr Lerama was not executing the contract when he attended to SAA Cargo on Saturday 23 June 2012 to steal Fujitsu's goods and that the theft was an act outside the performance of the agreement. Therefore, the high court held, the exemption clause relied upon by Schenker to escape liability did not apply. The court reasoned that the parties did not contemplate that clauses 40 and 41 of the contract would include a delictual liability of the sort articulated in the particulars of claim (theft by

an employee) 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.

[11] The crux of the appeal therefore is whether on a proper construction of the agreement, in particular clause 17 read with 40 and 41 of the STC, Schenker's liability is exempted or limited. The enquiry into this question is a matter of interpretation of the clauses. This Court restated the correct approach to interpretation of documents in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ in the following terms:

' . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. . . . '

[12] In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by common law unless they have plainly and unambiguously indicated the contrary. A disclaimer clause is a contractual modification of the common law rule as to risk which, in the absence of a special agreement, would apply to the contract between the parties.⁴ Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out.⁵

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 para 18.

⁴ *Weinberg v Olivier* 1943 AD 181 at 188.

⁵ *First National Bank of Southern Africa Ltd v Rosenblum and Another* [2001] 4 All SA 355 (A); 2001 (4) SA 189 (SCA) para 6.

[13] This Court restated the correct approach with regard to the interpretation of an exemption clause in *Durban's Water Wonderland*⁶ as follows:

'If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C-D).'

[14] Fujitsu submitted that Mr Lerama was not executing the agreement when he uplifted the goods. Thus, it was contended for Fujitsu, it was a bit far-fetched that the goods were being 'handled' or 'dealt with' as set out in the definition of 'goods' in clause 1.3.3 of the STC. In terms of the Concise Oxford English Dictionary,⁷ 'deal' is defined as including taking part in 'commercial trading of a commodity'; and to 'deal with' means to 'have relations with in a commercial context' and more importantly to 'take measures concerning'. To 'handle' is defined, *inter alia*, as to 'manage or cope with (a situation or problem)'; or to 'deal with – receive or deal in'. To my mind, absent any ambiguity, the ordinary meaning conveyed by the words must be given effect to. The argument that Schenker did not deal with or handle any goods for Fujitsu is plainly unsound. The evidence established that Schenker was informed of the arrival of Fujitsu's goods at ORTIA and SAA cargo warehouse; the goods were checked by FSI on the instructions of Schenker; Mr Lerama had been issued with the IVS security access card; he custom-cleared the goods using documents prepared by Schenker; and the goods were handed over to him on the basis of these documents. In light of this, there can be little question that the goods were handled, transported, or dealt with by or on behalf of Schenker as contemplated in clause 1.3.3 of the STC.

⁶ *Durban's Water Wonderland (Pty) Ltd v Botha and Another* [1999] 1 All SA 411 (A); 1999 (1) SA 982 (SCA) at 989G-I.

⁷ Concise Oxford English Dictionary Tenth ed (1999).

[15] In developing his argument further, Fujitsu's counsel submitted that in its language clause 17 cannot be construed so as to include within its ambit intentional acts by the employees of Schenker. Apparent from the clear language of clause 17 a claim against Schenker in respect of valuable goods, as in this case, is governed by the provisions of clauses 40 and 41. Sub-clause 40.1 expressly excludes Schenker's liability ' . . . for any claim of whatsoever nature (whether in contract or in delict) and whether for damages or otherwise, howsoever arising. . . '. A delict can arise through intentional or negligent acts. Read contextually and having regard to the agreement as a whole, the phrases 'of whatsoever nature' and 'howsoever arising' should be given their ordinary literal meaning and are, in my view, sufficiently wide in their ordinary import to draw into the protective scope of the exemption the deliberate and intentional acts of the employees of Schenker. The exclusion of liability under clause 40.1 includes loss, damage or expense arising from or in any way connected with the non-delivery or mis-delivery of any goods.⁸

[16] It is not in dispute that the goods were 'valuables' as stipulated in clause 17 of the STC. There is no evidence that Fujitsu made prior 'special arrangements' in respect of the goods as envisaged in the clause. The commercial rationale behind the inclusion of the clause is manifest. Prior written notice would be necessary in respect of valuable goods to enable Schenker to take steps to mitigate the risk of theft or any potential claim. 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.

[17] Much attention was devoted to the decision of the full court in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd (Goodman Brothers)*.⁹ It was submitted for Schenker, on one hand, that the issues and the principles there enunciated were on all fours with the present matter. On the other hand, it was argued on behalf of Fujitsu that the judgment was distinguishable. The high court took the view that the decision did not find application

⁸ Sub-clause 40.1.3.

⁹ *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) (*Goodman Brothers*).

as it predated the decision of this Court in *Stallion Security (Pty) Ltd v Van Staden*.¹⁰ At issue in *Stallion Security* was a delictual claim founded only on vicarious liability for a wrong committed by Stallion Security's employee. There, the court considered the question whether the risk of harm caused by an employee to a third party was sufficiently closely connected to the conduct authorised by the employer to justify the imposition of vicarious liability. *Stallion Security* did not concern the question whether a defendant's liability was excluded or limited on the basis of the agreement, an issue with which we are here concerned, as in *Goodman Brothers*, which was referred to in *First National Bank of Southern Africa Ltd v Rosenblum and Another*¹¹ with approval.

[18] In *Goodman Brothers* the court had occasion to consider an exemption clause (clause 9) worded in terms almost identical to clause 17 in circumstances where the appellant claimed damages as the result of the theft of its watches by the employees of the respondent, Rennie's Group Ltd, a carriage company. Clause 9 read:

'9. Exclusion of liability

The company shall not accept liability for the handling of any bullion, coins, precious stones, jewellery, valuables, antiques, pictures, bank notes, securities and other valuable documents or articles, livestock or plants, unless special arrangements have previously been made in writing. Should any customer nevertheless deliver any such goods to the company or cause the company to handle or deal with any such goods otherwise than under special arrangements previously made in writing with the company, whether or not it is aware of the nature of the goods, shall bear no liability whatsoever, for or in connection with any loss or damage to the goods.'¹²

Significantly, at 96C-E the court said:

'So understood, in my view, the meaning of the clause is unambiguous; there is accordingly no room for the application of the *contra proferentem* doctrine of interpretation; and the word "whatsoever" which qualifies "no liability" and the phrase "any loss" must be given their literal meaning as being intended to exempt the respondent (in the circumstances contemplated) from liability even for loss or damage caused by its own deliberate wrongdoing or negligent conduct, or by that of its servants acting within the course and scope of their employment as such, and whether the customer of the respondent seeks to assert a claim in contract or in delict.'

¹⁰ *Stallion Security (Pty) Ltd v Van Staden* [2019] ZASCA 127; 2020 (1) SA 64 (SCA).

¹¹ *First National Bank of Southern Africa Ltd* supra, para 22.

¹² *Goodman Brothers* at 94E-G.

[19] In *Goodman Brothers* it was held that if an employer responsible to deliver goods to another person with whom he has contracted to do just that, can validly and without more contract out of liability for the dishonesty of his servants entrusted by him with the performance of his contractual duty, then *a fortiori* must the respondent be entitled to escape liability where it had stipulated for 'special arrangements' to be made in the case of valuables. Had these 'special arrangements' been made, the respondent would have been able to protect itself against the dishonesty of its employees by taking out fidelity insurance or by taking additional precautions for the safe conveyance of the valuables, or both. The respondent could validly stipulate that in the absence of special arrangements as contemplated in clause 9, it would not be liable even where the valuables were to be stolen by the very employees whom it had instructed to clear, convey and deliver them. The court went on to say that there were no considerations of public policy which required that the respondent be precluded from enforcing the risk allocation agreed upon by the parties as contained in clause 9 of its standard trading conditions.

[20] It was never contended before us that *Goodman Brothers* was wrongly decided. The legal position there articulated still holds sway and applies equally here.

[21] To further bolster its argument that liability for theft was excluded for purposes of the disclaimer, counsel for Fujitsu sought to persuade us that annexure F to the STC, in particular section two thereof, provided that no liability for 'loss in-transit' would be accepted in terms of the STC. In addition, under negligence the contract condition stipulated that: 'No liability for loss in transit or negligence will be accepted'. He further highlighted, that the preamble to section three, which related to goods in-transit insurance, provided that 'Schenker service fees do not include cover for loss, damage or negligence whilst goods are in transit'. All these contractual provisions, he argued, set the scene for Schenker, in effect, disclaiming liability for loss in transit or negligence in transit. They signified that Schenker would not be liable for loss that occurs once it had collected the goods for purposes of executing the agreement and they were in transit at the time of

the loss. This did not include a disclaimer for theft from a storage facility on a third party's premises, the argument continued. I have already determined that the exemption clause 17 read with clause 40 applied to theft in the circumstances described in this case. It therefore does not matter that annexure F to the STC refers to exclusion of liability for 'loss in-transit'. The STCs are incorporated by reference to annexure F. At the foot of the pages which contain annexure F it is recorded that: 'All business undertaken is subject to the Standard Trading Terms and Conditions of SAAFF which have been adopted by Schenker (SA) (Pty) Ltd'.

[22] Fujitsu also relied on the decision of this Court in *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash and Carry (Pty) Ltd and Another (G4S)*¹³ and contended that the reasoning there applied in this case. The facts and the issues raised in *G4S* are entirely distinguishable from the present. At issue in *G4S* was whether a time-limitation clause in the agreements concluded between the parties precluded Zandspruit from instituting delictual claims for damages against G4S, formerly known as Fidelity Cash Management Services (Pty) Ltd. In terms of the agreement, G4S had to collect money from Zandspruit and store it. Thieves pretending to be G4S employees stole money from Zandspruit. Clause 9.1 provided in part that G4S '. . . shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the client [Zandspruit] pursuant to or during the provision of services by Fidelity, unless such loss or damage is the direct result of the gross negligence of or theft by Fidelity employees, acting within the course and scope of their employment, and which occurs while the money is in the custody of Fidelity'. The court held that clause 9.1 conveyed a loss or damage which has its genesis in 'the provision of services' by G4S to Zandspruit. The parties did not contemplate that the time-limitation clause would encompass delictual claims which did not arise pursuant to or during the services rendered by G4S. To reiterate, in the present case, all business and all services were undertaken in terms of the STC.

¹³ *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash and Carry (Pty) Ltd and Another* [2016] ZASCA 113; 2017 (2) SA 24 (SCA).

[23] In conclusion, Schenker established that its liability is excluded by clause 17 read with clause 40.1 which absolved it from liability for the loss suffered by Fujitsu. It follows that Fujitsu's cause of action was one which fell within the ambit of the disclaimer and ought to have been dismissed. Therefore, the appeal must succeed.

[24] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order made by the high court is set aside and in its place is substituted the following:

‘The plaintiff’s claim is dismissed with costs.’

M V PHATSHOANE
ACTING JUDGE OF APPEAL

Appearances

For the appellant:

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