IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Constitutional Court Case No.: CCT 32/22

In the matter between :-

FUJITSU SERVICES CORE (PTY) LIMITED Applicant

and

SCHENKER SOUTH AFRICA (PTY) LIMITED Respondent

FILING NOTICE : APPLICANT'S HEADS OF ARGUMENT, PRACTICE NOTE AND LIST OF AUTHORITIES

KINDLY TAKE NOTICE THAT the Applicant hereby serves and files its Heads of Argument, Practice Note and List of Authorities in relation to the above matter, set down for hearing on the 1st of November 2022.

DATED AT JOHANNESBURG THIS 23rd **DAY OF AUGUST 2022.**

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APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 At issue in this case is the proper interpretation of two exclusion of liability clauses which feature in standard terms and conditions that operate across the freight forwarding industry in this country. A second issue which arises, depending on how this Court interprets those clauses, is whether those clauses are against public policy.

Factual background

2 The respondent ("Schenker") carries on business as a warehouse operator, distributor and clearing and forwarding agent.[1]

3 On 10 July 2009, the applicant ("Fujtitsu") and Schenker concluded a national distribution agreement in terms of which Schenker agreed to provide clearing, forwarding and logistics services.[2] This agreement was subject to the South African Freight Forwarding Association's standard terms of conditions.[3]

4 Some time in early 2012, Fujitsu purchased and imported a consignment of laptops from Germany,[4] whereupon it engaged the services of Schenker to assist it with the logistics, freight forwarding, warehousing and clearing of the consignment.[5] This would entail Schenker importing the goods into South Africa,

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[1] Supreme Court of Appeal judgment para 2 Vol 4 pp 422-3.

[2] Fujitsu's Founding Affidavit ("FA") paras 9-10 Vol 4 p 359.

[3] Id para 11 Vol 4 p 359.

[4] Id para 9 Vol 4 p 359.

[5] High Court judgment para 12 Vol 4 p 408.

receiving them from the airline and thereafter delivering them to Fujitsu, after having attended to the necessary customs clearance.[6]

5 Between 19 and 23 June 2012, the consignment of laptops and accessories arrived at the SAA Cargo Warehouse at OR Tambo International Airport.[7] Pursuant to the agreement between the parties, Schenker requested one of its drawing clerks, Mr Wilfred Bongani Lerama, to collect the consignment.[8]

6 On Thursday 21 June 2012, only one pallet of the consignment arrived at the SAA warehouse. The rest of the pallets arrived the next day, on Friday 22 June 2012.[9]

7 Mr Lerama did not work on Saturdays,[10] nor was Schenker ordinarily engaged in the collection or carrying of goods on Saturdays.[11] Nevertheless, on Saturday, 23 June 2012, Mr Lerama arrived at the SAA Cargo Warehouse in an unmarked, privately hired truck, furnished the necessary custom release documents to SAA cargo employees, and took possession of the consignment of laptops and accessories.[12] It is common cause[13] - and the Supreme Court of Appeal

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[6] Id.

[7] Supreme Court of Appeal para 3 Vol 4 p 423.

[8] Schenker's Reply to the Fujitsu's Request for Further Particulars para 5 Vol 1 p 72.

[9] Supreme Court of Appeal judgment para 5 Vol 4 p 423.

[10] Fujitsu's FA para 15 Vol 4 p 360.

[11] Id para 16(b) Vol 4 p 360.

[12] Supreme Court of Appeal judgment para 5 Vol 4 p 423.

[13] Schenker's Answering Affidavit para 8 Vol 4 p 451.

expressly found[14] - that Mr Lerama never delivered the goods and effectively stole them.

The litigation

8 Fujitsu instituted a delictual action against Schenker for damages arising from the theft of the goods by Mr Lerama whilst acting in the course and scope of his employment with Schenker. In response, Schenker invoked three exclusion of liability clauses in its standard terms and conditions which, so it was contended, precluded a delictual claim based on theft.

9 These clauses 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 -**

[14] Supreme Court of Appeal judgment para 5 Vol 4 p 423.

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

40.1.2 any act or omission of the customer or agent of the customer with whom [Schenker] deals; and/or

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

40.1.4 any loss, damage or expense arising from or in any way connected with the weight, measurements, contents quality, inherent vice, defect or description of any goods; and/or

40.1.5 any loss, damage or expense arising from or in any way connected with any circumstance, cause or event beyond the reasonable control of [Schenker], including but without limiting the generality of the aforesaid, strike, lock-out, stoppage or restraint of labour; and/or

40.1.6 damages arising from loss of market or attributable to delay in forwarding or in transit or failure to carry out any instruction given to [Schenker]; and/or

40.1.7 loss or non-delivery of any separate package forming part of a consignment or for loss from a package or an unpacked consignment or for damage or mis-delivery; and/or

40.1.8 damage or injury suffered by the customer or any person whatsoever as a result of the [Schenker's] execution or attempted execution of its obligations to the customer and/or the customer's requirements or mandate;

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.

41. MONETARY LIMITATION OF LIABILITY OF THE COMPANY

41.1 In those cases where [Schenker] is liable to the customer in terms of clause 40.1, in no such case whatsoever shall any liability of [Schenker], howsoever arising, exceed whichever is the least of the following respective amounts:

41.1.1 the value of the goods evidenced by the relevant documentation or declared by the customer for customs purposes or for any purpose connected with their transportation;

41.1.2 the value of the goods declared for insurance purposes;

41.1.3 double the amount of the fees raised by [Schenker] for its services in connection with the goods, but excluding any amounts payable to sub-contractors, agents and third parties.

41.2 If it is desired that the liability of [Schenker] in those cases where it is liable to the customer in terms of clause 40.1 should not be governed by the limits referred to in clause 41.1 written notice thereof must be received by [Schenker] before any goods or documents are entrusted to or delivered to or into the control of [Schenker] (or its agent or sub-contractor), together with a statement of the value of the goods. Upon receipt of such notice [Schenker] may in the exercise of its absolute discretion agree in writing to its liability being increased to a maximum amount equivalent to the amount stated in the notice, in which case it will be entitled to effect special insurance to cover its maximum liability and the party giving the notice shall be deemed, by so doing, to have agreed and undertaken to pay to [Schenker] the amount of the premium payable by [Schenker] for such insurance. If [Schenker] does not so agree the limits referred to in clause 41.1 shall apply."

10 Fujitsu was successful in the High Court before Adams J.

11 Although vicarious liability was conceded by Schenker in oral argument, the High Court proceeded to consider whether Mr Lerama acted in the course and scope of his employment at the time of the theft.[15] It concluded that although Mr Lerama was not acting in the course and scope of his employment when he stole the laptops,[16] his actions were sufficiently and so closely related to the functions he was required to perform, that vicarious liability should be visited on Schenker.[17]

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[15] See High Court judgment paras 17 – 30 Vol 4 pp 409 – 413.

[16] Id para 19 Vol 4 p 409.

[17] High Court judgment para 30 Vol 4 p 413.

Schenker would therefore be held vicariously liable for Mr Lerama's actions unless that liability was excluded by the contract between the parties.[18]

12 The High Court further held that:

12.1 As a matter of law, a defendant should not be allowed to rely on an exemption clause in circumstances where the contract is not being executed unless it evinced a clear intention of the parties to that effect.[19]

12.2 The theft by Mr Lerama "*was an act outside the performance of the contract*" concluded between Fujitsu and Schenker.[20]

12.3 Properly interpreted, the exemption clauses relied upon by Schenker did not apply in such circumstances.[21]

13 This led Adams J to uphold Fujitsu's claim for damages.[22]

14 By the time the matter reached the Supreme Court of Appeal, the sole issue for determination was whether Fujitsu's delictual claim based on theft was excluded by clauses 17 and 40 of the standard terms.[23]

15 In that regard, the Supreme Court of Appeal interpreted clause 17 of the standard terms as having wide application to any goods that are "*handled*" or "*dealt with*",

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[18] Id.

[19] Id para 37 Vol 4 p 415.

[20] Id para 35 Vol 4 p 414.

[21] Id para 33 Vol 4 p 414.

[22] Id Vol 4 p 418.

[23] Supreme Court of Appeal judgment para 6 Vol 4 pp 423-4.

regardless of whether the person handling or dealing with them is a thief.[24] In doing so, the Court purported to apply the ordinary meaning of "*handled*" and "*dealt with*" without having regard to the overall contractual context in which those words appear.[25] Indeed, the Court expressly rejected Fujitsu's contention that, read in context, clauses 17 and 40 had to be understood as applying to goods in transit that are dealt with and handled in the course of Schenker's performance of the contract.[26]

16 Finally, the Supreme Court of Appeal endorsed the decision of the Full Court in *Goodman Brothers,*[27] in which the court gave an almost identically worded exemption clause a wide interpretation extending it to all deliberate wrongdoing or negligent conduct by employees and found that the clause did not offend public policy. Notably, the Supreme Court of Appeal did not consider the contractual context in which the exemption clause in *Goodman Brothers* operated, nor did it interrogate whether there were other public policy considerations, other than those considered by the *Goodman Brothers* court, which militated against the enforcement of the exemption.

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[24] Id para 14 Vol 4 p 427.

[25] Id.

[26] Id para 21 Vol 4 pp 430-1.

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

Issues for determination

17 The first issue for determination in this matter is whether the exemption clauses relied upon by Schenker, properly interpreted, exclude liability for a delictual claim for theft by one of its employees.

18 If, properly interpreted, the exclusion clauses do not exclude liability for theft by an employee, the appeal must succeed. If, however, this Court finds that exclusion clauses do operate to exclude liability for Fujitsu's claim, that is not the end of the matter. This Court must still decide whether it will lend its imprimatur to the enforcement of such clauses. This raises the question of whether the exemption clauses – to the extent that they exclude liability for theft by an employee in the context of a distribution agreement like the one concluded by Fujitsu and Schenker– offend public policy.

Structure of these heads of argument

19 The remainder of these heads of argument is organised as follows:

19.1 First, we explain why this Court has jurisdiction and ought to grant leave to appeal;

19.2 Second, we deal with the proper approach to interpretation generally, and to the interpretation of exemption clauses specifically;

19.3 Third, we address the proper interpretation of clauses 17 and 40 of the South African Freight Forwarding Association's standard terms and conditions;

19.4 Fourth, we address the validity of clauses 17 and 40 in the event that this Court does not favour the interpretation we advance;

19.5 Fifth, we conclude with the relief sought by Fujitsu. We submit that leave to appeal should be granted and that the appeal should succeed.

JURISDICTION AND LEAVE TO APPEAL

20 The question of whether the exemption clauses relied upon by Schenker exclude liability for a delictual claim for theft by one of its employees requires this Court to definitively interpret key clauses in the South African Freight Forwarding Association's standard terms and conditions. It therefore raises "*a quintessential point of law*"[28] that is one of general public importance.

21 As this Court has emphasised, the requirement that a point of law be one of general public importance "*does not mean the requirement will be met only if the interests of society as a whole are implicated*".[29] It is sufficient that the matter "*transcend[s] the narrow interests of the litigants*" and implicates the interest of a significant part of the general public.[30] In determining whether this bar is met, this Court can take judicial notice of the fact that a certain form of contract is commonplace[31] or is "*a standard-form document in widespread use, affecting a*

[28] *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC) (*Big G*) at para 11.

[29] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) para 26

[30] Id.

[31] *Big G* above n 28 para 14.

large number of consumers".[32] It can also take note of the fact that a particular contractual term has appeared in reported decisions.[33]

22 The distribution agreement incorporates the South African Association of Freight Forwarders' Trading ("SAAFF") Terms and Conditions, which are used across the freight forwarding industry in this country. Distribution and forwarding agreements with terms identical to clauses 17 and 40 are therefore commonplace. This is attested to by a number of cases dealing with the interpretation and enforcement of the SAAFF Terms and Conditions.[34] It is also notable that an almost identical standard form clause was at issue in *Goodman Brothers*.[35]

23 The point of law raised by the interpretation of the SAAFF standard terms is therefore substantial and implicates the interests of all freight forwarders and counterparties who make use of the standard terms. This is a significant segment of the public which has an interest in a definitive judgment from this Court on the proper interpretation of the exclusion of liability in these terms.

24 Fujitsu contends further that, if the distribution agreement can only be interpreted as excluding liability for wrongful acts committed outside the contractual context, including theft by an employee, then the enforcement of the agreement, to the

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[32] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) at para 13.

[33] *Mokone v Tassos Properties CC [*2017] ZACC 25; 2017 (10) BCLR 1261 (CC); 2017 (5) SA 456 (CC) para 16.

[34] *World Net Logistics (Pty) Ltd v Donsantel 133 CC* [2020] 1 All SA 593 (KZP); *Kuehne & Nagel (Pty) Ltd v Breathetex Corporation (Pty) Ltd* [2008] 2 All SA 446 (SE); *Freitan (SA) (Pty) Ltd v Kingtex Marketing (Pty) Ltd* [2006] JOL 15960 (T).

[35] *Goodman Brothers* above n 27.

extent that it excludes such liability, would be against public policy. As this Court has held, "*[w]hether the enforcement of a contractual clause would be contrary to public policy . . . is a constitutional issue*"[36] given that public policy is "*deeply rooted in our Constitution and the values which underlie it*".[37]

25 Although this Court is concerned with the particular wording of the clauses in issue, exemption clauses are widespread and their proper interpretation will thus also be of broader significance.

26 Apart from engaging this Court's jurisdiction, we respectfully submit that Fujitsu has good prospects of success based on the arguments advanced below.

PRINCIPLES OF INTERPRETATION

The contextual approach to interpretation

27 The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[38] which has been endorsed by this Court on several occasions,[39] offer guidance as to how to approach the interpretation of the words used in a document.[40] According to the contextual approach they advocate, it is the

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[36] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*) para 16.

[37] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 28.

[38] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*).

[39] *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29 and *Mokone* above n 33 para 29.

[40] *Endumeni Municipality* above n 38 at para 18:

> "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, understood in the context in which it is used, and having regard to the purpose of the provision, that constitutes the unitary exercise of interpretation. Elaborating on this approach, the Supreme Court of Appeal in *Capitec Bank Holdings Limited* explained that "*the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose*".[41]

Interpreting exemption clauses

28 The approach to the interpretation of exemption clauses is well-established.

29 In *First National Bank of SA Ltd v Rosenblum*[42] Marais JA said:

> **"Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. 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,**

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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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (Footnotes omitted.)

[41] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 50.

[42] 2001 (4) SA 189 (SCA).

> **she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application."[43]**

30 And as the Supreme Court of Appeal held in *Durban's Water Wonderland*:[44]

> **"If the language of the 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 . . . 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'."[45]**

31 The following principles emerge from the cases:

31.1 It is trite law that parties may contractually define and restrict the nature and scope of their obligations.

31.2 The general approach is to construe indemnity clauses restrictively.[46] Indeed, courts are "*wary of contractual exclusions since they do deprive parties of rights that they would otherwise have had at common law*".[47]

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[43] Id para 6.

[44] *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A) (*Durban's Water Wonderland*).

[45] Id at 989.

[46] *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) para 9.

[47] *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) para 21.

31.3 A party wishing to contract out of liability must do so in "*clear and unequivocal terms*".[48] In the case of doubt, ambiguity or secondary meaning, the issue must be resolved against the *proferens*.[49]

31.4 It is a further principle that where an exemption clause purports to exclude liability in general terms, the exemption clause must be given the minimum degree of effectiveness, by only excluding liability involving the minimum degree of blameworthiness.[50]

32 These interpretive guides serve to tame the potential unfairness and unreasonableness of overbroad exemption clauses. They call upon courts to carefully scrutinise exemption clauses to discern whether a particular form of wrongful conduct falls within the four corners of the exemption. It is thus a matter of construction as to whether liability for wrongful conduct will be excluded by an exemption clause. To the extent that our courts fashion rules precluding the exclusion of liability for certain forms of wrongful conduct, they do so under the rubric of public policy.[51]

33 Following this approach, courts examine exemption clauses to discern whether they reveal a common intention of the parties that the clause should only protect the *proferens* from liability arising while substantially performing the contractual obligations:

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[48] *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 40.

[49] *Durban's Water Wonderland* above n 44 989.

[50] *Essa v Divaris* 1947 (1) SA 753 (A).

[51] See for example *Johannesburg Country Club v Stott* [2004] ZASCA 138 para 12; *Naidoo v Birchwood Hotel* above n 48 and *Wells v SA Alumenite Co.*1927 AD 69.

33.1 In *Weinberg v Olivier,*[52] the erstwhile Appellate Division considered the application of an exemption clause in circumstances where a garage owner had agreed to keep the plaintiff's car in safe custody. An employee of the garage had then taken the car out of the garage, driven and crashed it. Referring to the exemption clause, Watermayer JA said:

> **"In my opinion it means that the plaintiff took upon himself certain risks of damage occurring while it was in the garage. Clearly, while the car was in the garage it was exposed to risks arising from the ordinary activities carried on in the garage . . . I do not propose, however, to attempt to the task of defining accurately the type of risk which plaintiff took upon himself, <u>because the only risks which he undertook to bear were risks attendant on the "garaging" of the car in Scott's garage</u>. He did not undertake to bear any additional risks to which the car might become exposed, if in breach of the contract between the parties it was taken out of the garage and into the public streets."[53]**

In short, the exemption clause in that instance did not apply beyond the performance of the defendant's obligation to garage the plaintiff's car.

33.2 In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyd's*,[54] a clause exempted a security company from liability for loss or damage "*from whatsoever cause*". Interpreting the ambit of the exclusion, the High Court's starting point was that if regard was had to the agreement as a whole, it was clear that the security company had undertaken to provide security services and security personnel in order to minimise the risk of loss or damage by fire. To interpret the clause as excluding liability for loss or damage caused by a fire started by one of the security company's

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[52] 1943 AD 181.

[53] Id 188.

[54] 1998 (4) SA 466 (C).

employees would "*make a mockery of the other provisions of the contract*".[55] It was therefore clear that the parties had not intended the exclusion clause to operate when the security company's employees were engaged in conduct that was diametrically opposed to the performance of its obligations under the contract.

33.3 In *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash and Carry (Pty) Ltd and Another*,[56] the parties concluded an agreement in terms of which G4S would collect, convey, store and deliver money on behalf of the respondent. The respondents subsequently fell victim to a theft perpetrated by unknown third parties imitating the cash collection procedure of G4S and utilizing vehicles, personnel uniforms, collection boxes and identification cards identical to that used by G4S.

33.4 The respondents brought a delictual action against G4S on the basis that G4S had, among other things, failed to put in place the necessary procedures in order to ensure that its cash security uniforms, identification cards, collection boxes and transit vehicles could not be copied or duplicated and used by third parties. In a special plea, G4S relied on a time-limitation clause in the agreements concluded between the parties which on the face of it precluded the respondents from bringing a delictual claims for damages against G4S outside a prescribed 12-month window.

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[55] Id para 30.

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

33.5 In concluding that the exemption clause did not apply to the respondents' delictual claim, the Supreme Court of Appeal reasoned as follows:

33.5.1 The time-limitation clause had to be read within the context of the agreement as a whole, whose nature and commercial purpose was that of a services agreement in terms of which G4S was to perform cash management services for the respondents, which would entail the collection, conveyance, storage or delivery of money.[57]

33.5.2 Other clauses dealing with the exclusion of G4S' liability specifically referred to loss or damage "*pursuant to or during the provision of services*" by G4S.[58] The wording of surrounding clauses and the broader context thus "*clearly convey[ed] that the loss or damage in respect of which the appellant wished to restrict its liability is a loss or damage suffered by the respondents pursuant to or during the provision of services by [G4S] to the respondents*". In other words, "*it is a loss of damage which has its genesis in the provision of services by [G4S] to the respondents*".[59]

33.5.3 This was so regardless of the fact that the various clauses excluding liability featured wide language lie "*any loss or damage",* "*any consequential loss or damage*", "*howsoever*

[57] Id para 14 and 15.

[58] Id.

[59] Id para 14.

arising or for any reason whatsoever" and "*howsoever arising*".[60] The Court emphasised that such language, however broad, could not be divorced from its context and the "*recurring theme that the loss or damage envisaged in the agreements . . . is a loss or damage suffered by the respondents pursuant to or during the provision of such services*".[61] In particular, it held that the word "*any*" used in the exclusion of liability clauses had to be "*restricted by the context as appears from the wording of the agreements as a whole*".[62]

33.5.4 It followed that the time-limitation clause only applied to delictual claims that arose pursuant to or during the services rendered by G4S and not where the respondents handed over money to unknown third parties.[63]

References to acts or conduct must be taken to refer to lawful acts or conduct

34 It is a well-established principle of interpretation that reference in a statute (or, we submit, contract) to any action or conduct will be presumed, in the absence of any indication to the contrary, to lawful action or conduct.[64]

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[60] Id para 17.

[61] Id para 18.

[62] Id para 19.

[63] Id para 16.

[64] *S v Mapheele* 1963 (2) SA 651 (A) at 655D-E, which has been followed by the Supreme Court of Appeal in *MTN International (Mauritius) Ltd v Commissioner of South African Revenue Services* [2014] ZASCA 8; 2014 (5) SA 225 (SCA) para 10 and *City of Tshwane Metropolitan Municipality v Lombardy Development* (Pty) Ltd [2018] ZASCA 77; 2018 (3) All SA 605 (SCA) para 21.

35 Hence, in the context of the present matter, the references to "*handled*" and "*dealt with*" in clauses 1.3.3 and 17 must, we submit, be taken to mean "*lawfully handled*" and "*lawfully dealt with*".

36 Moreover, as we explain below, the language of the clauses themselves make clear that only authorised "*handling*" or "*dealing*" is contemplated.

Comparative law

37 Courts in comparative jurisdictions follow a similar approach.

38 In the Australian case of *Council of the City of Sydney v West*,[65] the plaintiff claimed damages arising from the theft of his car from a cark park whose conditions of parking included a wide exclusion of liability for "*loss or damage to any vehicle . . . however such loss or damage may arise or be caused*". The High Court held that the defendant was nevertheless not excused from liability for the loss of the plaintiff's vehicle. After carefully considering the terms of the exclusion clause, and its context, the Court concluded that the clause "*contemplates that loss or damage may occur by reason of negligence on the part of the warehouseman or his servants in carrying out the obligations created by the contract*".[66] It therefore could not have been intended to protect the car park operator from "*negligence on the part of [its] servants in doing something which it is neither authorised not permitted to do by the terms of the contract*".[67]

[65] (1965) 114 CLR 481.

[66] Id 488.

[67] Id 488.

39 In *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd*,[68] containers of scotch whiskey that had arrived at the Glebe Island Terminal were stolen. Clause 4 of the conditions of the Bill of Lading which applied to the terminal stated that "*[t]he Carrier shall not in any circumstances whatsoever be liable for any loss of or damage to the goods howsoever caused occurring after they are discharged at the ocean vessel's rail at the port of discharge*". The Court of Appeal of New South Wales found that, notwithstanding the broad language "*in any circumstances*" and "*howsoever caused*", the exemption in clause 4 "*did not extend to an unauthorised delivery amounting to a conversion of the goods*".[69]

40 Some Australian courts have gone so far as to endorse a so-called "four corners rule" that "*general terms should not be read as excluding liability for acts done by the bailee or carrier with respect to a bailor's goods otherwise than in intended performance of its contract*".[70] The doctrine was explained in the following terms by Windeyer J in *Thomas National Transport (Melbourne) Pty Ltd v May and Baker*:[71]

> ***". . . It is* a condition absolving a party from liability, in particular exonerating a bailee from liability from the loss of goods in his care, is construed as referring only to a loss which occurs when the party is dealing with the goods in a way that can be regarded as intended performance of his contractual obligation. He is not relieved of liability if, having obtained possession of the goods, he deals with them in a way that is quite alien to his contract."[72]**

[68] (1993) 40 NSWLR 206 (*Glebe Island Terminals*)

[69] Id at 239.

[70] *Glebe Island Terminals* above n 68 at 238.

[71] (1966) 115 CLR 353 (*Thomas National Transport*).

[72] Id at 377.

41 In these cases, and cases from our own jurisdiction, courts have carefully scrutinised the exemption clause in question in light of the *proferen*'s obligations under the contract. In each case, they carefully considered whether the exemption clause was intended to exclude liability for wrongful acts outside the performance of the contract. Taken together, they are authority for the proposition that unless there is a clear intention to the contrary, exemption clauses should not be construed in a way that would excuse or limit the consequences of wrongful actions undertaken outside the operation or authority of the contract.

42 It is important to emphasise, given that the doctrine was jettisoned from our law by the Appellate Division in *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*,[73] that none of these cases purports to revive the doctrine of fundamental breach.[74] Indeed, the cases all proceed from the premise that the scope of an exemption clause's application turns first and foremost on a proper, contextual interpretation of the clause. As Windmeyer J in *Thomas National Transport* put it:

> **"The first question in all such cases is therefore what did the party who relies upon the exception clause contract to do. That being ascertained, the next question is was there such a radical breach by him of his obligations under the contract that, upon the true construction of the contract as a whole including the exception clause, he cannot rely upon the exception clause".[75]**

[73] 1993 (3) SA 424 (A).

[74] According to this doctrine, a party cannot rely on an exemption clause which purports to protect it from the consequences of a "fundamental breach" of the contract.

[75] *Thomas National Transport* above n 71 at 379.

43 As will become apparent, this is precisely the interpretive approach advocated by Fujitsu in this matter.

44 Finally, we note that courts are particularly wary of allowing employers to exclude liability for theft by their employees by way of generally worded exclusion clauses.

45 In the Canadian case of *Punch v Savoy's Jewellers Ltd et al*,[76] a limitation clause in a contract between a carrier and a jeweller for the carriage of a valuable ring limited the carrier's liability to $50 whether the loss arose through "*negligence or otherwise*". The carrier admitted that the loss could have been due to the theft of the ring by its driver. Proceeding on the basis that "*the question of whether an exclusionary clause applied when there had been a fundamental breach of the contract was to be determined according to the true construction of that contract*", the Court considered the meaning of "*negligence or otherwise*". The court noted that although the phrase "*or otherwise*" was "*an apparently broad one*", nowhere in the contract had reference been made to loss occasioned by theft by an employee. The court reasoned further that "*[i]f an employer wishes to exclude any responsibility for loss arising from theft by his own employees then good conscience requires that such an exclusion be spelt out with clarity and precision*".

[76] (1986) 14 O.A.C. 4 (CA).

46 *Punch* was subsequently endorsed in *Aurora TV and Radio Ltd v Gelco Express Limited*,[77] in which Oliphant J held that "*a carrier is liable for loss where theft is a possibility unless there is a clause which clearly exempts the carrier from loss occasioned by theft*".[78]

47 Later, in *Kishinchand & Sons (Hong Kong) Ltd v Wellcorp Container Lines Ltd*,[79] the Federal Court emphasised that "*clear, precise and unambiguous words are required to exempt or limit one's liability as against the failure to perform the very obligation which forms the object of a contractual undertaking*". In that case, liability was excluded for the "*loss or damage to the goods*" in a contract of carriage. The Court reasoned that theft by an employee did not amount to the "loss" of the goods given that "*the whereabouts of the goods was known at the time of delivery and even thereafter*". In the Court's view, "*[i]t would take much clearer words to hold that the parties contemplated that the defendant could limit its liability in the face of a wilful breach of the very obligation it had undertaken*".

48 Finally, in *Morris v C.W. Martin & Sons Ltd*,[80] a case involving theft by a sub-bailee's employee, Lord Denning held that in order for a contracting party to rely on an exemption for theft, that party must "*stipulate specially that he would not be responsible for theft*".[81]

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[77] (1991) 72 Man.R.(2d) 234 (CA).

[78] Id para 67.

[79] (1994), 88 F.T.R. 301 (TD).

[80] [1966] 1 Q.B. 716.

[81] Id 729E.

THE PROPER INTERPRETATION OF CLAUSES 17 AND 40

49 Schenker relies on clause 17, read with clauses 40 and 41, of the standard terms. Since clause 41 only operates where liability has been established in terms of the carve out in clause 40.1, its application only arises if the exclusion of liability in clause 40.1 applies. As will become apparent, the exclusion in clause 40 does not operate and therefore there is no question of liability being established in terms of the carve out in clause 40.1.

50 The overarching question of interpretation raised by Schenker's reliance on clauses 17 and 40 is whether, properly interpreted, they exclude liability for a delictual claim for theft by one of its employees. This, in turn, raises two questions:

50.1 First, do the exemption clauses apply to a sphere of activity or conduct that includes theft by an employee?

50.2 Second, do they apply to intentional, as opposed to merely negligent, conduct?

51 We address these questions in turn below.

Do the exemption clauses apply to activity or conduct that includes theft by an employee?

52 When interpreting both clause 17 and 40, the Supreme Court of Appeal expressly eschewed any regard for the broader contractual context in which the clauses

operate.[82] Instead, the Court fixated on the broad, literal meaning of terms like "*handle*" and "*dealt with*" in clause 17, which it determined were broad enough to encompass the theft of goods by Mr Lerama.[83] The Court also gave words like "*any*" and "*howsoever arising*" in clause 40 their "*ordinary literal meaning*" without enquiring whether that meaning was modulated by the context in which the clause operates.

53 Such an approach conflicts with the proper contextual approach to interpreting exemption clauses.

54 Indeed, the apparently wide import of clauses 17 and 40 is constrained substantially, both by language in the provisions themselves which the Supreme Court of Appeal ignored, and by various contextual indicators.

55 The starting point is clause 3 of the standard terms, which indicates that the standard terms only apply to conduct in the course of legitimately executing or performing the contract. The clause, which is headed "*application of trading terms and conditions*", states that "*all and any business undertaken or advice, information or services provided by the Company, whether gratuitous or not, is undertaken or provided on these trading terms and conditions*". In other words, the standard terms and conditions apply to "*business undertaken*", "*advice*", "*information*" or "*services*" provided by the Company (ie Schenker). If an activity falls outside any of these categories, the standard terms and conditions simply

[82] Supreme Court of Appeal judgment para 21 Vol 4 pp 430-1.

[83] Id para 14 Vol p 427.

do not apply. This is a clear indication that if conduct is not in the performance of the contract – that is, in the undertaking of business or giving of advice, information or services – the exemption of liability in clause 17 and 40 does not arise.

56 Plainly, the theft of goods does not constitute the undertaking of business or giving of advice, information or services and, as such, the standard terms and conditions do not apply to claims arising from such conduct. Although this should be the end of the matter (if the standard terms do not apply, clause 17 and 40 have no application at all), clause 3 at the very least provides a strong contextual indication that clauses 17 and 40 apply only when there is performance of business and services in terms of the contract.

57 The language of the clauses themselves also bears this out.

58 Clause 17 says, in essence, that Schenker shall assume no liability in respect of "*goods*" handled or dealt with by Schenker unless special arrangements are made.[84] The exclusion of liability thus applies to "*goods*", as defined.

59 The term “goods” is defined in clause 1.3.3 of the standard terms:

> **“Goods” means any goods, handled, transported or dealt with by or on behalf of or at the instance of the Company or which come under the control of the Company or its agents, servants, or nominees on the instructions of the customer, 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.**

[84] It is common cause that special arrangements were not made in this case.

60 The Supreme Court of Appeal interpreted clause 17 of the standard terms as having wide application to any goods that are "*handled*" or "*dealt with*", regardless of whether the person handles or deals with them unlawfully as a thief.[85]

61 This interpretation is unsustainable. Applying the principle from *Mapheele*'s case referred to above,[86] and having regard to the language of the clauses itself, the reference to "*handled*" and "*dealt with*" in clauses 1.3.3 and 17 must, we submit, contemplate only authorised "handling" or "dealing".

62 While it is so that the dictionary definitions of "*handled*" and "*dealt with*" in clause 17 have wide import, clause 1.3.3 includes the qualification that the goods contemplated are those which are handled, transported or dealt with by or on behalf of or at the instance of the Company or which otherwise come under the control of the Company or its agents, servants or nominees on the instructions of the customer. The goods contemplated in Clause 17 are therefore handled and dealt with according to the dictates of the contracting parties. Put differently, they are goods handled or dealt with in the execution of the contract. They are not handled or dealt with illegitimately and without authorisation from either contracting party, as in the case where goods are stolen by an employee.

63 Clause 40, for its part, refers to loss or damage arising from the malperformance of Schenker's obligations under the contract. For example:

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[85] Supreme Court of Appeal judgment para 14 Vol 4 p 427.

[86] See [34] above.

63.1 Clause 40.1.3 refers to "*any loss, damage or expense arising from or in any way connected with the marking, labelling, numbering, non-delivery or mis-delivery of any good*".

63.2 Clause 40.1.6 refers to "*damages arising from loss of market or attributable to delay in forwarding or in transit or failure to carry out any instruction given to the Company*".

63.3 Clause 40.1.7 refers to "*loss or non-delivery of any separate package forming part of a consignment or for loss from a package or an unpacked consignment or for damage or mis-delivery*".

64 Clause 40 is also silent on theft by an employee. Following the approach taken by Canadian and English courts, this silence alone – given that the theft of the goods is fundamentally contrary to the nature of the contract – warrants a finding that the exemption of liability does not apply to theft by an employee.

65 The sum total of text and context is that clauses 17 and 40 exclude liability within a limited field of activity. According to clause 3, this activity is limited to "*the undertaking of business or giving of advice, information or services*". The language of clause 17 and 40 likewise suggests that the activity to which they apply is the activity of performing the contract according to the dictates of the contracting parties. This leaves no room for an exclusion of liability for theft, which does not constitute the performance of a contract that requires Schenker to collect and then deliver goods to Fujitsu.

66 The above interpretation of clauses 17 and 40 is based solely on the SAAFF standard terms and conditions and would therefore have general application to all parties involved in freight forwarding that incorporate those terms and conditions into their contracts. On the strength of that context alone, clauses 17 and 40 can (and should) be interpreted as excluding liability for wrongful conduct committed in the course of executing or performing the agreement and not for wrongful conduct like theft.

67 For completeness, however, we note that the particular distribution agreement in place between Fujitsu and Schenker lends credence to this interpretation. Indeed, it too provides clear indicators that clauses excluding liability in terms of the agreement operate only when the obligations under the agreement are performed:

67.1 Section One of the distribution agreement deals with the Proposed Rate Structure in relation to three services offered by Schenker. These include:

67.1.1 An Overnight express service, which is described as "*[o]vernight delivery to Main Centres only by 10:30 the next day*", with "*deliveries and collections on weekends and public holidays by prior arrangement*";[87]

67.1.2 An Economy Road Service, which is described as "*[d]elivery to Main Centers listed below by no later than the second business day after collection*".[88]

[87] National Distribution Agreement Vol 4 p 378.

[88] Id Vol 4 p 380.

67.1.3 A Chain Store Deliveries service, which is described as "*[d]elivery to Chain Stores within one calendar week after the normal economy transit days for all Main Centres*".[89]

67.2 Clearly, the services for which Fujitsu pays consideration is the service of collection and delivery. To the extent that Schenker "handles" or "deals with" goods at the request of Fujitsu, that handling or dealing is part and parcel, or at least ancillary, to the collection and delivery of goods from point A to point B.

67.3 Section Two of the distribution agreement deals with Contract Conditions. Notably, the "*liability*" contemplated in the section is "*liability for loss in transit*", which will not be accepted in terms of the applicable Standard Trading Conditions. By implication, the standard terms' exclusion of liability regime, which includes clauses 17 and 40, must be concerned with the exclusion of liability for loss in transit. So when the standard terms' limitation of liability provisions refer to goods being "*handled*" and "*dealt with*", they must be referring to goods that are handled and dealt with in transit.

67.4 Section Three of the distribution agreement - headed "Goods in Transit Insurance" – states that "*Schenker service fees do not include cover for loss, damage or negligence whilst goods are in transit*".[90]

[89] Id Vol 4 p 383.

[90] Id Vol 4 p 389.

67.5 The term "in transit" refers to "*the activity or process of transporting goods or materials from one place to another*".[91] In the context of the services offered by Schenker in terms of the distribution agreement, as provided for in Section One, goods are in transit when they are being transported by Schenker from a point of collection to a point of delivery. In other words, they are in transit in the course of the journey contemplated by the contract.

68 Seen in this context, clauses 17 and 40 are, plainly, clauses which give effect to a refusal of liability for loss in transit and, as such, must have in mind only the exclusion of liability for loss or damage which arises in transit.

69 At the very least, the context and language of clauses 17 and 40 suggest that more than one possible meaning can viably be attributed to them. The words "handle" and "dealt with", interpreted literally and without due regard to context, could cover any and all handling of goods, in whatever context, regardless of whether such handling is in the legitimate performance of the contract. Likewise, phrases like "*any*" and "*howsoever arising*" might in another contract cover even wrongful conduct that arises outside the performance of the contract. More – or at least equally – viable, however, is an interpretation of both clauses which takes into account the recurring theme which runs through the standard terms and the distribution agreement itself, which is that liability is excluded in respect of activities carried out by Schenker in the course of undertaking business or giving of advice, information or services whilst the goods are in transit.

[91] Cambridge Dictionary definition of "in transit". Available at https://dictionary.cambridge.org/dictionary/english/transit.

70 This is a construction which is not far-fetched, to which the clauses are fairly susceptible. To the extent that the clauses yield ambiguity or a secondary meaning, the issue must be resolved against Schenker, in whose favour the clause operates.[92]

71 This interpretation also aligns with the approach taken by the Australian courts in *Rick Cobby Haulage Pty Ltd v Simsmetal Pty Ltd*.[93]

72 In that case, a carrier subcontracted the carriage of goods to a subcontractor who stole the goods and was never seen again. Clause 2 of the consignment note provided that no responsibility was accepted for "*any loss of or damage to or mis-delivery or non-delivery of goods . . . either in transit or in storage for any reason whatsoever*". Clause 4 stated that the consignor must accept responsibility for any damage or loss of any goods whilst in the carrier's custody during storage or in transit.

73 In the Supreme Court of South Australia, Bollen J considered that the exclusion clause was ineffective because "*transit*" must be read down to mean transit during the course of the journey contemplated by the contract:

> **"Clauses exempting liability must be closely examined to see whether their words apply to the circumstances giving rise to the apparent liability (which) is always a question of construing the exemption clause and applying it, properly construed, to the events causing the losses.**
>
> **. . .**
>
> **Both clauses 2 and 4 purport to protect the Appellant whilst goods are "in transit or in storage". . . . In transit must mean "in**

[92] *Durban's Water Wonderland* above n 44.

[93] (1986) 43 SASR 533.

> **transit during the course of the journey contemplated by the contract". The phrase "in storage" must have a comparable meaning. The goods were not in transit nor in storage when Cook converted them. They were in transit or in storage for Cook's dishonest purposes. The appellant has not proved that the goods were in transit or in storage for the purposes of the "contractual journey" when the loss occurred."[94]**

74 The words used in the exemption clause, which narrowed the exemption to loss or non-delivery in transit or in storage, were thus "*not wide enough to exempt the appellant from the consequences of conduct far outside the work and activity contemplated by the contract*". Likewise, in this case, the text and context of clauses 17 and 40 narrow the wrongful conduct for which liability is excluded to conduct that falls within the work and activity contemplated by the contract, that is, "*transit during the course of the journey contemplated by the contract*".

75 Finally, the Full Court's decision in *Goodman Brothers* does not assist Schenker. That case did indeed concern a similarly worded exclusion clause, but that clause was interpreted against the backdrop of a different contract altogether. To apply *Goodman Brothers* as authority for a particular interpretation of the particular exemption clauses before this Court would be fundamentally at odds with the contextual approach to interpretation this Court is enjoined to follow.

Do the exemption clauses apply to intentional, as opposed to merely negligent, conduct?

76 The Supreme Court of Appeal held that the phrases "*of whatsoever nature*" and "*howsoever arising*" should "*be given their ordinary literal meaning and are . . .*

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[94] Id p 540.

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]".[95]

77 While it is so that clause 40.1 uses these phrases, no mention is made of liability for intentional acts, only liability "*in contract or in delict*". Indeed, the remainder of clause 40 makes reference to, and only contemplates, negligent acts or omissions causing loss or damage.

78 In nevertheless construing clause 40.1 as including intentional acts, the Supreme Court of Appeal did not have regard to the holding of Marais JA in *First National Bank v Rosenblum* that even if the language of an exclusionary clause is sufficiently wide to exclude liability for a negligent omission, it will not be regarded as doing so if there is "*another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application*".[96] In this case, even though the language of clause 40.1 may literally be wide enough to exclude liability for an intentional wrongful act, the clause is silent on this basis of liability and can plausibly be interpreted as applying only to negligent acts and omissions. This interpretation is further buttressed by the trite principle that where an exemption clause purports to exclude liability in general terms, the exemption clause must be given the minimum degree of effectiveness, by only excluding liability involving the minimum degree of blameworthiness.[97]

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[95] Supreme Court of Appeal judgment at para 15 p 428.

[96] *First National Bank v Rosenblum* above n 42 para 6.

[97] *Essa v Divaris* above n 50.

The exemption clauses, properly interpreted, do not exclude liability for Mr Lerama's theft

79 The facts reveal that when Mr Lerama went to the SAA Cargo Warehouse to steal the goods, he was not executing the contract and the goods were not in transit:

79.1 Mr Lerama used a privately hired, unmarked vehicle to collect the goods.

79.2 He collected on a Saturday, a day on which Schenker did not ordinarily collect or carry transit.

79.3 At no stage were the goods transported *en route* to their authorised final destination.

79.4 In the circumstances, Mr Lerama did not collect the goods on behalf of Schenker or on the instructions of Fujitsu.

79.5 He collected the goods *animus furandi*, for his own enrichment.

80 It is far-fetched to conclude that in stealing the goods in these circumstances Mr Lerama was undertaking business or giving of advice, information or services whilst the goods were in transit, which is when the exclusion of liability kicks in.

81 Finally, Mr Lerama's wrongful act was intentional and not merely negligent and therefore cannot be covered by the exclusion of liability in clause 40, which is silent in relation to loss or damage caused by intentional acts.

THE EXEMPTION CLAUSES ARE AGAINST PUBLIC POLICY

82 This Court has confirmed that a contractual term that is contrary to public policy is unenforceable and that public policy, which represents the legal convictions of the community, is now "*deeply rooted in our Constitution and the values which underlie it*".[98] These include the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.[99]

83 If the exemption clauses are not interpreted in the manner we suggest, their effect will be that liability is excluded for wrongful acts by employees committed outside the contractual context, including theft. This, in the context of an agreement in which a party has agreed to collect goods and deliver them to the other.

84 Although a similar exclusion was deemed compatible with public policy in *Goodman Brothers*, there are compelling public policy considerations which warrant a reconsideration of that finding. Indeed, apart from being the decision of the Full Court, which does not bind this Court, *Goodman Brothers,* and a subsequent Supreme Court of Appeal decision which endorsed it,[100] had a narrow focus and pre-dated this Court's seminal ruling on public policy in *Barkhuizen*.

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[98] *Barkhuizen* above n 37 para 28. See also *Beadica* above n 36.

[99] Id.

[100] See *First National Bank v Rosenblum* above n 42 at para 22.

85 In *Goodman Brothers*, the sole focus of the Court's analysis was on whether theft by an employee constituted the kind of "*fraudulent conduct*" for which liability could not, in accordance with the Appellate Division's decision in *Wells v South African Alumenite Co*, be excluded. In that case, Innes CJ held that liability for a fraudulent misrepresentation made by one's employee could not be excluded. This was so because "*[t]o allow the principal to take advantage of fraudulent misrepresentation by relying on excluding liability for misrepresentations by the servant or agent, would encourage fraud*".[101]

86 In *Goodman Brothers*, the Full Court held that the position was different in the case of theft by an employee of goods that have been entrusted to his employer:

> **"Like the fraud, the theft by the servant is not a theft by the employer; but unlike the fraudulent misrepresentation, the theft is not for the benefit of the employer but for the benefit of the employee. To allow the employer to rely on a clause excluding liability in the case of a theft by an employee would not encourage theft."[102]**

87 Clearly, the *Goodman Brothers* case was narrowly concerned with whether the *Wells v South African Alumenite Co* rationale for refusing to enforce an exemption clause applied in cases involving theft by an employee. No mention was made of the Constitution, nor was any other public policy rationale for refusing to enforce the clause considered. Indeed, one might go so far as to say that the *ratio decidendi* of Goodman Brothers is simply that as long as an exemption clause does not allow a party to benefit from intentional wrongdoing, the clause does not offend public policy.

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[101] Id at 72.

[102] *Goodman Brothers* above n 27 99E-G.

88 So general a proposition cannot hold without more under our constitutional dispensation. Public policy is concerned with more than simply discouraging intentional wrongdoing. It now imports the values enshrined in the Constitution and values such as fairness, reasonableness and justice.[103] Given this broader outlook, the narrow approach taken in *Goodman Brothers* is incompatible with the notion of public policy infused with constitutional values.

89 Post-*Barkhuizen*, and as the Supreme Court of Appeal put it in *Johannesburg Countryclub v Stott*, our courts must ask "*whether a contractual regime that permits such exemption is compatible with constitutional values, and whether the growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation*".[104]

90 Both courts and academics alike have become increasingly wary of exemption clauses which undermine the very essence of the contract in which they appear.[105] Professors Lubbe and Naude give the example of a clause in a contract to obtain medical care that excludes liability for negligently caused death:

> **"A contract to obtain medical care is not a simple commercial transaction. What is at stake here is the interest in the patient's bodily inviolability and not merely his patrimonial interest. Where such an interest is affected by a term that excludes the essence of a contract designed to protect it, there is every reason to regard it as objectionable in principle."[106]**

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[103] *Beadica* above n 36 para 72.

[104] Above n 51 para 12.

[105] See for example *Mercurius Motors v Lopez* [2008] ZASCA 22; [2008] 3 All SA 238 (SCA); 2008 (3) SA 572 (SCA) para 33 and *Van der Westhuizen v Arnold* above n 47 para 34.

[106] Naude and Lubbe "Exemption clauses: A rethink occasioned by Afrox Healthcare Bpk v Strydom" 2005 *SALJ* 441 at 460.

91 Likewise, in an agreement in which a party undertakes an obligation to collect and deliver goods into the custody of another, a clause which excludes liability for the theft of those goods undermines the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties. To enforce an agreement in such circumstances would be to thwart the contracting parties' basic contractual purpose. Where the very purpose of a contract is jeopardized by a one-sided exemption clause negating the essential rights and duties inherent in the contract, the dignity inherent in the bargain is eroded. The party against whom the exemption operates is reduced to "*an object of economic gratification of the other*".[107]

92 In this case, the essence of the agreement between the parties is Schenker's undertaking to collect goods and deliver them to Fujitsu. A clause which says that Schenker's employees can not only fail to carry out such collection and delivery but can in fact *steal the goods altogether* undermines the essence of that bargain.

93 Although this Court has been careful to emphasise that good faith and fairness are not free-standing yardsticks against which contractual provisions can be measured, it has also acknowledged their role in fashioning new contractual doctrines.[108] Indeed, this Court has praised jurisprudential developments in which "*clear doctrines*" have "*brought our law of contract in line with the values of fairness, reasonableness and justice*".[109]

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[107] Id at 452.

[108] *Beadica* above n 36 para 77.

[109] Id para 77.

94 A substantive rule that a contractual term which, in a contract like the one before this Court, excludes liability for theft by an employee is against public policy would bring our law regarding exemption clauses in line with the *boni mores* of the community, which would not countenance an exemption of liability that would so erode the fundamental bargain between the parties.

CONCLUSION

95 For the reasons set out above, we submit that Fujitsu ought to be granted leave to appeal and that the appeal should succeed. The order of the Supreme Court of Appeal should be set aside and replaced with an order in the following terms:

"The appeal is dismissed with costs, including the costs of two counsel."

GILBERT MARCUS SC
JEAN MARAIS SC
CHRISTOPHER GIBSON
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Applicant's counsel
Chambers, Sandton
16 August 2022

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Punch v. Savoy's Jewellers Ltd. et al (1986) 14 O.A.C. 4 (CA)

English case law

Morris v C.W. Martin & Sons Ltd [1966] 1 Q.B. 716

Academic articles

Naude and Lubbe "Exemption clauses: A rethink occasioned by Afrox Healthcare Bpk v Strydom" 2005 *SALJ* 441[110]

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: 32/2022

In the matter between:

FUJITSU SERVICES CORE (PTY) LTD Applicant

and

SCHENKER SOUTH AFRICA (PTY) LTD Respondent

APPLICANT'S PRACTICE NOTE

NAME OF COUNSEL

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NATURE OF THE APPLICATION

1 This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal on 9 November 2021, in which that Court upheld the respondents' appeal against the judgment and order of Adams J in Gauteng Local Division of the High Court.

ISSUES TO BE DETERMINED

2 On 10 July 2009, the applicant ("Fujitsu") and respondent ("Schenker") concluded a national distribution agreement in terms of which Schenker agreed to provide clearing, forwarding and logistics services. This agreement was subject to the South African Freight Forwarding Association's standard terms of conditions.

3 Some time in early 2012, Fujitsu engaged the services of Schenker to assist it with the freight forwarding, warehousing and clearing of a consignment of laptops imported from Germany. This consignment was subsequently stolen by an employee of the respondent, Mr Wilfred Bongani Lerama ("Mr Lerama") who arrived at the SAA Cargo Warehouse in an unmarked hired truck and had with him all of the necessary custom release documents which he had received from

his employer Schenker.

4 Fujitsu instituted a delictual action against Schenker for damages arising from the theft of the goods by Mr Lerama whilst acting in the course and scope of his employment with Schenker. In response, Schenker invoked exclusion of liability clauses in its standard terms and conditions which, so it was contended, precluded a delictual claim based on theft.[1]

5 Arising from those facts this Court is called upon to determine:

5.1 Whether, properly interpreted, the exclusion of liability clauses relied upon by the respondent exclude liability for theft by one of the respondent's

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[1] These clauses 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**
>
> **40.1.2 any act or omission of the customer or agent of the customer with whom [Schenker] deals; 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**
>
> **. . .**

employees.

5.2 To the extent that the exclusion clauses exclude liability in those circumstances, whether the clauses are against public policy.

SUMMARY OF THE APPLICANT'S SUBMISSIONS

6 The applicant contends that neither exemption clause excludes liability for a delictual claim for theft by one of Schenker's employees. In support of this submission, the applicant relies on a contextual interpretation of the exemption clauses that is founded on the following principles:

6.1 Contractual provisions in general must be interpreted with due regard to the words used, the purpose of the provision and the context in which it operates.

6.2 The general approach is to construe indemnity clauses restrictively.

6.3 A party wishing to contract out of liability must do so in "*clear and unequivocal terms*". In the case of doubt, ambiguity or secondary meaning, the issue must be resolved against the *proferens*.

6.4 Unless there is a clear intention to the contrary, exemption clauses should not be construed in a way that would excuse or limit the consequences of wrongful actions undertaken outside the operation or authority of the contract.

6.5 Where an exemption clause purports to exclude liability in general terms, the exemption clause must be given the minimum degree of effectiveness,

by only excluding liability involving the minimum degree of blameworthiness.

6.6 Where a party seeks to exclude liability for theft, it must state this in express terms.

7 The applicants also invoke the trite principle that a reference in a statute (or, the applicant submits, contract) to any action or conduct will be presumed, in the absence of any indication to the contrary, to be a reference to lawful action or conduct.

8 Applying these principles, the applicant contends that the exemption clauses only apply to loss or damage arising from the authorised handling of goods that are in transit. In this regard, the applicant notes that:

8.1 The standard terms apply to "*business undertaken*", "*advice*", "*information*" or "*services*" provided by Schenker (clause 3).

8.2 The "*goods*" to which clause 17 applies are those which are handled, transported or dealt with by or on behalf of or at the instance of the Company or which otherwise come under the control of the Company or its agents, servants or nominees on the instructions of the customer (clause 1.3.3). They are therefore handled and dealt with in the execution of the contract.

8.3 This interpretation is reinforced by the presumption that the references to "*handled*" and "*dealt with*" in clauses 1.3.3 and 17 must be taken to mean "*lawfully handled*" and "*lawfully dealt with*".

8.4 Clause 40 refers to loss or damage arising from the malperformance of Schenker's obligations under the contract.

8.5 The terms of the distribution agreement contemplate the exclusion of liability when goods are "*in transit*". In the context of the services offered by Schenker in terms of the distribution agreement, goods are in transit when they are being transported by Schenker from a point of collection to a point of delivery. In other words, they are in transit in the course of the journey contemplated by the contract.

8.6 Clause 40 is silent on theft by an employee and does not expressly apply to intentional, as opposed to merely negligent, acts. It must therefore be presumed that the parties did not intend to exclude liability for theft and other intentional acts.

9 In sum, the exemption clauses apply only when the contract is being lawfully performed by Schenker.

10 In this case, it is far-fetched to conclude that by stealing the goods Mr Lerama was undertaking business or giving of advice, information or services whilst the goods were in transit. For this reason alone, the appeal must succeed.

11 If, however, the Court does not accept this interpretation of the exemption clauses, the clauses are nevertheless unenforceable because they are against public policy.

12 In the constitutional era, both courts and academics alike have become increasingly wary of exemption clauses which undermine the very essence of the contract in which they appear. In an agreement in which a party undertakes an

obligation to collect and deliver goods into the custody of another, a clause which excludes liability for the theft of those goods undermines the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties.

13 A substantive rule that a contractual term which, in a contract like the one before this Court, excludes liability for theft by an employee is against public policy would bring our law regarding exemption clauses in line with the *boni mores* of the community, which would not countenance an exemption of liability that would so erode the fundamental bargain between the parties.

ESTIMATED DURATION OF ARGUMENT

14 3 hours

RECORD

15 The following portions of the record are, in the opinion of counsel, necessary for the determination of the matter:

15.1 The email from Juanita Grobler to Joseph Makibelo dated 25 June 201 – Vol 1 at p 85;

15.2 The retyped version of the statement made by Juanita Grobler to SAPS – Vol 1 at p109 (in particular para 3 and 4);

15.3 The witness statement of Ricardo Da Cunha – Vol 2 at pp 139 – 142;

15.4 The witness statement of Cedric Kgopane – Vol 2 at pp 144 – 150;

15.5 The witness statement of Pieter Mare – Vol 2 at pp 152 – 160;

15.6 The witness statement of Weco van Basten – Vol 2 at pp 165 (para 9.1);

15.7 The supplementary witness statement of Ricardo Da Cunha – Vol 2 at pp 167 – 168;

15.8 Transcript of the High Court proceedings – Vol 2 at pp169 – 275;

15.9 Applicant's founding affidavit in this Court – Vol 4 at pp 357 - 374;

15.10 Respondent's opposing affidavit in this Court – Vol 4 at pp 450 - 869;

15.11 National Distribution Agreement and Proposal, including the South African Association of Freight Forwarders' terms and conditions – Vol 4 at 376 – 402 (with emphasis on clause 17 at p396 and clause 40 at p400);

15.12 the judgment by Adams J delivered on 25 March 2020 – Vol 4 at pp 403 - 419; and

15.13 the judgment of the Supreme Court of Appeal by Phatshoane JA (Dambuza, Gorven, Mothle JJA and Smith AJA concurring) – Vol 4 at pp 420 – 432.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

16 Case law:

16.1 *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC)

16.2 *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A)

16.3 *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA)

16.4 *G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd* [2022] ZAGPJHC 7

16.5 *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyd's* 1998 (4) SA 466 (C)

16.6 *Mercurius Motors v Lopez* [2008] ZASCA 22; [2008] 3 All SA 238 (SCA); 2008 (3) SA 572 (SCA)

16.7 *S v Mapheele* 1963 (2) SA 651 (A)

16.8 *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA)

16.9 *Weinberg v Olivier* 1943 AD 181

17 Academic writing:

17.1 Naude and Lubbe "Exemption clauses: A rethink occasioned by Afrox Healthcare Bpk v Strydom" 2005 *SALJ* 441

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22 August 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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LIST OF AUTHORITIES

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1. *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC)

2. **Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC)

3. *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC)

4. *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC)

5. *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA)

6. *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd* [2018] ZASCA 77; 2018 (3) All SA 605 (SCA)

7. *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA)

8. *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A)

9. *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A)

10. *Essa v Divaris* 1947 (1) SA 753 (A)

11. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC)

12. **First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA)

13. *Freitan (SA) (Pty) Ltd v Kingtex Marketing (Pty) Ltd* [2006] JOL 15960 (T)

14. **G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd* [2022] ZAGPJHC 7

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

16. **Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyd's* 1998 (4) SA 466 (C)

17. *Johannesburg Country Club v Stott* [2004] ZASCA 138

18. *Kuehne & Nagel (Pty) Ltd v Breathetex Corporation (Pty) Ltd* [2008] 2 All SA 446 (SE)

19. *Mercurius Motors v Lopez* [2008] ZASCA 22; [2008] 3 All SA 238 (SCA); 2008 (3) SA 572 (SCA)

20. *Mokone v Tassos Properties CC [*2017] ZACC 25; 2017 (10) BCLR 1261 (CC); 2017 (5) SA 456 (CC)

21. *MTN International (Mauritius) Ltd v Commissioner of South African Revenue Services* [2014] ZASCA 8; 2014 (5) SA 225 (SCA)

22. *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ)

23. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

24. *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC)

25. *S v Mapheele* 1963 (2) SA 651 (A)

26. *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC)

27. *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA)

28. **Weinberg v Olivier* 1943 AD 181

29. *Wells v SA Alumenite Co.*1927 AD 69

30. *World Net Logistics (Pty) Ltd v Donsantel 133 CC* [2020] 1 All SA 593 (KZP)

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1. *Council of the City of Sydney v West* (1965) 114 CLR 481

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