

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Constitutional Court Case No.: \_\_\_\_\_

Supreme Court of Appeal Case No.: 508/2020

Gauteng Local Division Case No.: 21830/2014

In the matter between:-

**FUJITSU SERVICES CORE (PTY) LIMITED**

Applicant

and

**SCHENKER SOUTH AFRICA (PTY) LIMITED**

Respondent

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**APPLICANT'S NOTICE OF MOTION IN THE APPLICATION FOR LEAVE TO APPEAL  
TO THE CONSTITUTIONAL COURT**

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**TAKE NOTICE THAT** the Applicant intends to apply to this Court, on a date determined by the Chief Justice, for an order in the following terms:

1. the Applicant is granted leave to appeal against the whole of the judgment and costs order of the Supreme Court of Appeal handed down by Justice Phatshoane AJA on 18 January 2022 under case number 508/2020;
2. the appeal is upheld with costs, including the costs of two counsel;

3. the order of the Supreme Court of Appeal is set aside and replaced with the following:

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

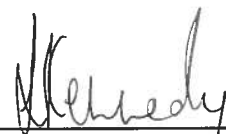
**TAKE FURTHER NOTICE THAT** the Affidavit of **ERIK MARINUS VAN HUYSSTEEN** and the annexures attached thereto will be used in support of this application.

**TAKE NOTICE FURTHER THAT** the Applicant has appointed **EVH INC C/O MOODIE & ROBERTSON** with offices at the address set out herein below, at which the Applicant will accept notice and service of process in these proceedings.

**TAKE NOTICE FURTHER THAT** if you intend to oppose this application you are required:

- (a) to notify the Applicant in writing within 10 (ten) days after receiving this notice;
- (b) to appoint in such notification an address within 25 kilometers of the office of the Registrar at which you will accept notice and service of all documents in these proceedings; and
- (c) to file your opposing affidavit, if any, within 15 (fifteen) days after you have given notice of your intention to oppose the application.

**DATED at JOHANNESBURG on this the 8<sup>TH</sup> day of FEBRUARY 2022.**



**EVH INC ATTORNEYS**

Applicant's Attorney

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Ref: B7204/0001

**C/O MOODIE AND ROBERTSON**

Physical Address:

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Ref: M Patterton/ae/M197051

**TO:**

**THE REGISTRAR OF THE  
CONSTITUTIONAL COURT**

**AND TO:**

**PRINSLOO INC.**

Respondent's Attorneys

Ground Floor, Unit 1001B

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Melrose Arch

Sandton

E-mail: [prinsloo@prinslooinc.com](mailto:prinsloo@prinslooinc.com) / [larkens@prinslooinc.com](mailto:larkens@prinslooinc.com)

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Ref: P Prinsloo/A Larkens / SCHE12.5

**Service via email**

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No.: 2022  
Supreme Court of Appeal Case No.: 508/2020  
Gauteng Local Division Case No.: 21830/2014

In the matter between:

**FUJITSU SERVICES CORE (PTY) LIMITED**

**Applicant**

and

**SCHENKER SOUTH AFRICA (PTY) LIMITED**


**Respondent**

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**APPLICANT'S FOUNDING AFFIDAVIT IN THE APPLICATION  
FOR LEAVE TO APPEAL**

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I, the undersigned,

MARIUS   
**ERIK VAN HUYSSTEEN,**  
A

hereby state under oath as follows:

**THE DEPONENT:**

1. I am an adult male, attorney practising under the name and style EM van Huyssteen Inc t/a EVH Inc, Umhlanga. I have been the attorney for the Applicant since the commencement of these proceedings. The Applicant's claim is subrogated to Tokio Marine Europe S.A ("the Insurer"), who has instructed me to pursue this application for leave to appeal, as reflected



by the authority annexed hereto (marked "A").

2. The facts dealt with herein arise from the proceedings and since the issues that fall due for determination contained herein are legal issues, I believe that I am in the position to deal with both the facts and the legal issues (there was no gainsaying evidence by the Respondent and the legal issues therefore fall for determination against a common factual backdrop).
3. I advance the submissions herein on the basis that I believe them to be correct.

**THE PARTIES:**

4. The Applicant is **FUJITSU SERVICES CORE (PTY) LTD**, a company with limited liability, duly registered and incorporated according to law, which has its registered address at Fourteenth Road, Erand Gardens, Midrand, Gauteng. (I established that the Applicant, recently, underwent a change of name to COCRE8 Technology Solutions (Pty) Ltd, but, for the sake of convenience, submit that the matter may proceed under the name reflected in these proceedings).
5. The Applicant was at the relevant time an importer, seller and distributor *inter alia* of laptop computers and accessories.
6. The Respondent is **SCHENKER SOUTH AFRICA (PTY) LTD**, a company with limited liability, duly registered and incorporated according to law, which has its principal place of business at Shiraz Close, JT Ross Park, Witfontein Extension 54, Kempton Park.
7. The Respondent conducts business as a warehouse operator, freight-forwarder, logistics manager, distributor and forwarding agent.
8. The parties had been doing business with each other, in terms of which the

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Applicant, from time to time, engaged the Respondent to render these services to the Applicant, in terms of different agreements, with the latest one being relevant to these proceedings, concluded on 10 July 2009.

**BACKGROUND FACTS:**

9. The Applicant purchased and imported a consignment of laptops from Germany and engaged the Respondent for clearing, forwarding and logistics services.
10. The Respondent undertook to render these services in terms of the agreement concluded on 10 July 2009, a copy of which is annexed hereto (marked "B").
11. The contract incorporated the **Standard Trading Terms and Conditions of the South African Association of Freight-Forwarders**, which, in turn, contained certain exemption and disclaimer clauses.
12. In 2012 the Respondent employed Mr Lerama ("Lerama") as a drawing clerk who was, amongst other things, responsible for the collection of cargo at the SAA Cargo Warehouse. To that end he had passed a vetting process, was issued with a security card and, from time to time, given access to all relevant airway bills and customs clearance documents necessary for the cargo to be released from SAA Cargo Warehouse.
13. A consignment of the Applicant's laptop computers and accessories arrived at the SAA Cargo Warehouse at the OR Tambo Airport on 21 and 22 June 2012. In terms of the agreement between the parties, the Respondent was going to collect, clear and carry the goods.
14. The cargo was not collected when it arrived.



15. Lerama did not work on Saturdays. However, on Saturday 23 June 2012, Lerama arrived at the SAA Cargo Warehouse, not in a Schenker Truck, but, instead, in a truck privately hired, showed his security and the release documents, collected the consignment of laptops and accessories and disappeared with them all. (He never returned to work and was not found again). (As the Supreme Court found, **he never delivered the goods and effectively stole them**).
16. Since it is important to the Applicant's argument, it is necessary to emphasise that the following circumstances all reveal, that Lerama went to the SAA Cargo Warehouse to steal the goods and that they were, therefore, not stolen en-route or during the execution of the contract:
- (a) Lerama did not proceed to SAA with a company vehicle;
  - (b) Lerama proceeded **ostensibly** to collect on a Saturday, in circumstances where Schenker did not usually collect or carry in transit on Saturdays;
  - (c) Lerama went to the SAA Cargo with the clear intention to steal the goods;
  - (d) in the circumstances he did not, in fact, collect on behalf of Schenker; and
  - (e) Lerama collected the goods *animus furandi*, for his own enrichment.
17. Patently Lerama did not, therefore, execute the agreement when he stole the goods.
18. The Applicant then instituted a delictual action against the Respondent, for



the loss of the goods, on the basis that it was vicariously liable for the theft.

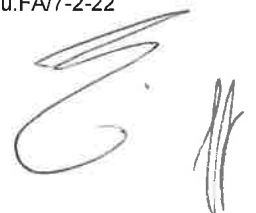
19. Since Lerama had used the security documents and the benefits of his employment with the Respondent to gain access to the goods and because of the judgment of the Supreme Court of Appeal in **Stallion**,<sup>1</sup> vicarious liability was no longer in issue when the matter was argued at the conclusion of the trial.
20. The only issue that remained was whether, upon a proper construction of the contract, the Respondent's liability for the theft perpetrated by Lerama was excluded by the contract. (That was also the only issue on appeal to the Supreme Court of Appeal).

#### **THE PROCEDURAL HISTORY:**

21. The matter went to trial before his Lordship Justice Adams in the Gauteng Division of the High Court, Johannesburg.
22. The Applicant led the evidence of four witnesses, who dealt, largely, with Lerama's employment and the circumstances of the theft. The Respondent closed its case without leading any evidence. (It, predominantly, relied upon the exemption/disclaimer clauses contained in the contract - which was common cause).
23. At the end of the trial, the High Court granted judgment in favour of the Applicant. A copy of the judgment is annexed hereto (marked "C").
24. Pursuant thereto, the Respondent was granted leave to appeal to the Supreme Court of Appeal.
25. The appeal was heard on 9 November 2021.

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<sup>1</sup> Stallion Security (Pty) Limited v Van Staden 2019 JDR 1885 (SCA).





26. On 18 January 2022, the appeal was upheld, and the Order of the Court below set aside and substituted with dismissal of the Plaintiff's claim, with costs. A copy of the judgment is annexed hereto (marked "D").

**JURISDICTION:**

27. This is an application for leave to appeal to this Honourable Court under Article 167(3)(b) of the Constitution, on the grounds **that the matter raises an arguable point of law of general public importance which ought to be considered** by this Honourable Court.
28. The points of law arising from the judgment of the Supreme Court of Appeal, are as follows:
- (a) whether a party who relies upon an exemption / disclaimer in a contract to avoid delictual liability may do so successfully without presenting any evidence of the background circumstances, context or purpose behind the contract;
  - (b) whether, bearing in mind that contracts fall to be interpreted, insofar as possible, in harmony with the common law and without restricting a party's common law rights, a contracting party may avoid liability in terms of an exemption / disclaimer clause contained in the contract when, in fact, the delictual wrong (the theft) had nothing whatsoever to do with the execution of the contract;
  - (c) when a party may be said to be executing a contract and what indicators could be relied upon to determine that;
  - (d) whether, in any event, a contracting party may rely upon a disclaimer / exemption contained in a contract regulating the relationship between the parties where it is clear that the theft



had nothing to do with the contract;

- (e) whether considerations of public policy in any event preclude such reliance;
- (f) whether a party could provide a disclaimer to avoid liability for the intentional wrongdoing of an employee even if such wrongdoing was perpetrated outside the contractual setting.

29. It is submitted that the Applicant has good prospects of success on the points of law, on the basis that, for the reasons dealt with later herein, the Supreme Court of Appeal applied incorrect legal principles and that it, in effect, departed from settled law (*inter alia* arising from its own judgment in **G4S Cash Solutions**).<sup>2</sup>

30. The issues are, I submit, of significant public importance and that their resolution would benefit the general public (beyond the interests of the parties to this litigation). They invite the correct approach to contractual exemption / disclaimer in the context of delictual claims, the circumstances under which these may give rise to a defence where the delict had nothing to do with the execution of an agreement and whether parties should be allowed to escape liability on the basis of such clauses in these circumstances.

31. In further support of the foregoing, I point out that the **Standard Terms and Conditions** are incorporated, by reference, across the freight-forwarding industry - as is self-evident from the very circumstances under consideration, that clauses of the kind relied upon therefore operate across the width and breadth of the country whenever anyone were to contract with freight-forwarders, and so be exposed with such exemption / disclaimer clauses when their goods had been stolen **outside** of the execution of the

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<sup>2</sup> G4S Cash Solutions SA (Pty) Ltd v Zanspruit Cash & Carry (Pty) Ltd & Another 2017 (2) SA 24 SCA.



contract. (As it is, I have been given to understand through my engagement with at least one other attorney that the judgment of the Supreme Court of Appeal has already become a talking point in the industry and that importers and distributors like the Applicant experience much concern and discomfort in anticipation of the implications of the judgment).

32. In these circumstances I respectfully submit that it is clearly in the interests of justice for leave to appeal to be granted.

33. Against this background, I turn, first, to the relevant terms of the contract.

### **THE CONTRACT:**

34. This Honourable Court, recently, emphasised the duty of a Court interpreting a contract to **from the outset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion and the knowledge at the time of those who negotiated and produced the contract.** <sup>3</sup>

35. That is why this Honourable Court also observed that the parties would invariably adduce evidence to establish the context and purpose of the relevant contractual provisions.

36. I submit that the onus to establish the exemption therefore lay four-squarely upon the Respondent.

37. The Respondent led no evidence.

38. Such evidence as was available to obtain a contextual setting, indicated only that:

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<sup>3</sup> University of Johannesburg v Auckland Park Theological Seminary and Another [2021] ZACC 13.

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- (a) the Respondent carried on business as a warehouse operator, distributor and clearing and forwarding agent; <sup>4</sup>
  - (b) the Applicant, from time to time (and over some years) made use of the Respondent's aforementioned services;
  - (c) in doing so, the relationship between the parties was regulated by earlier contracts.
39. The Applicant sued the Respondent in delict and as a result, the onus on proving that the exemption clauses apply, rested, in my submission, upon the Respondent, not the Applicant.
40. Clause 3 clearly provides that the scope of the Agreement was limited to business undertaken in terms of the Agreement or services provided or undertaken on such terms and conditions.
41. Clause 17 <sup>5</sup> likewise confirms that special arrangements were required when **the company** (Respondent) accepted or dealt with certain valuables and specifically arises when the company (Respondent) was required to **handle or deal** with such goods.
42. It is self-evident that these provisions could only operate within the contextual backdrop and against the scope of the Agreement and it is, therefore, farfetched for the Respondent to apply this disclaimer in circumstances where it did not, accept, deal with or handle any goods **qua company**.
43. The interpretation favoured by the Court of first instance is also supported by the context, obvious purpose behind, and the language used in the provisions:

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<sup>4</sup> Pleadings : page 34, paragraph 3.

<sup>5</sup> Judgment quotation in para 7.

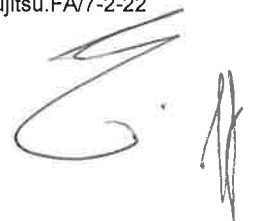


- (a) the context is that the parties were in a contractual (and only contractual) relationship, in terms of which the one would clear, fetch, store and deliver, and the other would pay for such services;
- (b) the purpose is to limit the one contractual party's exposure obviously only **during the** "fetch, carry, store and deliver exercise";
- (c) clause 17<sup>6</sup> in its language:
- (i) firstly, acquires application only when the goods had been delivered by Applicant to Respondent or Applicant had caused Respondent to handle / deal with the goods;
  - (ii) secondly, restricts the exclusion to operate only for an employee of Respondent's negligent acts or omission (not the intentional act of an employee);
  - (iii) thirdly, determines the scope of clauses 40 and 41, by stating that such a claim (one in terms of clause 17) would be governed by the provisions of clauses 40 and 41;
- (d) the language of clause 40<sup>7</sup>, likewise:
- (i) firstly, limits the wide ambit of the words "whether in contract or in delict... for damages ... howsoever arising" to a negligent act or omission or a grossly

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<sup>6</sup> Annexure "B" hereto, paginated page 43

<sup>7</sup> Annexure "B" hereto, paginated pages 47 - 48



negligent act or omission of Respondent or its servants;

(ii) secondly, repeats or amplifies the earlier limitation contained in clause 17, to a claim arising when the goods were in Respondent's actual custody or control;

(e) in its language, clause 41 operates only once liability had been established in terms of clauses 17 and 40.

44. This recurring **theme**<sup>8</sup> arises from the provisions of clause 40 (which operates against this contextual backdrop and following the provisions of clause 17).

45. This is also consistent with the provisions in annexure "B"<sup>9</sup>:

**Liability:** No liability for loss in transit is accepted in terms of our Standard Trading Conditions. Copies of our conditions are available from your nearest call centre or on Respondent's website ([www.schenker.co.za](http://www.schenker.co.za)).

**Negligence:** Negligence claims in the event "goods in-transit" insurance cover is declined: No liability for loss in transit or negligence will be accepted. Respondent has no insurable interest in the cargo, goods in transit (GIT) insurance / marine insurance must be arranged by yourselves or your supplier. Should a loss be experienced you or your supplier should lodge a claim against your insurers. Once your claim has been settled by your insurers, your insurers will then attempt to recover the loss of damage from all parties involved in the freight forwarding process. To this end and in terms of our Standard Trading Terms and Conditions, Respondent has a Liability Insurance Policy in place and should it be proven that we were negligent in the handling of your cargo leading to the loss or damage, our Liability Insurance will settle any claims subject to the limitations of the Standard Trading Terms and Conditions.<sup>10</sup>

<sup>8</sup> As referred to by the Court a quo in the judgment, para 48.

<sup>9</sup> Annexure "B" hereto, paginated page 33

<sup>10</sup> Pleadings at 66.



46. It is also significant that the liability section commences with a disclaimer of liability for loss **in transit**.<sup>11</sup> In other words, it is clearly contemplated that there is no liability for loss arising **once** transit takes place. That, in turn, assumes collection and execution. (This is confirmed also by the preamble in section 3, to the effect that the service fees do not include cover for loss, damage or negligence **whilst goods are in transit**).<sup>12</sup>
47. On simple logic, these provisions mean that Respondent will not be liable for a loss occurring once it had collected the goods for purposes of executing the agreement and they were **in transit** at the time of the loss. (These provisions cannot, possibly, include a disclaimer for theft from a storage facility on third party premises).
48. The **negligence** portion under Section 2 (quoted above), finds meaning against this backdrop. In other words, it falls to be interpreted in harmony with the **liability** portion. The heading, itself, makes reference to negligence claims **in the event of “goods in transit” insurance (having been) declined**. This sets the scene for Respondent, in effect, disclaiming liability for loss in transit or negligence **in transit**. After all, the concluding provisions include the phrase **should it be proven that we were negligent in the handling of your cargo**,<sup>13</sup> liability would be limited. (The **we** is a clear reference to Respondent. Contextually it must mean that Respondent had collected the cargo and was handling it in the execution of the agreement. This does not include theft by an employee who was not handling it **on behalf of Respondent** or for purposes of **executing the agreement**).
49. The provisions of clause 40 of the STC's (annexure “B”) clearly also do not

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<sup>11</sup> Annexure “B” hereto, paginated page 33

<sup>12</sup> Pleadings at 69.

<sup>13</sup> Our emphasis.



apply:

- (a) firstly, it, too, falls to be interpreted within the context of execution (and we know that the goods were not collected by Lerama in that context);
- (b) secondly, sub-clause 40.1.1 specifically **talks of** the negligence of Respondent or its servants (and we know that there was no negligence on the part of Lerama but, rather, intention - *animus furandi*); <sup>14</sup>
- (c) thirdly, the exclusion to the disclaimer is limited to claims arising from a **gross negligent act or omission on the part of the company or its servants**, with the result that intention is, once again, not covered and, in any event, the goods were not **in the actual custody** of Respondent, at the time of the loss;
- (d) fourthly, the monetary limitation contained in clause 41 clearly **kicks in** only once there was liability **in terms of the aforesaid**.

50. In short, the relevant provisions in clause 40 do not, **in fact**, come near to excluding liability for the theft or intentional act of a servant of Respondent.

51. Within the aforesaid context the phrase "howsoever arising" in clause 40.1 of the STC's does not change anything:

- (a) it applies in the execution of the agreement (which did not happen);
- (b) it is neutralised by the specific exclusions following. <sup>15</sup>

<sup>14</sup> The words **howsoever arising** could not, possibly, be construed wide enough to include *dolus* since this approach is directly gainsaid by the portion which follows (in sub-clause 4.1.8) the word **unless**.

<sup>15</sup> Christie : Law of Contract in South Africa, 7<sup>th</sup> edition, at 259 to 261.



52. Since liability arises from an intentional act by an employee and **before** Respondent had custody or control of the goods, the exclusion and limitations simply do not apply.
53. The Supreme Court of Appeal, however, found that the exemption / disclaimer operated, notwithstanding.

**SUPREME COURT OF APPEAL JUDGMENT:**

54. The Court restated the **Endumeni test**, in terms of which context plays an important role in the new holistic approach applied to the interpretation of contracts, but then, failed entirely to implement the test and, rather, resorted to out of context Oxford dictionary definitions of **deal** and **handle**.
55. On the basis that **deal** meant **having relations within the commercial context**, the Court then found that the Respondent had, in effect, commenced executing the contract by being informed of the arrival of the goods and having them checked by an independent security concern (FSI), and, then, concluded that **in the 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's**.
56. This finding, it is respectfully submitted, is astonishing, especially if regard is had to the context, the purpose behind the agreement and the fact that there was absolutely no relationship between the contract and what Lerama did.
57. The Court then considered the **Goodman Bros** judgment to be directly in point. <sup>16</sup>

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<sup>16</sup> Goodman Brothers (Pty) Ltd v Rennies Group Limited 1997 (4) SA 91 W.

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58. There are substantial differences between the case under consideration and Goodman Brothers:
- (a) the goods were stolen, in the Goodman Brothers' case, whilst en route from its own warehouse at Johannesburg Airport and, therefore, whilst the goods were, in fact, in the possession or under the control of **Rennies**;
  - (b) unlike in the present case (and no doubt because it was accepted that the contract between the parties applied), Goodman Brothers pursued a claim in **contract**;
  - (c) that is why, in Goodman Brothers, the Court was mainly concerned with **other** issues, like:
    - (i) whether watches could be described as valuables;
    - (ii) whether the disclaimer was against public policy, insofar as it could be relied upon to avoid liability for intentional wrongdoing on the part of staff;
    - (iii) whether timeous special notice had been given of the valuables, as contemplated in the agreement and, in particular, whether the credit application constituted such notice;
    - (iv) whether a fundamental breach of an agreement would, in effect, neutralise the effect of a disclaimer.
59. The Goodman Brothers' judgment is therefore clearly distinguishable.
60. Finally, the Court relied upon G4S, to distinguish it from the case under



consideration. However, although other issues also arose there, the overall principle remained, namely that the parties and was, in my submission, the same, namely the parties (both there and in the present case) **did not contemplate that the time limitation clause** (there) (or the disclaimer, here) **would encompass delictual claims which did not arise pursuant to or during the services rendered by G4S.** <sup>17</sup>

**CONCLUSION:**

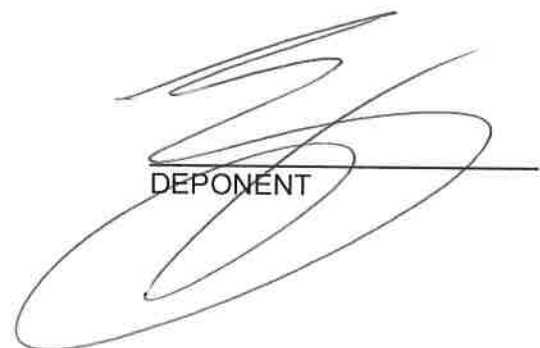
61. I respectfully submit that, even to an outsider and as a matter of simple common sense, it must be obvious that the exemption could only apply to losses sustained within the contractual setting. If, for example, a Schenker employee, on a Sunday afternoon, driving under the influence of alcohol, collided with a vehicle belonging to the Applicant, the otherwise wide-ranging exclusions could never be applicable.
62. Even if Lerama had been instructed to collect the goods, those instructions (and even the verification by FSI) did not have anything to do with the loss. The loss occurred when Lerama, in effect, changed his role from employee to thief. All the steps the Respondent took, merely provided him with the opportunity to do so. He did not take the documentation to execute the contract. He used it to steal the goods. His actions were completely removed from any intention to perform his employer's contract.
63. It must follow that if the disclaimer applied only during the performance of the contract (which it obviously did), it would be entirely illogical to reason that the intentional theft somehow formed part of the performance of the contract (as little as it would have been the case if an administrative clerk employed by the Respondent had secretly removed the necessary documentation and proceeded to the airport to steal the goods). The limitation contained in clause 50 of the contract also could not support the

<sup>17</sup> Whether we are concerned with a time limitation clause or an exemption / disclaimer, makes no difference to the principle.



Respondent (as it sought to demonstrate) since this clause, too, could only find effect if the goods were in the actual custody or under the actual control of the Respondent. (The clause served a different purpose).

64. In short, everything in the contract (taken together and in the relevant context) points to protection only while the Respondent was performing the contract. (There is a complete disconnect between the goods handled by, or dealt with by the Respondent on the one hand, and the goods handled or dealt with by a thief).
65. If the dictionary definitions were allowed to override context and everything else, the Supreme Court of Appeal's approach would mean that even the issue of an internal memorandum from one division of the Respondent to another, would likewise qualify as taking measures within the commercial context to execute the contract.
66. In these circumstances it is respectfully submitted that the Applicant has met the requirements for this Honourable Court to grant leave to appeal.

  
DEPONENT

I **CERTIFY** that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at La Lucia this 8th day of **FEBRUARY 2022**, the Regulations contained in Government Notice R.1258 published in Government



Gazette No. 3619 dated 21<sup>st</sup> July 1972 (as amended), having been complied with.



COMMISSIONER OF OATHS

FULL NAMES :

BUSINESS ADDRESS :

DESIGNATION :

AREA :

**LORYN LIBERTY**  
**COMMISSIONER OF OATHS**  
**PRACTISING ATTORNEY R.S.A**  
GARLICHE & BOUSFIELD INC  
7 Torsvale Crescent, La Lucia Ridge Office Estate  
Umhlanga Rocks 4320, South Africa





Tokio Marine Europe S.A.  
Niederlassung für Deutschland  
Berliner Allee 26  
D-40212 Düsseldorf  
Tel: ++49 211 17237-0  
tmhcc.com

**TO WHOM IT MAY CONCERN**

Your Contact: Mr. Thomas Deerberg      Phone: +49 211-17237-33      E-Mail: TDeerberg@TMHCC.com      Date: 8th February 2022      Dept.: Marine

**Fujitsu Services Core (Pty) Ltd. vs. Schenker South Africa (Pty) Ltd ("the action")**

**EVH Inc B7204/0001 / BDJ W002555120001**

**Theft of one pallet computer devices between 19th and 23<sup>rd</sup> June 2012**

Dear Sir or Madam,

We, Tokio Marine Europe S.A. confirm being the insurer regarding the above mentioned shipments forming the subject matter of the action and having proper rights by subrogation and we have and do hereby instruct and authorize

Mr. Erik van Huyssteen  
EVH Inc. Attorneys  
Unit 4, 7 Holwood Office Park  
5 Canegate Road  
La Lucia Ridge, 4319  
("the attorney")

to act for and on our behalf in relation to the action and to represent our interest therein and in doing so specifically to do all things necessary, take any actions required, sign all and any documents and affidavits required and to instruct agents and advocates to further act on our behalf and to, in doing so, take instructions either directly from our offices (represented by Head of Underwriting Marine J Business, Thomas Deerberg) or through the offices of our duly authorised agents, through our agents Burmester, Duncker and Joly GmbH and Co (represented by Senior Claims Manager, Julien Roseler).

Without limiting the generality of the foregoing, we hereby specifically authorise the attorney to so do all things necessary in order to, on our behalf, proceed with an application for leave to appeal the action to the Constitutional Court and to, if such leave is granted, pursue such an appeal to its finality.

DocuSigned by:

Kind regards

Thomas Deerberg  
Head of Underwriting Marine J Business

TOKIO MARINE  
EUROPE S.A.  
Zweigniederlassung  
für Deutschland  
Berliner Allee 26  
D-40212 Düsseldorf

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**Schenker (S.A.) (Pty) Ltd**

**National Distribution  
Proposal to  
Fujitsu Technology Solutions (Pty) Ltd**

Proposal Prepared By: Michela de Stefani  
Date: 19 May 2009



Schenker (S A ) (Pty) Ltd  
Head Office, Johannesburg  
Freight City, 24 Pomona Road  
Pomona, 1620  
www.schenker.co.za

Schenker (S A ) (Pty) Ltd Reg. No. 1962/003897/07

**Fujitsu technology Solutions (Pty) Ltd**  
**Attention: Ronn Sing**  
13 Friesland Drive  
Longmeadow Business Estate  
Modderfontein  
1609  
Tel: 011 284 3300  
[Ronn.sing@fujitsu-siemens.com](mailto:Ronn.sing@fujitsu-siemens.com)

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19 May 2009

**Ref: Revised National Distribution Agreement for Fujitsu Technology Solutions (Pty) Ltd**

Dear Ronn,

We would like to take this opportunity to thank you for your continued support over the past few years.

Herewith kindly find our revised National Distribution Agreement incorporating our annual rates review, which has not been adjusted *since April 2008*. We have adjusted all rates quoted in our previous agreement as reflected in the attached amended agreement.

Contributing factors to rate adjustment:

1. Foreign exchange volatility remains a destabilizing factor.
2. CPI peaked at 13.7% during the course of 2008 and the average CPI for 2008 is 11.5%.
3. The transport index peaked at 23.6% during the year. Fuel cost variations continue to hamper the Road Freight Industry.
4. Transport and labour costs have increased to more than 75% of our cost structure.
5. Annual escalation included in vehicle lease agreements due to increased maintenance costs.
6. Increased costs to service retail stores and regional area distribution.
7. Re-investment in business and IT developments to enhance infrastructure, security and services.

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The attached revision replaces any other contracts and / or agreements. Please note the escalation implementation date of **01 January 2010** incorporates the full billing month for the applicable month, which may include the last few days of the preceding month.

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We reiterate our commitment to service excellence and dedicated customer focus, and look forward to our continued mutually beneficial business relationship. Should you have any further enquiries, please do not hesitate to contact the undersigned.

Yours faithfully,  
Schenker (S.A.) Pty Ltd

**Michela de Stefani**  
**Business Relationship Manager – National Distribution**

Schenker (S.A.) (Pty) Ltd  
Freight City  
24 Pomona Road  
Pomona, Kempton Park  
P O Box 379  
Isando, 1600  
Tel: +27 11 971 8400  
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[www.schenker.co.za](http://www.schenker.co.za)

Registered Address:  
Freight City  
24 Pomona Road  
P O Box 379  
Isando, 1600

Directors:  
A J Pfeiffer (C.E.O.)  
D A Nair (C.O.O.)  
Dr T Leub (German) (Chairman)



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The Company is not a common carrier. All business and services are conducted according to Schenker (S.A.) (Pty) Ltd and the South Africa Association of Freight Forwarders, Standard Trading Terms and Conditions. Full text is available on request or can be accessed on our website <http://www.schenker.co.za>. All customers are deemed to have read and understood all the aforementioned conditions and agree to be bound thereby. We are acting as agents only and do not accept liability for actions, errors or omissions on the part of carriers or third parties who are governed by their respective rules, regulations and conditions.



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# Section One Proposed Rate Structure

## Overnight Express

Overnight delivery to **Main Centres only** by 10:30 the next business day. Deliveries & Collections on weekends and public holidays by prior arrangement. This service is subject to the availability of direct cargo flights from the main centre origin to final destination hub. Where direct flights are not available SFX will co-ordinate the transit on the next available linehaul service connection.

- National Minimum:** R50.00 for the first 1 kg  
 thereafter the below rate per kilogram will apply

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- Local Minimum:** R40.00 for the first 1 kg  
 thereafter the below local rate per kilogram will apply

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- Regional Surcharge:** R28.00 for the first 1kg  
 thereafter R2.80 per kg  
 Add the Regional Surcharge to the nearest Main Centre charge.  
 Consignments will be flown general cargo to meet the next available linehaul service cut-off.

MAIN CENTRES	JHB	PTA	KLE	PIE	NLP	WIT	DUR	PMB	BFN	CPT	GRJ	PLZ	ELS
Johannesburg	R 2.48												
Pretoria	R 3.08	R 2.48											
Klerksdorp	R 5.55	R 5.55	R 2.48										
Pietersburg	R 5.55	R 5.55	R 10.45	R 2.48									
Nelspruit	R 5.55	R 5.55	R 10.45	R 10.45	R 2.48								
Witbank	R 5.55	R 5.55	R 10.45	R 10.45	R 5.55	R 2.48							
Durban	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 2.48						
Pietermaritzburg	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 3.08	R 2.48					
Bloemfontein	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 10.45	R 2.48				
Cape Town	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 2.48			
George	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 10.45	R 2.48		
Port Elizabeth	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 20.09	R 10.45	R 2.48	
East London	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 23.65	R 20.09	R 10.45	R 2.48	

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Delivery the next business day to all Main Centres, delivery during business hours to all destinations, excluding weekends and public holidays. This service is subject to the availability of direct general cargo flights from the main centre origin to destination hub. Where direct flights are not available SFX will co-ordinate the transit on the next available linehaul service connection. This may result in a delay of an additional day to affect delivery to final destination.

**National Minimum:** R55.00 for the first 5 kgs  
 thereafter the below rate per kilogram will apply

**Local Minimum:** R45.00 for the first 5 kgs,  
 thereafter the below local rate per kilogram will apply

**Regional Surcharge:** R28.00 for the first 5 kgs  
 thereafter R1.65 per kg  
 Add the Regional Surcharge to the nearest Main Centre charge.

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MAIN CENTRES	JHB	PTA	KLE	PIE	NLP	WIT	DUR	PMB	BFN	CPT	GRJ	PLZ	ELS
Johannesburg	R 1.87												
Pretoria	R 2.48	R 1.87											
Klerksdorp	R 3.08	R 3.08	R 1.87										
Pietersburg	R 3.08	R 3.08	R 3.85	R 1.87									
Nelspruit	R 3.08	R 3.08	R 3.85	R 3.85	R 1.87								
Witbank	R 3.08	R 3.08	R 3.85	R 3.85	R 3.08	R 1.87							
Durban	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 1.87						
Pietermaritzburg	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 2.47	R 1.87					
Bloemfontein	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 3.85	R 1.87				
Cape Town	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 1.87			
George	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 3.85	R 1.87		
Port Elizabeth	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 4.29	R 3.85	R 1.87	
East London	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 11.00	R 4.29	R 3.85	R 1.87	

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**Economy Road Service**

Delivery to Main Centers listed below by no later than the **second business day** after collection. An additional day is required where there is a trans-shipment onto a second linehaul route (example: DUR – CPT linehaul via Johannesburg). An additional two days are required to effect delivery to other (regional) destinations. Delivery during business hours to all destinations, excluding weekends and public holidays.

**National Minimum:** R60.00 for the first 20 kgs  
 thereafter the below rate per kilogram will apply

**Local Minimum:** R50.00 for the first 20 kgs  
 thereafter the below local rate per kilogram will apply

**Regional Surcharge:** R28.00 for the first 20 kgs  
 thereafter R1.10 per kg  
 Add the Regional Surcharge to the nearest Main Centre charge.

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MAIN CENTRES	JHB															
Johannesburg	JHB	R 1.00	PTA													
Pretoria	PTA	R 1.21	R 1.00	KLE												
Klerksdorp	KLE	R 2.04	R 2.04	R 1.00	PIE											
Pietersburg	PIE	R 2.04	R 2.04	R 2.15	R 1.00	NLP										
Nelspruit	NEL	R 2.04	R 2.04	R 2.15	R 2.15	R 1.00	WIT									
Witbank	WIT	R 2.04	R 2.04	R 2.15	R 2.15	R 2.15	R 1.00	DUR								
Durban	DUR	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 1.00	PMB							
Pietermaritzburg	PMB	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 1.49	R 1.00	BFN						
Bloemfontein	BFN	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 2.15	R 1.00	CPT					
Cape Town	CPT	R 2.42	R 2.42	R 2.75	R 2.75	R 2.75	R 2.75	R 2.64	R 2.64	R 2.42	R 1.00	GRJ				
George	GRJ	R 2.75	R 2.75	R 3.08	R 3.08	R 3.08	R 3.08	R 2.97	R 2.97	R 2.42	R 2.20	R 1.00	PLZ			
Port Elizabeth	PLZ	R 2.75	R 2.75	R 3.08	R 3.08	R 3.08	R 3.08	R 2.97	R 2.97	R 2.42	R 2.31	R 2.31	R 1.00	ELS		
East London	ELS	R 2.75	R 2.75	R 3.08	R 3.08	R 3.08	R 3.08	R 2.97	R 2.97	R 2.42	R 2.42	R 2.42	R 2.31	R 1.00		

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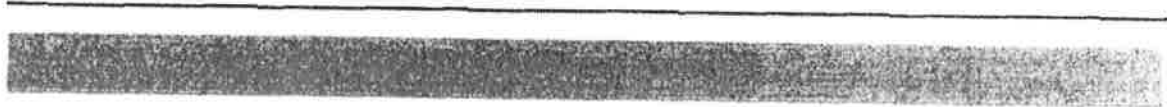
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Delivery to Main Centers listed below by no later than the **fourth business day** after collection. An additional day is required where there is a trans-shipment onto a second linehaul route (example: DUR – CPT linehaul via Johannesburg). An additional two days are required to effect delivery to other (regional) destinations. Delivery during business hours to all destinations, excluding weekends and public holidays.

**National Minimum:** R100.00 for the first 50 kgs  
 thereafter the below rate per kilogram will apply

**Local Minimum:** R80.00 for the first 50 kgs  
 thereafter the below local rate per kilogram will apply

**Regional Surcharge:** R70.00 for the first 50 kgs  
 thereafter R1.65 per kg  
 Add the Regional Surcharge to the nearest Main Centre charge.

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MAIN CENTRES	JHB																	
Johannesburg	JHB	R 0.88	PTA															
Pretoria	PTA	R 1.10	R 0.88	KLE														
Klerksdorp	KLE	R 1.93	R 1.93	R 0.88	PIE													
Pietersburg	PIE	R 1.93	R 1.93	R 2.04	R 0.88	NLP												
Nelspruit	NEL	R 1.93	R 1.93	R 2.04	R 2.04	R 0.88	WIT											
Witbank	WIT	R 1.93	R 1.93	R 2.04	R 2.04	R 2.04	R 0.88	DUR										
Durban	DUR	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 0.88	PMB									
Pietermaritzburg	PMB	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 1.38	R 0.88	BFN								
Bloemfontein	BFN	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 2.04	R 0.88	CPT							
Cape Town	CPT	R 2.31	R 2.31	R 2.64	R 2.64	R 2.64	R 2.64	R 2.53	R 2.53	R 2.31	R 0.88	GRJ						
George	GRJ	R 2.64	R 2.64	R 2.97	R 2.97	R 2.97	R 2.97	R 2.86	R 2.86	R 2.31	R 2.09	R 0.88	PLZ					
Port Elizabeth	PLZ	R 2.64	R 2.64	R 2.97	R 2.97	R 2.97	R 2.97	R 2.86	R 2.86	R 2.31	R 2.20	R 2.20	R 0.88	ELS				
East London	ELS	R 2.64	R 2.64	R 2.97	R 2.97	R 2.97	R 2.97	R 2.86	R 2.86	R 2.31	R 2.31	R 2.31	R 2.20	R 0.88				

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Delivery to Main Centres on the **same day** of collection.

**National Main Centres:** Subject to availability & capacity of scheduled flights.

**National Minimum:** R420.00 for the first 1 kg thereafter R24.50 per kilogram  
Where no flights are available, a drive-away sameday will be arranged.  
Such requirements are subject to individual quote.

**Local Minimum:** R220.00 for the first 1 kg thereafter R3.85 per kilogram  
Where the collection and delivery is effected in the same Main Centre.

10 **Express Priority** surcharge of R75.00 per consignment is applicable & billed in conjunction with Overnight Express rate. Delivery in **Main Centres** by 08h30 the following business day.

Deliveries and collections effected on a **Saturday** will incur a surcharge of:

R150.00 for the first 1 kg thereafter R2.75 per kilogram per consignment.

Available to all Main Centres and billed in conjunction with Overnight Express rate.

**After Hours** (incl. Sundays & Public Holidays) delivery or collection surcharge:

Collections or deliveries between 18H00 and 22H00 will incur a R330.00 surcharge.

Collections or deliveries between 22H00 and 07H00 will incur a R550.00 surcharge.

20 Available to all Main Centres and billed in conjunction with Overnight Express rate.

After hours collections or deliveries to Regional Areas are subject to individual quote.

Deliveries or Collections effected at **Mines, Plots, Farms, Rural Areas** and Townships will incur a surcharge of: R165.00 for the first 1 kg thereafter R2.75 per kilogram per consignment.

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**Chain Store Deliveries**

Delivery to Chain Stores within ONE CALENDAR WEEK, AFTER the normal economy transit days for all Main Centres, and is subject to the booking dates allocated to Schenker by the relevant Store. Only the Schenker delivery branch may make bookings, in accordance with their delivery schedule. Delivery will be effected during business hours to all destinations, excluding weekends and public holidays. An additional two days are required to affect delivery to other destinations.

<b>National Minimum:</b>	R95.00 for the first 20 kgs thereafter the below rate per kilogram will apply
<b>Local Minimum:</b>	R85.00 for the first 20 kgs thereafter the below local rate per kilogram will apply
<b>Regional Surcharge:</b>	R28.00 for the first 20 kgs thereafter R1.65 per kg Add the Regional Surcharge to the nearest Main Centre charge.
<b>Ad-Hoc Chain Store Delivery Surcharge:</b>	R450.00 for the first 1 kg thereafter the relevant EXPRESS RATE per kilogram will apply. The surcharge will be ADDED to the rates specified above. Should delivery be required within a shorter time frame than the above service standard OR on a specific delivery date as specified by the customer a surcharge will be applied (e.g. emergencies or promotions).

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MAIN CENTRES	JHB																		
Johannesburg	JHB R 1.50	PTA																	
Pretoria	PTA R 1.50	R 1.90	KLE																
Klerksdorp	KLE R 2.70	R 2.70	R 1.90	PIE															
Pietersburg	PIE R 2.70	R 2.70	R 2.85	R 1.90	NLP														
Nelspruit	NEL R 2.70	R 2.70	R 2.85	R 2.85	R 1.90	WIT													
Witbank	WIT R 2.70	R 2.70	R 2.85	R 2.85	R 2.70	R 1.90	DUR												
Durban	DUR R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 1.90	PMB											
Pietermaritzburg	PMB R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.00	R 1.90	BFN										
Bloemfontein	BFN R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 2.85	R 1.90	CPT									
Cape Town	CPT R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 1.90	GRJ								
George	GRJ R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 3.75	R 2.85	R 1.90	PLZ						
Port Elizabeth	PLZ R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 2.95	R 2.85	R 1.90	ELS					
East London	ELS R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 3.15	R 2.95	R 2.85	R 1.90					

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**Over Border Delivery Service**

**Road Freight (Door to Door Service)**

From Johannesburg to below Destination:

	<b>Botswana</b>	<b>Minimum (0-20 Kg)</b>	<b>Rate per Kg</b>	<b>Transit Time</b>
	Gaberone	R220.00 (0 - 20 Kg)	R2.20 per kg	1 - 3 Days
	Francistown	R330.00 (0 - 20 Kg)	R3.30 per kg	3 - 4 Days
	Southern Botswana	R300.00 (0 - 20 Kg)	R3.30 per kg	1 - 3 Days
	Central Botswana	R385.00 (0 - 20 Kg)	R3.85 per kg	2 - 4 Days
	Northern Botswana	R495.00 (0 - 20 Kg)	R4.95 per kg	3 - 5 Days
10	<b>Swaziland</b>	<b>Minimum (0-20 Kg)</b>	<b>Rate per Kg</b>	<b>Transit Time</b>
	Manzini, Matsapa, Ezulwini, Malkems	R190.00 (0 - 20 Kg)	R2.20 per kg	1 - 2 Days
	Swaziland Regional	R220.00 (0 - 20 Kg)	R2.20 per kg	2 - 4 Days
	<b>Namibia</b>	<b>Minimum (0-20 Kg)</b>	<b>Rate per Kg</b>	<b>Transit Time</b>
	Windhoek	R250.00 (0 - 20 Kg)	R4.40 per kg	2 - 4 Days
	Swakopmund, Walvis Bay, Rehoboth, Mariental, Gobabis, Omaruru	R275.00 (0 - 20 Kg)	R5.50 per kg	2 - 4 Days
	Keetmanshoop, Grootfontein	R360.00 (0 - 20 Kg)	R6.60 per kg	2 - 4 Days
	Oranjemund, Oshakati, Khorixa, Ombalantu, Okakarara	R385.00 (0 - 20 Kg)	R7.15 per kg	2 - 5 Days
20	Luderitz, Henties Bay, Rundu	R435.00 (0 - 20 Kg)	R7.70 per kg	4 - 5 Days
	<b>Lesotho</b>	<b>Minimum (0-20 Kg)</b>	<b>Rate per Kg</b>	<b>Transit Time</b>
	Maseru	R275.00 (0 - 20 Kg)	R3.30 per kg	2 - 3 Days

**Surcharges**

<b>Volumetric Ratio:</b>	2000 cubic centimetres per kg
<b>Documentation Fee:</b>	R165.00 per waybill
<b>Sales Tax:</b>	If sales tax is paid on customer behalf, facility fee of 10%, R55.00 minimum. Will be charged
<b>Notes:</b>	An original supplier's invoice plus three copies must accompany all consignments. In instances where value exceeds SAR 50 000, a bank form F178 stamped by the suppliers bank must also be included.

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<b>Additional Charges</b>	
<b>Chargeable Mass:</b>	Chargeable mass of consignments is based on actual mass, or a volumetric ratio of 5000 cubic centimetres per kg per piece, whichever is the greater.
<b>Remote Surcharge:</b>	Where a Regional Area is further than 250kms from a main centre, an additional R150.00 remote surcharge will be added to the regional rate per consignment.
<b>Documentation Fee:</b>	A Documentation Fee of R0.00 will be levied per waybill/invoice dispatched.
<b>Fuel Surcharge:</b>	A fuel surcharge of 13.3% is levied, based on the cost of fuel during February 2009. A proportionate adjustment will be made should the fuel price increase or decrease. Notification will be distributed each month with any adjustments. Detailed statistics are available upon request.
<b>Palletize and Shrink-Wrap of consignments:</b>	A fee of R150.00 per pallet will be levied.
<b>In-house charges:</b>	Will be negotiated separately, depending on customer requirement and monthly spend.
<b>POD's:</b>	POD's will be supplied free of charge on an adhoc basis. However, should a POD be required for every shipment within a specified time frame a R15.00 levy per POD will be charged.
<b>Return Surcharge:</b>	A R50.00 admin fee will be levied on all return delivery consignments and billed in conjunction with the return of freight charges.
<b>Account Facility Fee:</b>	A Monthly Fee of R200.00 will be levied on all accounts with a expenditure of less than R1,000.00 per month.
<b>VAT:</b>	Value added tax is excluded from all quoted fees.

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## Section Two Contract Conditions

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**Receiver to Pay Service:** Charges collect facility available if the consignee holds a valid Schenker Freight Express account code. The sender remains responsible should charges be refused at destination.

**COD Transactions:** No service is available to collect payment for cost of goods upon delivery. Contact your nearest call centre for alternatives.

**Insurance:** Service fees do not include cover for loss or damage whilst goods are in transit. Please see proposal for Insurance availability.

**Liability:** No liability for loss in transit is accepted in terms of our Standard Trading Conditions. Copies of our conditions are available from your nearest call centre or on Schenker's website ([www.schenker.co.za](http://www.schenker.co.za)).

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**Negligence:** Negligence claims in the event "goods in-transit" insurance cover is declined: No liability for loss in transit or negligence will be accepted. Schenker has no insurable interest in the cargo, goods in transit (GIT) insurance/marine insurance must be arranged by yourselves or your supplier. Should a loss be experienced you or your supplier should lodge a claim against your insurers. Once your claim has been settled by your insurers, your insurers will then attempt to recover the loss or damage from all parties involved in the freight forwarding process. To this end and in terms of our Standard Trading Terms and Conditions, Schenker has a Liability Insurance Policy in place and should it be proven that we were negligent in the handling of your cargo leading to the loss or damage, our Liability Insurance will settle any claims subject to the limitations of the Standard Trading Terms and Conditions

**Collection Times:** Collections scheduled during standard business hours. After hours services available by arrangement.

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**Hazardous Goods:** SFX is not registered to carry hazardous cargo and will recommend licensed hazardous cargo haulers where necessary. The sender is responsible for ensuring that no hazardous cargo is handed to SFX.

All business undertaken is subject to the Standard Trading Terms and Conditions of SAAFF which have been adopted by Schenker (S.A.) (Pty) Ltd. A copy is available on request.

19 May 2009

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<b>Contract conditions continued/...</b>	
<b>Scheduled Drugs:</b>	Advance notification is imperative to ensure special handling for schedule six and higher drugs.
<b>Chain Stores Deliveries:</b>	Transit times for delivery to chain stores are subject to delays due to delivery booking requirements and congestion at store receiving areas. A store will be considered a 'Chain Store' should the delivery requirement be receiving of cargo through a 'back door' receiving (queuing process) and (or) where bookings are required. The following stores are listed as examples of Chain Stores: Ackermans, Builders Warehouse, CNA, Cashbuild, Clicks, Clothing City, CTM, Dion, Dischem, Ellerines, Foschini, Game, Hyperama, Hypermarket, Incredible Connection, Joshua Doore, Makro, Markhams, Metro Cash & Carry, Mica, Miladys, MR Price, Outdoor Warehouse, PEP, Pick n Pay, Queenspark, Servistar, Shoprite Checkers, Spar, Stax, Stuttafords, Supermart, Trade Centre, Truworths, UPD, Woolworths and most DC's (Distribution Centres), etc.
<b>Packaging &amp; Parcel Identification:</b>	All consignments must be marked, packed, sealed (unique security tape & tamper proof seals to ensure that any tampering is clearly visible to receiver) & strapped to ensure adequate protection during standard handling, stacking and storage whilst in transit. Waybill, sender and receiver name, address & contact details are required on all parcels to ensure clear identification. A copy of the waybill/invoice must be made available for SFX billing. The cost of packaging, sealing, strapping and labeling of consignments for transportation and tracking purposes have been excluded from this proposal. Schenker reserves the right of approval of the minimum packaging requirement for secure distribution.
<b>Attempted Collections and Deliveries:</b>	Unsuccessful collection and/or delivery attempts due to no fault of SFX, (e.g. goods not ready at collection point, delivery rejected by recipient or recipient not available to receive goods etc) will be charged according to the applicable rate quoted in this proposal.
<b>Mode of Transport:</b>	SFX reserves the right to exclusively determine the network routing and mode of transport to ensure that service levels are maintained.
<b>Delivery Delays:</b>	Where delivery is refused and SFX was directly at fault, a full credit for the SFX transportation charges will be passed.

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**Contract conditions continued/...**

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**Distribution Parameters:** The rates on this proposal are based on the distribution parameters supplied by your company. Should the below details fluctuate considerably, Schenker reserves the right to renegotiate.  
Average expenditure per month: > R200,000.00  
Average % to Main Centres: > 80%  
Average % to Chain Stores: < 65% (Makro Only)

**Proof of Delivery (POD) Document Return:** Schenker will endeavor to confirm delivery of goods via return of POD document. Should POD copy on customer Invoice, Delivery Note or Schenker Waybill be misplaced, credit for transportation costs and/or claims will not be entertained in all instances where Schenker is able to confirm delivery of goods via alternative methods (e.g. a fully endorsed Trip Sheet). **Payment of freight charges may not be withheld against outstanding POD's.**

**Weight & Measurement Verification:** All consignments will be weighed and dimmed by Schenker. Should there be a variance in the weight or volumetric measurements, those determined by Schenker will apply.

**Replacement Agreement:** This proposal replaces all other proposals and/or agreements submitted prior to the date of this proposal.

20

**Validity:** This proposal will remain valid for 30 days from date specified on this proposal and will be effective upon signed acceptance thereof, and once the completed application has been approved by Schenker.

**Escalation:** Quoted prices will escalate annually on anniversary date, in accordance with the applicable rate of inflation (CPIX). Should it be necessary to adjust the rates prior to the annual review date, based on changes in industry or legislation, 30 days notification will be sent.

**Acceptance:** Your utilization of the services as set out in this proposal, serves as confirmation of your acceptance of this proposal and its conditions.

30

**Terms of Payment:** **Terms of payment** are 30 days from date of statement. Any outstanding claims or POD's must be directed through the SFX Risk Department. No monies in lieu thereof may be deducted from your monthly statement.

**Interest:** **Interest** is payable on overdue accounts at a rate of 1.85% on 30 days and a rate of 2.97% on 60 days

**Trading Conditions:** Trading is subject to Schenker's Standard Trading Conditions.

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## Section Three Goods in Transit Insurance

Schenker service fees do not include cover for loss, damage or negligence whilst goods are in transit. Insurance cover is available at the rates specified below, once signed and accepted. Please select one of the following flexible options to suit your specific insurance requirements:

	Option 1: Capped Value R1,000.00	Option 2: Capped Value R2,000.00	Option 3: Capped Value R5,000.00	Option 4: Declared Value Value must be specified on the waybill
<b>Minimum Fee per Consignment:</b>	R 5.00 Covers up to R1,000.00 insurable value	R 8.00 Covers up to R2,000.00 insurable value	R15.00 Covers up to R5,000.00 insurable value	0.75 % of declared value of goods – Minimum R25.00
<b>Limit:</b>	R1,000.00 per consignment	R2,000.00 per consignment	R5,000.00 per consignment	R250,000.00 per consignment
<b>Excess:</b>	R50.00	R100.00	R250.00	1% or min of R250.00
<b>Hi-jack Excess:</b>				20% or min of R750.00
<b>Kindly indicate selected insurance option:</b>	Signed acceptance: Option 1	Signed acceptance: Option 2	Signed acceptance: Option 3	Signed acceptance: Option 4

- Notes:**
1. Minimum Fee includes an administration fee of R1.50 on Options 1 and 2, no admin fee on Option 3 and 0.25% of the declared value on Option 4.
  2. No migration of options: Once the applicable option is selected, this will apply to all consignments. Insurance options may not be changed without prior written authorization from Schenker's Risk Management Department.
  3. Cover: "All risks" in terms of Institute Cargo Clauses (A), including Institute strikes Clauses (Cargo). Please refer attached Institute Cargo Clauses (A) for detailed information on Risks Covered, Exclusions and other applicable clauses.
  4. Transport mode: Road and air, to and from anywhere within South Africa.
  5. Packaging: The onus is on the sender to ensure all goods are packed securely to ensure adequate protection against standard handling, slacking and storage procedures whilst in transit.
  6. Limit (applicable to Option 4 only): Where the insured value exceeds R250,000.00 per consignment / waybill, please contact Schenker Risk Management department in order for special arrangements to be made.
  7. Excludes:
    - a. Unendorsed pods, where a clean pod can be supplied by Schenker
    - b. Consignments where client has received payment from their customer
    - c. Loss / damage resulting from delay, consequential loss and Fidelity Guarantee losses
    - d. Factory faults, second hand goods
    - e. Claims resulting from insufficient packaging
    - f. No claims will be entertained if payment on the Schenker debtors account is withheld to offset claim/s, or payment is overdue, in terms of our Standard Trading Conditions.
  8. Claims submissions period: Claims must be submitted in writing to the Schenker Claims Department within 30 days of consignment being dispatched, with the exception of claims resulting from hi-jacked goods, which must be submitted within 48-hours of the event. Schenker will not accept liability in the instance of late submission of claims.

**Goods in Transit Insurance Cover Endorsement:**

Accepted:  Declined:

Company: FUJITSU TECHNOLOGY SOLUTIONS (PTY) LTD

Signed at: PARONA

On: (dd/mm/yyyy) 10/07/2009

Name: S. MARRIDAY

Signature: [Signature]

Signed for on behalf of THE ACCOUNT HOLDER, who warrants that he/she is so duly authorised.

All business undertaken is subject to the Standard Trading Terms and Conditions of SAAFF which have been adopted by Schenker (S.A.) (Pty) Ltd. A copy is available on request.

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*[Handwritten signatures and initials]*

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## Section Four Confirmation of Customer Acceptance

This serves to confirm acceptance of the Terms and Conditions contained in this Proposal. This Proposal supersedes all prior Proposals should these exist, and no Clause of this document, may be altered either in part or in full, unless these alterations are agreed to by both parties, and reduced to writing and acceptance thereof is confirmed by the signature of both parties.

10

<b>I/We hereby confirm</b>	Company:	<u>FUJITSU TECHNOLOGY SOLUTIONS</u>
<b>acceptance of the above</b>	Signed at:	<u>PAMONA</u>
<b>Proposal and Quotation</b>	On: (dd/mm/yyyy)	<u>10/07/2009</u>
<b>presented by SCHENKER</b>	Name:	<u>S. MARRIDAY</u>
<b>FREIGHT EXPRESS</b>	Signature:	<u>[Signature]</u>
<b>(SFX), and sign in</b>	<b>Signed for on behalf of THE ACCOUNT HOLDER, who warrants that</b>	
<b>acceptance thereto.</b>	<b>he/she is so duly authorised.</b>	

Should you have any queries, please do not hesitate to contact the undersigned.

Yours sincerely,

**Michela de Stefani**

**Business Relationship Manager**

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Tel: +27 11 966 8800  
Fax: +27 11 966 8836  
Cell: +27 082 491 7182  
Email: [michela.destefani@schenker.co.za](mailto:michela.destefani@schenker.co.za)

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**SOUTH AFRICAN ASSOCIATION  
OF FREIGHT FORWARDERS  
TRADING TERMS  
AND  
CONDITIONS**

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## APPENDIX B

# SOUTH AFRICAN ASSOCIATION OF FREIGHT FORWARDERS TRADING TERMS AND CONDITIONS

October 1990 Edition

### 1. INTERPRETATION

In these trading terms and conditions:-

- 10
- 1.1 the headings to the clauses are for reference purposes only and shall not aid in the interpretation of the clauses to which they relate;
- 1.2 unless the context clearly indicates a contrary intention, words importing any one gender include the other two genders, the singular includes the plural and *vice versa*, and natural persons include created entities (corporate or unincorporated) and *vice versa*;
- 1.3 the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have a corresponding meaning, namely -
- 20
- 1.3.1 "the Company" means the Company referred to above, or if it exercises its rights under clause 2, the member of the group in respect of which it exercises its rights;
- 1.3.2 "customer" means any person at whose request or on whose behalf the Company undertakes any business or provides any advice, information or services;
- 1.3.3 "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;
- 1.3.4 "the group" means the Company and any Company which is a holding Company or subsidiary of the Company from time to time which may render services to the customer in terms of clause 2;
- 1.3.5 "the owner" means the owner of goods to which any business concluded under these trading terms and conditions relates and any other person who is or may have or acquire any interest, financial or otherwise, therein.

### 30 2. MEMBERS OF THE GROUP RENDERING SERVICES TO THE CUSTOMER

The Company may at its election perform all and any business undertaken or provide advice, information or services, whether gratuitous or not, either itself or it may procure that any member of the group undertakes such business or provides such advice, information or services as principal upon and subject to the terms and conditions contained herein which shall apply *mutatis mutandis* to the customer and any such member of the group.

### 3. APPLICATION OF TRADING TERMS AND CONDITIONS

Subject to clause 5, 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 (as amended from time to time).



4. **OWNER'S RISK**  
All handling, packing, loading, unloading, warehousing and transporting of goods by or on behalf of or at the request of the Company are affected at the sole risk of the customer and/or the owner, and the customer indemnifies the Company accordingly.
5. **APPLICABLE LEGISLATION**  
5.1 If the Company is obliged, in the execution of any of its duties and/or responsibilities to comply with any common law or legislative enactment ("the law") of any nature whatsoever, then the Company by complying therewith shall not be deemed to waive nor abandon any of its rights in terms of these trading terms and conditions.  
5.2 In addition thereto, in complying with the law, the Company shall not be deemed to have assumed any onus, obligation, responsibility or liability in favour of the customer; 10  
5.3 If any of the terms of these trading terms and conditions is repugnant to or in conflict with the law, then and in such event the conflicting term embodied herein shall be deemed to be amended and/or altered to conform therewith, and such amendment and/or alteration shall not in any way affect the remaining provisions of these trading terms and conditions.
6. **FIATA COMBINED TRANSPORT BILL OF LADING**  
The Company shall be entitled to issue in respect of the whole or part of any contract for the movement of goods a FIATA combined transport bill of lading ("FBL") provided that where a FBL is issued these trading terms and conditions shall continue to apply except insofar as they conflict with the terms and conditions applicable to the FBL. The issue of a FBL by the Company shall entitle it to raise an additional charge, determined by the Company, to cover its additional obligations arising under the FBL. 20
7. **EXCLUSION OF OBLIGATIONS OF COMMON OR PUBLIC CARRIER**  
The Company deals with goods only on the basis that it is neither a common carrier nor a public carrier.
8. **COMPANY'S DISCRETION IN THE ABSENCE OF INSTRUCTIONS**  
In the absence specific instructions given timeously in writing by the customer to the Company -  
8.1 it shall be in the reasonable discretion of the Company to decide at what time to perform or to procure the performance of any or all of the acts which may be necessary or requisite for the discharge of its obligations to the customer; 30  
8.2 the Company shall have an absolute discretion to determine the means, route and procedure to be followed by it in performing all or any of the acts or services it has agreed to perform;  
8.3 in all cases where there is a choice of tariff rates or premiums offered by any carrier, warehouseman, underwriter, or other person depending upon the declared value of the relevant goods or the extent of the liability assumed by the carrier, warehouseman, underwriter or other person, it shall be in the discretion of the Company as to what declaration, if any, shall be made, and what liability, if any, shall be imposed on the carrier, warehouseman, underwriter or other person.
9. **COMPANY'S GENERAL DISCRETION**  
9.1 Notwithstanding anything to the contrary herein contained, if at anytime the Company should consider it to be in the customer's interests or for the public good to depart from any of the customer's instructions, the Company shall be entitled to do so and shall not incur any liability in consequence of doing so. 40  
9.2 If events or circumstances come to the attention of the Company, its agents, servants or nominees which, in the opinion of the Company, make it in whole or in part, impossible or impracticable for the Company to comply with a customer's instructions the Company shall take reasonable steps to inform such customer of such events or circumstances and to seek further instructions. If such further instructions are not timeously received by the Company in writing the Company shall, at its sole discretion, be entitled to detain, return, store, sell, abandon, or destroy all or part of the goods concerned at the risk and expense of the customer. 50





10. **INSURANCE**

The Company shall endeavour to affect any insurance the customer timeously and in writing instructs it to effect. Such insurance will be subject to such exceptions and conditions as may be imposed by the insurance company or underwriter taking the risk and the Company shall not be obliged to obtain separate cover for any risks so excluded. Unless otherwise agreed in writing the Company shall not be under any obligation to obtain separate insurance in respect of separate consignments but may insure all or any of such consignments under any open or general policy held by the Company from time to time. Should any insurer dispute its liability in terms of any insurance policy in respect of any goods, the customer concerned shall have recourse against such insurer only and the Company shall not have any responsibility or liability whatsoever in relation thereto notwithstanding that the premium paid on such policy may differ from the amount paid by the customer to the Company in respect thereof. Insofar as the Company agrees to arrange insurance the Company acts solely as agent for and on behalf of the customer.

11. **COMPANY'S OBLIGATIONS IN THE ABSENCE OF INSTRUCTIONS**

Unless specific written instructions are timeously given to and accepted by the Company, the Company shall not be obliged to-

- 11.1 make any declaration for the purpose of any statute, convention, or contract, as to the nature or value of any goods or as to any special interest in delivery. In particular, the Company shall be under no obligation to make any declaration or to seek any special protection or cover from any carrier in respect of any goods which are, or fall within the definition ascribed thereto by that body of dangerous goods or other goods which require special conditions of handling or storage;
- 11.2 arrange for any particular goods to be carried, stored or handled separately from other goods.

12. **CUSTOMER'S UNDERTAKINGS**

12.1 For all purposes hereunder the customer shall be deemed to have in relation to the customer's business, the goods and the services to be rendered by the Company in regard thereto, reasonable knowledge of any matters directly or indirectly relating thereto or arising there from including, without limitation, terms of sale and purchase and all matters relating thereto and the customer undertakes to supply all pertinent information to the Company.

12.2 The customer warrants that-

- 12.2.1 it is either the owner or the authorised agent of the owner of any goods in respect of which the customer instructs the Company and that each such person is bound by these trading terms and conditions;
- 12.2.2 in authorising the customer to enter into any contract with the Company and/or in accepting any document issued by the Company in connection with such contract, the owner, or consignee is bound by these trading terms and conditions for itself and its agents and for any parties on whose behalf it or its agents may act, and in particular, but without prejudice to the generality of the foregoing, it accepts that the Company shall have the right to enforce against them jointly and severally any liability of the customer under these trading terms and conditions or to recover from them any sums to be paid by the customer which upon proper demand have not been paid;
- 12.2.3 all information and Instructions supplied and to be supplied by it to the Company is and shall be accurate, true and comprehensive, and in particular, without derogating from the generality of the foregoing, the customer shall be deemed to be bound by and warrants the accuracy of all descriptions, values and other particulars furnished to the Company for customs, consular and other purposes, and the customer warrants that it will not withhold any necessary or pertinent information, and indemnifies the Company against all claims, losses, penalties, damages, expenses and fines whatsoever, whensoever and howsoever arising as a result of a breach of the foregoing whether negligently or otherwise including, without derogating from the generality of the foregoing, any assessment or reassessment;
- 12.2.4 all goods will be properly, adequately and appropriately prepared and packed, stowed, labeled and marked, having regard *inter alia* to the implementation by or on



- behalf of the Company or at its instance of the contract involved, and the characteristics of the goods involved and are capable of withstanding the normal hazards inherent in the implementation of such contract;
- 12.2.5 where goods are carried in or on containers, trailers, flats, tilts, railway wagons, tanks, igloos or any other unit load devices specifically constructed for the carriage of goods by land, sea or air, (each such device hereinafter Individually referred to as "the transport unit") then, save where the Company has been given and has accepted specific written instructions to load the transport unit -
- 12.2.5.1 that the transport unit has been properly and competently loaded; and
- 12.2.5.2 that the goods involved are suitable for carriage in or on the transport unit; and
- 12.2.5.3 that the transport unit is itself in a suitable condition to carry the goods loaded therein and complies with the requirements of all relevant transport authorities and carriers.
- 10
13. **RECOVERY OF DEBTS DUE TO THE COMPANY**  
The Company shall be entitled to recover any amounts due to it by the customer in respect of instructions relating to or in terms of any contract in respect of particular goods from the customer, or if the customer act as agent for a disclosed or undisclosed principal from the customer or the principal, as the Company In its absolute discretion deems fit.
14. **COMPANY ENTITLED TO ACT AS AGENT OR PRINCIPAL IN CONTRACTING**
- 14.1 Unless otherwise agreed in writing, the Company in procuring the carriage, storage, packaging or handling of goods shall be entitled to act either as an agent for and on behalf of the customer or as a principal, as it in its absolute discretion deems fit.
- 14.2 The offer and acceptance of a fixed price for the accomplishment of any task shall not itself determine whether such task is to be arranged by the Company acting as agent for and on behalf of the customer or as principal.
- 14.3 The customer acknowledges that when the Company acting as agent for and on behalf of the customer concludes any contract with a third party, such agreement is concluded between the customer and the third party.
- 14.4 Unless otherwise agreed in writing, the Company, when acting as agent for and on behalf of the customer, shall be entitled to enter into any contract it reasonably deems necessary or requisite for the fulfillment of the customer's instructions, including, without limitation, contracts for the -
- 14.4.1 carriage of goods by any route or means or person;
- 14.4.2 storage, packing, transport, shipping, loading, unloading and/or handling of goods by any person at any place whether on shore or afloat and for any length of time;
- 14.4.3 carriage or storage of goods in break-bulk form or in or on transport units as defined in clause 12.2.5 or with or without other goods of whatsoever nature.
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- 30
15. **SUBCONTRACTING**
- 15.1 Any business entrusted by the customer to the Company may, in the absolute discretion of the Company, be fulfilled by the Company itself, by its own servants performing part or all of the relevant services, or by the Company employing, or entrusting the goods or services to third parties on such conditions as may be stipulated by, or negotiated with, such third parties for the purposes of such services, or such part thereof as they may be employed to carry out.
- 15.2 Where the Company employs third parties to perform all or any of the functions which it has agreed to perform, the customer agrees that the Company shall have no responsibility or liability to its customer for any act or omission of such third party, even though the Company may be responsible for the payment of such third party's charges; but the Company shall, provided it has been suitably indemnified against all costs, (including attorney and client costs) which may be incurred by or awarded against the Company, take such action against the third party on the customer's behalf as the customer may direct.
- 40
- 50



**16. TERMS AND CONDITIONS OF AGENTS AND SUBCONTRACTORS**

Notwithstanding anything to the contrary contained herein the customer agrees that all goods shall be dealt with by the Company on the terms and conditions, whether or not inconsistent with these trading terms and conditions, stipulated by the carriers, warehousemen, government departments, and all other parties (whether acting as agents or subcontractors to the Company or not) into whose possession or custody the goods may pass, or subject to whose authority they may at any time be.

**17. GOODS REQUIRING SPECIAL ARRANGEMENTS**

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Except under special arrangements previously made in writing the Company will not accept or deal with bullion, coin, precious stones, jewelry, valuables, antiques, pictures, human remains, livestock or plants. Should the customer nevertheless deliver 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 the Company 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 the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 40 and 41.

**18. GOODS REQUIRING PRIOR CONSENT OF COMPANY**

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18.1 The customer shall obtain in advance the Company's specific written consent to accept into its possession or control or into the possession or control of any of its servants, agents or employees any goods, including radio-active materials, which may be or become dangerous, inflammable or noxious, or which by their nature may injure, damage, taint or contaminate, or in any way whatsoever adversely affect any person, goods or property, including goods likely to harbour or attract vermin or other pests. The customer warrants that such goods, or the case, crate, box, drum, canister, tank, flat, pallet, package or other holder or covering of such goods will comply with any applicable laws, regulations or requirements of any authority or carrier and that the nature and characteristics of such goods and all other data required by such laws, regulations or requirements will be prominently and clearly marked on the outside cover of such goods.

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18.2 if any such goods are delivered to the Company, whether or not in breach of the provisions of clause 18.1, such goods may for good reason as the Company in its discretion deems fit including, without limitation, the risk to other goods, property, life or health be destroyed, disposed of, abandoned or rendered harmless or otherwise dealt with at the risk and expense of the customer and without the Company being liable for any compensation to the customer or any other party, and - without prejudice to the Company's rights to recover its charges and/or fees including the costs of such destruction, disposal, abandonment or rendering harmless or other dealing with the goods. The customer indemnifies the Company against all loss, liability or damage caused to the Company as a result of the tender of goods to the Company and/or out of the foregoing.

**19. PERISHABLE GOODS**

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19.1 Without limiting or affecting any other terms of these trading terms and conditions, goods (whether perishable or otherwise) in the care, custody or control of the Company may at the customer's expense be sold or disposed of by the Company without notice to the customer, sender, owner or consignee, if -

19.1.1 such goods have begun to deteriorate or are likely to deteriorate;

19.1.2 such goods are insufficiently addressed or marked;

19.1.3 the customer cannot be identified;

19.1.4 the goods have not been collected or accepted by the customer or any other person after the expiration of 21 days from the Company notifying the customer in writing to collect or accept such goods, provided that if the Company has no address for the customer such notice period shall not be necessary, and payment or tender of the net proceeds, if any, of the sale thereof after deduction of those charges and expenses incurred by the Company in respect thereof shall be equivalent to delivery of such goods.

50



- 19.2 Should any amount owing by the customer to the Company in respect of any goods referred to in clause 19.1 become due and payable and remain unpaid, the Company shall be entitled and the customer hereby authorises the Company and without first obtaining an order of court, to sell all or any of the goods by public auction or on reasonable notice not exceeding 14 days by private treaty. The net proceeds of any such sale, after deducting therefrom all costs, charges and expenses incurred by the Company, shall be applied in reduction or discharge, as the case may be, of the customer's obligations to the Company in respect of such goods without prejudice to the Company's right to recover from the customer any balance which may remain owing to the Company after the exercise of such rights. Should the total amount collected by the Company, after deducting therefrom all costs, charges and expenses incurred by the Company in respect thereof, exceed the full amount of the customer's obligation to the Company in respect of such goods, the Company shall be obliged to refund such excess to the customer. 10
20. **ACCEPTANCE OF DELIVERY**  
If delivery of any goods is not accepted by the customer, consignee or party nominated by the customer at the appropriate time and place, then –  
20.1 the Company shall be entitled to store the goods or any part thereof at no risk to the Company and at the expense of the customer;  
20.2 the provisions of clause 19.2 shall apply *mutatis mutandis*.
21. **WAREHOUSING** 20  
Pending forwarding and/or delivery by or on behalf of the Company, goods may be warehoused or otherwise held at any place as determined by the Company in its absolute discretion, at the customer's expense.
22. **COLLECTION OF EXPENSES AND COD**  
22.1 When goods are accepted or dealt with by the Company upon instructions to collect freight, duties, charges or other expenses from the consignee or any other person, the customer shall remain responsible therefore if they are not paid by such consignee or any other person immediately when due.  
22.2 If accepted by the Company, instructions to collect payment on delivery shall be subject to the condition that the Company will be entitled to assume that the recipient will effect payment and in the matter of such collection will not be liable for any negotiable instrument which is not met on the due date for payment. 30
23. **SUNDRY GOODS RECOGNISABLE AS THE CUSTOMER'S**  
The Company shall have no obligation to take any action in respect of any goods which may be recognizable as belonging to the customer unless and until it receives suitable instructions relating to those goods together with all necessary documents.
24. **EXAMINATION OF LANDED GOODS**  
24.1 Where it is necessary for an examination to be held or other action to be taken by the Company in respect of any discrepancy in the goods which are landed or discharged from any vessel, aircraft, vehicle, or transport unit, no responsibility shall attach to the Company for any failure to hold such examination or to take any other action unless the Company has been timeously advised by the landing or discharging agent that such goods have been landed and that such discrepancy exists. 40  
24.2 The Company will not be responsible for examining or counting any goods received by it where such goods are bundled, palletized or packed in any other manner such that their number cannot be quickly and easily counted. Should the Company undertake to count goods so received, it shall incur no liability in respect of any error or inaccuracy in such counting, whether such error or inaccuracy is the result of negligence on the part of the Company or otherwise. The Company shall be entitled to levy a charge on the customer for the counting of goods in such circumstances. 50



**25. DUTIES, TAXES, IMPOSTS, LEVIES, AND DEPOSITS**

25.1 The customer, whether or not the cause of payment was due to an act, instruction or omission of the sender, owner and/or consignee and their agents, if any, shall be liable for any duties, taxes, imposts, levies, deposits or out-lays of whatsoever nature levied by or payable to the authorities, intermediaries or other parties at any port or place for or in connection with the goods and whether at the time of entry and/or at any subsequent time, and for any payments, fines, penalties, expenses, loss or damage or whatsoever incurred or sustained by the Company in connection therewith or arising thereout.

25.2 The Company shall bear no liability in consequence of the fact that there may be a change in the rate of duty, wharfage, freight, railage or cartage, or any other tariff, before or after the performance by the Company of any act involving a less favourable rate or tariff or by virtue of the fact that a saving might have been effected in some other way had any act been performed at a different time.

**26. RECOVERY OF DUTIES INCORRECTLY PAID**

Where as a result of any act or omission by or on behalf or at the instance of the Company and whether or not such act or omission was negligent, any duty, tax, levy, railage, wharfage, freight, cartage or any other impost or charge has been paid or levied in an incorrect amount, then any responsibility or liability to the customer which the Company may otherwise have will cease and fall away if the customer does not-

26.1 within a reasonable time having regard to all the circumstances, and in particular to the time allowed for the recovery from the payee of the amount overpaid, advise the Company that an incorrect amount has been paid or levied, and

26.2 do all such acts as are necessary to enable the Company to effect recovery of the amount incorrectly paid.

The fact that the customer may not be aware that any such incorrect payment has been made shall not constitute a circumstance to be taken into account in calculating what is a reasonable time for the purpose of clause 26.1. Should any act or omission by the customer, whether or not such act or omission was due to ignorance on the part of the customer and whether or not such ignorance was reasonable or justified in the circumstances, prejudice the Company's right of recovery, the customer shall be deemed not to have complied with the provisions of clauses 26.1 and 26.2.

**27. PAYMENT BY THE CUSTOMER**

27.1 Unless otherwise specifically agreed by the Company in writing the customer shall pay to the Company in cash immediately upon presentation of account all sums due to the Company without deduction or set-off and payments shall not be withheld or deferred on account of any claim or counterclaim which the customer may allege.

27.2 All and any moneys received by the Company from the customer shall be appropriated by the Company in its sole and absolute discretion in respect of any undisputed indebtedness owing by the customer to the Company, notwithstanding that the customer might, when making payment, seek to appropriate the payment so made to any particular debt or portion of a debt.

**28. DEBITING FEES AND DISBURSEMENTS**

The Company shall under no circumstances be precluded from raising a debit and obtaining payment in respect of any fee or disbursements due to it, notwithstanding the fact that a previous debit or debits, whether excluding or partly excluding the items subsequently requiring to be charged or recovered, had been raised and whether or not any notice had been given that further debits were to follow.

**29. RISK OF POSTED ITEMS**

Notwithstanding any prior dealings between the Company and the customer, all documents, cash, cheques, bank drafts or other remittances, sent to the Company through the post shall be deemed not to have been received by the Company unless and until they are actually received by the Company.



**30. QUOTATIONS**

30.1 The Company shall be entitled at any time by notice to the customer to cancel or resale from any quotation or executory agreement in circumstances where it becomes impracticable or uneconomical for the Company to carry out the contract at the quoted rate and the customer shall have no claim whatsoever against the Company for any loss that the customer might incur as a result of the Company canceling or resiling from the quotation or executory agreement.

30.2 Without in any way limiting the provisions of clause 30.1, all quotations and agreements are subject to revision without notice having regard to changes in currency exchange rates and upward movements in amounts payable by or on behalf of or at the instance of the Company to third parties including, without limitation, freight, surcharges, insurance premiums, equipment rental and labour which charges and upward movements take place after quotation. Any revision of rates as aforesaid will be commensurate with the change in the currency exchange rate or the increase in such amounts payable. Any such increase shall, failing agreement between the parties be determined by the then auditors of the Company or any other auditors nominated by the Company, who in such determination shall act as experts and not as arbitrators and whose decision shall be final and binding on the parties.

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**31. NO CLAIMS AGAINST COMPANY DIRECTORS AND EMPLOYEES**

The customer undertakes that no claim shall be made against any director, servant or employee of the Company which imposes or attempts to impose upon him any liability in connection with the rendering of any services which are the subject of these trading terms and conditions and hereby waives all and any such claims.

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**32. CUSTOMER'S ORAL INSTRUCTIONS**

The customer's instructions to the Company shall be precise, clear and comprehensive and in particular, but without limitation, shall cover any valuation or determination issued by Customs in respect of any goods to be dealt with by or on behalf of or at the request of the Company. Instructions given by the customer shall be recognised by the Company as valid only if timeously given specifically in relation to a particular matter in question. Oral instructions, standing or general instructions or instructions given late, even if received by the Company without comment, shall not in any way be binding upon the Company, but the Company may act thereupon in the exercise of its absolute discretion.

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**33. VARIATION OF THESE TRADING TERMS AND CONDITIONS**

No variation or alteration of these trading terms and conditions shall be binding on the Company unless embodied in a written document signed by a duly authorised director of the Company. Any purported variation or alteration of these trading terms and conditions otherwise than as set out above shall be of no force or effect, whether such purported variation or alteration is written or oral, or takes place before or after the receipt of these trading terms and conditions by the customer.

**34. NON WAIVER**

No extension of time or waiver or relaxation of any of the trading terms and conditions shall operate as an estoppel against any party in respect of its rights under those trading terms and conditions, nor shall it operate so as to preclude such party thereafter from exercising its rights strictly in accordance with these trading terms and conditions.

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**35. GOVERNING LAW**

These trading terms and conditions and all agreements entered into between the Company and the customer pursuant thereto and on the terms thereof shall be governed by and construed in accordance with the laws of the Republic of South Africa.

**36. SUBMISSION TO JURISDICTION**

The parties agree that any legal action or proceedings arising out of or in connection with these trading terms and conditions shall be brought in the division of the Supreme Court of South Africa where the Company's head office is situated at the commencement of the proceedings, and the customer irrevocably submits to the non-exclusive jurisdiction of such court.

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**37. BENEFIT OF DISCOUNTS**

The Company is entitled to the benefit of any discounts obtained and to retain and be paid all brokerages, commissions, allowances and other remunerations of whatsoever nature and kind and shall not be obliged to disclose or account to the customer, or principal for any such amounts received or receivable by it.

**38. LIEN**

All goods and documents relating to goods including bills of lading and import permits, as well as all refunds, repayments, claims and other recoveries, shall be subject to a special and general lien and pledge either for monies due in respect of such goods or for other monies due to the Company from the customer, sender, owner, consignee, importer or the holder of the bill of lading or their agents, if any. If any monies due to the Company are not paid within 14 days after notice has been given to the person from whom the monies are due that such goods or documents are being detained, they may be sold by auction or otherwise or in some other way disposed of for value at the sole discretion of the Company and at the expense of such person, and the nett proceeds applied in or towards satisfaction of such indebtedness.

**39. INDEMNITY BY THE CUSTOMER**

Without prejudice to any of the Company's rights and securities under these trading terms and conditions, the customer indemnifies and holds harmless the Company against all liabilities, damages, costs and expenses whatsoever incurred or suffered by the Company against directly or indirectly from or in connection with the customer's express or implied instructions or their implementation by or on behalf of or at the instance of the Company in relation to any goods and in particular, but without limitation of the foregoing, in respect of any liability whatsoever which may be incurred -

- 39.1 to any haulier, carrier, warehouseman or other person whatsoever at any time involved with such goods arising out of any claim made directly or indirectly against any such person by the customer or by any consignor, consignee or owner of such goods or by any person having an interest in such goods or by any other person whatsoever; and/or
- 39.2 to any owner or consignee of such goods who is not the customer of the Company where the Company performs the service of a deconsolidation agent, or any other service; and/or
- 39.3 to any carrier of the goods if the Company is the consignor or consignee of the goods; and/or
- 39.4 in respect of any goods referred to in clause 18.

**40. LIMITATION OF COMPANY'S LIABILITY**

40.1 Subject to the provisions of clause 40.2 and clause 41, the Company 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 the Company 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 the Company deals; and/or
- 40.1.3 any loss, damage or expense arising from or in any way connected with the marking, labeling, 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 the Company, 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 instructions given to the Company; 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 arising out of any cause whatsoever as a result of the Company'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 the Company or its servants; and
  - b) such claim arises at a time when the goods in question are in the actual custody of the Company and under its actual control; and
  - c) in the instance provided in clause 40.1.7 above, the Company receives a written notice within 5 days after the end of the transit where the transit ends in the Republic of South Africa or within 14 days after the end of transit where the transit ends at any place outside the Republic of South Africa.
- 40.2 Notwithstanding anything to the contrary contained in these trading terms and conditions, the Company shall not be liable for any indirect and consequential loss arising from any act or omission or statement by the Company, its agents, servants or nominees, whether negligent or otherwise.
- 41. MONETARY LIMITATION OF LIABILITY OF THE COMPANY**
- 41.1 In those cases where the Company is liable to the customer in terms of clause 40.1, in no such case whatsoever shall any liability of the Company, 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 the Company 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 the Company 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 the Company before any goods or documents are entrusted to or delivered to or into the control of the Company (or its agent or sub-contractor), together with a statement of the value of the goods. Upon receipt of such notice the Company 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 the Company the amount of the premium payable by the Company for such insurance. If the Company does not so agree the limits referred to in clause 41.1 shall apply.
- 42. GENERAL AVERAGE**
- The customer indemnifies and holds harmless the Company in respect of any claims of a General Average nature which may be made against the Company and the customer shall provide such security as may be required by the Company in this connection.
- 43. BREACH**
- If the Company breaches any of these trading terms and conditions or any agreement between it and the customer and fails to remedy such breach within 30 days of the date of receipt of written notice requiring it to do so then the customer shall be entitled to compel performance by the Company of the obligations it has defaulted in, but shall not be entitled to cancel these trading terms and conditions and any agreement between the customer and the Company.
- 44. WARRANTIES AND REPRESENTATIONS BY THE COMPANY**
- The Company makes no warranties and representations to the customer save as may be specifically provided herein or as notified in writing by the Company to the customer from time to time. The customer acknowledges that the Company is not in anyway bound by any oral statement,





representation, guarantee, promise, undertaking, inducement or otherwise which may have been made at any time by any salesman, employee, representative or any person acting or purporting to act for and on behalf of the Company, whether negligently or otherwise, unless such statements, representations, guarantees, promises, undertakings, warranties or inducements are supplied or made in writing by an employee duly authorised by written resolution of the board of directors of the Company in response to a written enquiry specifying accurately and in complete detail what information is required.

45. DISPUTE

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45.1 Should there be any dispute of any nature whatsoever between the parties in regard to any aspect, matter or thing relating to these trading terms and conditions and whether or not the Company has executed its obligations in terms of any agreement it has with the customer, then and in such event the customer shall nevertheless be obliged to perform its obligations in terms of any such agreement as though the Company had performed properly and to the customer's satisfaction.

45.2 The customer's remedy, having performed its obligations as provided in clause 45.1, shall be limited to an action against the Company for repayment of either the whole or portion of the amount which the customer alleges, constitutes an overpayment.

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45.3 Without affecting the generality of clauses 45.1 and 45.2, the customer shall not be entitled to withhold payments of any amounts, by reason of any disputes with the Company, whether in relation to the Company's performance in terms of any agreement, or lack of performance or otherwise, after which payment the customer's rights of action against the Company in terms of this clause can be enforced. Until such payment is made, any rights that the customer may have, shall be deemed not yet to have arisen, and it is only the payment to the Company which releases such rights and makes them available to the customer in respect of any claim that he may have against the Company.

45.4 In any dispute between the Company and the customer the Company shall be deemed to have performed its obligations in a proper and workmanlike manner and strictly in accordance with any agreement between it and the customer, until such time as the customer proves the contrary.

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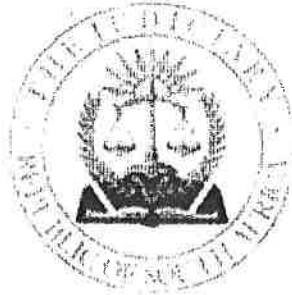
46. TIME FOR PERFORMANCE BY THE CUSTOMER

Time is of the essence for the performance by the customer of all obligations owed to the Company in terms of any agreement with the Company, governed by these terms and conditions.

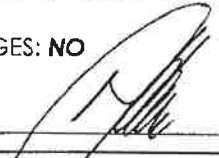
47. SEVERABILITY

If any provision of these terms and conditions is unenforceable, then the Company shall be entitled to elect (which election may be made at any time) that such provisions shall be severed from the remaining provisions of these terms and conditions which shall not be effected and shall remain of full force and effect.

*Adopted by: Schenker South Africa (Pty) Ltd. (Reg. No. 1962/003897/07)*



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>NO</b>
(3)	REVISED:
Date: <u>25<sup>th</sup> March 2020</u> Signature: 	

**COURT A QUO CASE NO:** 21830/2014

**DATE:** 25<sup>th</sup> MARCH 2020

In the matter between:

**FUJITSU SERVICES CORE (PTY) LIMITED**

Plaintiff

and

**SCHENKER SOUTH AFRICA (PTY)**

Defendant

**Coram:** Adams J

**Heard:** 9 and 11 December 2019

**Delivered:** 25 March 2020

**Summary:** Damages – *condictio furtiva* is a delictual claim for damages – used to vindicate the value of goods stolen by defendant's employee – defendant's vicarious liability for the intentional and wrongful conduct of its employee – recent development in the law discussed –

Contract – terms and conditions – interpretation of exclusionary clauses in light of recent developments – is liability excluded by the provisions of a written contract between the parties – to be interpreted to exclude the intentional wrongful acts of the defendant and delictual claims


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**ORDER**

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- (1) The plaintiff shall pay the defendant's costs of its action against the defendant under case number: 18981/2014, which action the plaintiff formally withdrew during July 2019.
  - (2) Judgment is granted against the defendant in favour of the plaintiff for:
    - a) Payment of the sum of US\$516 877.
    - b) Payment of interest on US\$516 877 from the date of service of the summons, at the legal rate applicable then, to date of final payment.
    - c) The defendant shall pay the plaintiff's costs of this action, which costs shall include the costs consequent upon the employment of two Counsel, one being a Senior Counsel.
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**JUDGMENT**


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**Adams J:**

[1]. The dispute in this matter raises the vexed issue of vicarious liability of the defendant ('Schenker') for the conduct of its employee who have deviated from the course and scope of his employment. A further issue relates to whether such vicarious liability on the part of Schenker, if any, is excluded by the terms and conditions of a written agreement between the parties.

[2]. This is an action in the Commercial Court of this division. The plaintiff ('Fujitsu') claims from the defendant ('Schenker') delictual damages on the basis of the theft by an employee of the defendant of certain goods belonging to the plaintiff. It is the plaintiff's case that the defendant is liable for its damages which arose from the theft because the defendant's employee stole property belonging to the plaintiff in circumstances in which the defendant should be held liable. The defendant denies being vicariously liable for the plaintiff's damages and, in any event, contends that its liability, if such exists, is excluded expressly

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by the contractual relationship between the parties. The question is simply whether the written agreements concluded between the parties and which governed their contractual relationship, properly interpreted, excluded the defendant's liability for the wrongful conduct on the part of one of its employees.

[3]. The plaintiff claims the value of the goods that were stolen by one Wilfred Bongani Lerama ('Lerama') from the cargo warehouse of SAA at O R Tambo International Airport ('ORTIA') on the 23<sup>rd</sup> of June 2012. At the time Lerama was employed by Schenker as a 'drawing clerk' or 'drawer', whose duties entailed him uplifting and collecting from the warehouses at the airport goods on behalf of customers of Schenker. Schenker carries on business as a warehouse operator, a distributor and a clearing and freight forwarding agent. As part of its business, Schenker was responsible for the import into South Africa from Germany on behalf of the plaintiff of a consignment of laptops and other computer accessories. Schenker was obviously also responsible for the logistics and the paperwork relating to the importation of the goods.

[4]. The value of the stolen goods was agreed upon between the parties as US\$516 877. This amount represents the damages suffered by the plaintiff as a result of the theft. The quantum of the plaintiff's claim is therefore not in issue. What needs to be decided *in casu* is whether, having regard to the contractual relationship between the parties and all things considered, the defendant is liable for such damages.

[5]. It is trite that theft – *condictio furtiva* – is a delictual remedy for damages. Lerama was at the time employed by Schenker *inter alia* to collect and deliver goods on behalf of its customers, including the laptops and accessories forming the subject matter of the claim, and he was at the relevant time acting within the course and scope of his employment with Schenker. Needless to say, it was not part of his duties to go around stealing from the customers of his employer.

[6]. Fujitsu alleges that the conduct of Lerama was sufficiently closely linked with the business of and/or his employment with and/or the risk created by Schenker, to render Schenker vicariously liable for the theft. Schenker disputes this.

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[7]. Moreover, at the relevant time there was in existence between the parties a national distribution agreement concluded between them on the 10<sup>th</sup> of July 2009 ('the contract'), which was extant at the time of the theft of the goods. Schenker contends that Fujitsu's claim is excluded / limited by the contract. In that regard, clause 17 of the agreement reads as follows:

**'17. Goods requiring Special Arrangements**

Except under special arrangements previously made in writing, the company [Schenker] will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should the customer [Fujitsu] nevertheless deliver 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, the Company 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 the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 40 and 41.'

[8]. Clause 40, under the heading 'Limitation of Company's Liability' in turn provides that 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 any negligent act or omission or statement by [Schenker] or its servants' unless the claim arises from a grossly negligent act or omission on the part of Schenker or its servants and such claim arises at a time when the goods were in the actual custody of Schenker and under its actual control. In view of its importance in this matter, it may be apposite to cite in full the *proviso* to clause 40, which reads as follows:

'unless –

- a) such claim arises from a grossly negligent act or omission on the part of the Company or its servants; and
- b) such claim arises at a time when the goods in question are in the actual custody of the company and under its actual control; and
- c) in the instance provided in clause 40.1.7 above, the Company receives a written notice within 5 days after the end of the transit where the transit ends in the Republic of South Africa or within 14 days after the end of transit where the transit ends at any place outside the Republic of South Africa.'

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[9]. Clause 41 reads as follows:

**'41. Monetary Limitation of Liability of the Company**

41.1 In those cases where the Company [Schenker] is liable to the customer [Fujitsu] in terms of clause 40.1, in no such case whatsoever shall any liability of the Company, 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 the Company 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 the Company 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 the Company before any goods or documents are entrusted to or delivered to or into the control of the Company (or its agent or sub-contractor), together with a statement of the value of the goods. Upon receipt of such notice the Company 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 the Company the amount of the premium payable by the Company for such insurance. If the Company does not so agree the limits referred to in clause 41.1 shall apply.'

[10]. As I indicated above, an employee of the defendant (Lerama), whilst about the business of the defendant, stole from the plaintiff a consignment of laptops and accessories. The question is this: Is the defendant liable for plaintiff's damages arising from the theft and, if so, is that liability excluded by the provisions of the written contracts between the parties? In order to answer that question, it may be necessary to refer briefly to the facts in this matter, which are by and large common cause.



**The facts**

[11]. The events giving rise to the plaintiff's claim against the defendant may be summarised as follows.

[12]. The plaintiff purchased and imported a consignment of laptops and accessories from Fujitsu-Germany to the value of US\$516 877. The plaintiff engaged the services of the defendant to assist it with the logistics, freight forwarding, warehousing, clearing and forwarding of the consignment. This entailed the defendant importing the goods into South Africa, receiving it from the airline and thereafter delivering it to the plaintiff, after having attended to the necessary customs clearance and other logistical issues.

[13]. The foregoing the defendant did pursuant to and in terms of the contract referred to *supra*.

[14]. By Saturday, the 23<sup>rd</sup> of June 2012, the goods had arrived in storage at the SAA Cargo Warehouse at ORTIA and were ready to be delivered to the plaintiff *via* its freight forwarding agent, the defendant. By then, the defendant had also issued to its 'drawer', Lerama, the necessary documentation which would have authorised him to collect the cargo on behalf of the plaintiff. Those documents consisted of the Master Air Waybill and the customs declaration form. On that day, being Saturday, the 23<sup>rd</sup> of June 2012, Lerama arrived at SAA Cargo, armed with the aforementioned documentation to collect the laptops ostensibly on behalf of Schenker and Fujitsu.

[15]. The goods were thereafter loaded onto Lerama's truck, which was not marked with the Schenker branding, and he thereafter drove off, never to be seen again. On exiting the premises of SAA Cargo he presented to security the delivery slip at the main gate. Lerama, like all drawing agents, had issued to him by Schenker an identity card which is issued by IVS and which allowed him almost unfettered access to SAA Cargo and its warehouses and storage facilities. SAA Cargo by then knew that Lerama was one of Schenker's drawers and on the day in question had no reason to suspect that Lerama was there for any unlawful business.

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[16]. Therefore, on the evidence it is clear that on Saturday, the 23<sup>rd</sup> of June 2012, Lerama stole the laptops and other accessories belonging to Fujitsu. On the probabilities, he had carefully planned and orchestrated the theft with the assistance of one or more co-conspirators. Fujitsu had fallen victim to the theft perpetrated by an employee of Schenker, who, up to the point when he stole the goods, was acting in the course and scope of his employment with Schenker.

### **Analysis**

[17]. The first enquiry is whether Schenker is vicariously liable to Fujitsu for Lerama's intentional misconduct in stealing the laptops.

[18]. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of his employment, or whilst the employee was engaged in any activity reasonably incidental to it. In *F v Minister of Safety and Security* 2012 (1) SA 536 (CC), Mogoeng J explained:

'Two tests apply to the determination of vicarious liability. One applies when an employee commits the deed while going about the employers business. This is generally regarded as the "standard test". The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as "deviation cases".'

[19]. *In casu* it is common cause that Lerama was not acting in the interests of his employer in any way, whether improperly or otherwise. By all accounts, he was 'on a frolic of his own'. He was not acting in the course and scope of his employment and this is accordingly a 'deviation case'.

[20]. The legal foundation of the test for vicarious liability in deviation cases was initially developed in two decisions of the SCA during the previous century: *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A). The test was further refined by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and in *F v Minister of Safety and Security* (supra). It is useful to have regard to these developments before seeking to apply the test to the facts of the present case.

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[21]. In *Feldman* a servant of the defendant had been given custody of a motor vehicle and a number of parcels with instructions to drive the vehicle and to deliver the parcels to various customers in town. Having completed his deliveries he was to return the vehicle to a certain garage. Instead, however, he drove the vehicle to a place some distance away, on his own business, and there consumed alcohol which significantly impaired his driving ability. Shortly after departing from this location and on route back to the garage he collided with and killed the father of two minor children. This court held that he had never entirely abandoned his master's work as he had throughout retained the custody and control of the vehicle on behalf of his master and that the master was therefore liable for his negligence.

[22]. In the course of his judgment, however, Watermeyer CJ discussed the common law position relating to vicarious liability. He stated:

'If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.

If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master would naturally be legally responsible for that harm ... If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master would not be responsible.'

[23]. Watermeyer CJ also discussed the reasons for imposing vicarious liability on a master and explained:

'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if a servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's



improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the Master is responsible to that harm.'

[24]. Since *Feldman* and in the post-constitutional era the law relating to vicarious liability in the context of 'deviation cases' has evolved and has been developed so as to give further effect to the test which relates to the connection between the deviant conduct and the employment. The development of the law in that regard, approached with the spirit, purport and objects of the constitution in mind, was required by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) to be sufficiently flexible to incorporate not only constitutional norms but other norms as well. The test, so the ConCourt held, requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not.

[25]. The development of the applicable legal principles has culminated in the recent SCA decision in *Stallion Security (Pty) Ltd v Van Staden* 2020 (1) SA 64 (SCA), in which the SCA held that the fundamental question has always been whether the wrongful act was sufficiently related to the conduct authorised by the employer to justify the imposition of vicarious liability and that, in the determination of the sufficiency of connection, the employer's creation or enhancement of the risk and the wrong complained of may be relevant.

[26]. The SCA also held that an employer will not be liable where the employee commits the act while wholly about his own purposes, unless there is a sufficiently close link of the employee's act and the business of the employer. In evaluating whether there is a sufficiently close link, so the Court held, a criterion a court may use is whether the employer created the risk of the harm that eventuated. In that case the Supreme Court of Appeal found that the employee committed the act, the killing, wholly for his own purposes. The question was whether there was a sufficiently close link of his act and the appellant's business, to make the appellant liable therefor. Going against

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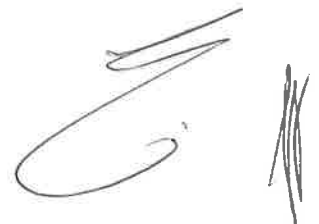
sufficient closeness in the *Stallion Security* matter was the fact that the employee carried out the action while on sick leave, outside the workplace, and with a firearm unconnected to the business. But for sufficient closeness, was the fact that by employing the employee, the appellant had enabled him to enter the office, and so had created the risk that he might abuse this power, so the SCA found. And it was indeed by his abusing the power that Stallion's employee came to perform the wrongful act. Moreover, the appellant's business in that case, which it was contracted to perform, was to protect respondent's husband and to guarantee his safety. And it had put its employee in charge of doing so. Accordingly, the Supreme Court of Appeal concluded that a sufficiently close link was established to hold the appellant vicariously liable.

[27]. At paras 31 and 32 Van der Merwe JA held as follows:

[31] These judgments show that it is now firmly established in Canada and the United Kingdom that the creation of a risk that eventuated is an important consideration in determining vicarious liability of an employer under the 'close connection' test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject. Leading South African academic commentators also support this proposition.

[32] For these reasons our law, as developed in *Rabie* and *K*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised must be determined objectively.'

[28]. Applying these principles in this matter, I find myself in agreement with the submissions made by Mr Marais, Counsel for the plaintiff, that the following considerations should be instructive in deciding whether or not to hold Schenker vicariously liable: Lerama was employed as a cargo drawer and he, as such, enjoyed unfettered access to the SAA security cargo area to uplift and remove goods belonging to clients; and he was given a specific security clearance, as well as the necessary customs and clearing documentation. On the occasion of the theft, Lerama was instructed and directed by the defendant to go and collect the laptops on the 19<sup>th</sup> and the 23<sup>rd</sup> of June 2012 and he followed his normal

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protocol involved in the collection of goods from SAA Cargo. He gained access to the warehouse and to the plaintiff's goods by relying on and displaying his Schenker issued security clearance, which he presented to the SAA Freight Warehouse officials. He was also in possession of Schenker issued customs and clearance documentation. All of the foregoing confirmed that he ostensibly performed the same procedures and went through the same motions as he would ordinarily have done with a lawful collection.

[29]. Borrowing from the *Stallion Security* matter, the point is this: The risk of theft arising from the access permitted and given the appearance of lawfulness by the defendant clearly demonstrates a sufficiently close link between the theft and the lawful business which Lerama was about on behalf of the defendant. Moreover, as a policy consideration, a finding of vicarious liability should follow if regard is had to the following: (a) the opportunity that Schenker afforded its employee to abuse his powers; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to and intimately and inherently connected to the business of Schenker; (d) the extent of power conferred on Lerama; and (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[30]. I am of the view that it follows from the foregoing that Lerama's actions were sufficiently and so closely related to the functions he was required to perform that vicariously liability should be visited on Schenker. Moreover, the foregoing also, in my judgment, demonstrates that Schenker created or enhanced the risk which, when applying the *Stallion* principles, makes Schenker vicariously liable for the damages arising from the theft. If regard is had to the recent development of the law relating to vicarious liability in 'deviation cases' and the approach adopted in *Stallion Security*, there can in my view be no doubt that the defendant is vicariously liable for the theft perpetrated by Lerama.

[31]. All that remains is to consider whether liability is excluded by reason of the contract. In that regard, I have already referred to the relevant clauses of the written agreements.

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[32]. It is a well-established principle that any limitations to liability fall to be strictly interpreted and that contractual instruments should not be allowed to restrict liability, even more so if they were to arise outside of the contract, unless expressly so provided for.

[33]. By all accounts Lerama was not executing the contract when he attended on SAA Cargo on Saturday, the 23<sup>rd</sup> July 2012, and proceeded to steal the plaintiff's goods. The exemption clause, which relates to damages arising from breach of contract, relied upon by the defendant does not apply in such circumstances.

[34]. Mr Marais referred me to *Weinberg v Oliver* 1943 AD 181 in which the Appellate Division considered the application of an exemption clause in the circumstance in which 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 the car. The Appellate Division held that the garage was under an obligation to keep the car under its control and that since it had delegated the performance of that obligation to its servant, who had not performed such obligation, the garage owner was liable for the damages. The exemption clause in this instance did not apply beyond the performance of the agreement, so the AD held.

[35]. In the present matter, the exemption clause relied upon by the defendant does not assist the defendant as the theft by Lerama was an act outside the performance of the contract concluded between the plaintiff and the defendant.

[36]. In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) the Court considered the application of an exemption clause which exempted a security company from liability for loss. The security company had been employed to prevent fires. However, the security company's own employee had started a fire. It was held as follows:

'In my view, upon the meaning of clause 5 as a whole read as part of the entire contract, clause 5.3 does not and cannot exclude liability for damages in circumstances where fire was deliberately started by FEND's security officers placed by FEND in the building to 'minimise' loss or damage. To hold otherwise would make a mockery of the other provisions of the contract, particularly clause 5.1 which imposed a duty on FEND

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to provide security services and security personnel to minimise the risk of loss or damage by fire.'

[37]. Therefore, as a general rule a defendant should not be allowed to rely on an exemption clause in the circumstance where the contract was not being executed, unless the clear intention of the parties was to such effect.

[38]. Having said this, I now turn to interpret the terms and conditions of the agreement between the parties.

[39]. To determine whether or not the plaintiff's delictual claim is excluded, it is necessary to interpret the agreements and in particular clauses 40 and 41 cited above. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) ([2015] ZASCA 111) para 27, that the SCA has consistently held that the interpretative process is one of ascertaining the intention of the parties — in this case, what they meant to achieve by incorporating clauses 40 and 41 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, i.e. the factual matrix or context, including any relevant subsequent conduct of the parties.

[40]. In this matter there are very little facts available to the court in the interpretative process regarding the circumstances surrounding the conclusion of the agreements or of any relevant subsequent conduct of the parties. The only available evidence upon which the court has to determine what the parties meant to achieve by incorporating clauses 40 and 41 in the agreements, and in particular whether or not they intended including delictual claims within the ambit of those clauses, was the agreements themselves.

[41]. Turning to the wording of the agreements, and in particular clause 40 and 41 thereof read within the context of the agreements as a whole, it has to be borne in mind that the nature and commercial purpose of the contractual relationship between the parties are those of a service agreement in terms of which the defendant was to perform clearing and freight forwarding services for

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the plaintiff, which would entail the import, collection, clearance, storage and distribution of goods by the defendant on behalf of the plaintiff.

[42]. The 'liability' clause of the contract conditions provided that 'no liability for loss in transit is accepted'. Clause 40 deals with 'Limitation of [Schenker's] Liability', providing for exclusions and limitations to the defendant's liability for loss or damage suffered by the plaintiff *inter alia* arising out of the execution or attempted execution of its obligations to the [plaintiff]. In particular, clause 40 provides that the defendant shall not be liable for any loss or damage unless it arises from a grossly negligent act or omission on the part of [Schenker] or its servants and arises at a time when the goods are in the 'actual custody of [Schenker] and under its actual control'.

[43]. In my view, this wording clearly conveys that the loss or damage in respect of which the defendant wished to restrict its liability is a loss or damage suffered by the plaintiff pursuant to or during the provision of services by the defendant to the plaintiff. Differently put, it is a loss or damage which has its genesis in the provision of services by the defendant to the plaintiff. This is not the case *in casu*. The loss arose independent from the performance by Lerama pursuant to the distribution contract.

[44]. This construction of clause 40 is fortified by clauses 17, cited in full *supra* as well as other provisions of the agreements. The clause headed 'Negligence' for example specifically provide that, should it be proven that they were negligent in the handling of the plaintiff's cargo leading to the loss or damage, their liability would be settled by their insurance company.

[45]. Also, clause 3 of the standard terms and conditions is headed 'Application of Trading Terms and Conditions'. This clause provides the scope of the agreement. The clause provides that the scope of the agreement is limited to: (i) business undertaken in terms of the agreement. or (ii) services provided by the defendant 'undertaken or provided on these trading terms and conditions'.

[46]. In my view the clear wording of the agreements shows that the parties did not contemplate that clauses 40 and 41 would encompass the delictual

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claim (based on theft) of the nature averred in the plaintiff's particulars of claim. This delictual claim did not arise pursuant to or during the services rendered by the defendant, nor while the goods were in the custody or under the control of the defendant, but in circumstances where the defendant's employee stole the plaintiff's computers. Had the defendant intended the exclusion in clauses 40 and 41 to also apply to delictual claims of this nature, it could easily have drafted the agreements to include such claims. Its failure to do so justifies the inference that the parties did not intend clause 40 to encompass the plaintiff's delictual claim.

[47]. Mr Stais, Counsel for the defendant, referred me to *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (WLD), in which case the exclusion or exemption clauses were remarkably similar to those in the contract between Fujitsu and Schenker. There the full court of this division held that delictual liability for the theft by employees of a transport carrier – not unlike the facts *in casu* – was excluded by the exemption clauses. In my view, the judgment in *Goodman Brothers* has been overtaken by the recent development in the law to which I have alluded to *supra*, in particular the judgment in *Stallion Security*. In that regard, I have already found that the delict perpetrated by Schenker through the medium of its employee in the form of the theft fell outside of the scope and ambit of the contract and was not implicated in the contract. For this reason, the *Goodman Brothers* judgment does not find application in this matter.

[48]. The context which is ignored is the recurring theme that the loss or damage envisaged in the agreements, and in particular in clause 40, is a loss or damage suffered by the plaintiff pursuant to or during the provision of services by the defendant. Therefore the exclusion of the defendant's liability is in respect of loss or damage suffered by the plaintiff pursuant to or during the provision of such services.

[49]. For all of the above reasons I conclude that the defendant's liability for the plaintiff's claim for delictual damages is not excluded by the exclusion clauses of the contract.

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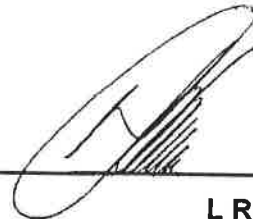


[50]. In all the circumstances, I am of the view that the judgment should be granted in favour of the plaintiff against the defendant for payment of the amount claimed and interest thereon.

**Order**

In the result, I make the following order:

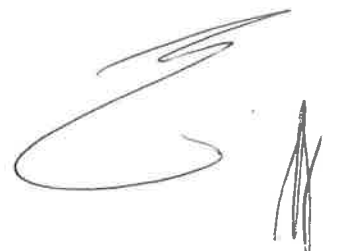
- (1) The plaintiff shall pay the defendant's costs of its action against the defendant under case number: 18981/2014, which action the plaintiff formally withdrew during July 2019.
- (2) Judgment is granted against the defendant in favour of the plaintiff for:
  - a) Payment of the sum of US\$516 877.
  - b) Payment of interest on US\$516 877 from the date of service of the summons, at the legal rate applicable then, to date of final payment.
  - c) The defendant shall pay the plaintiff's costs of this action, which costs shall include the costs consequent upon the employment of two Counsel, one being a Senior Counsel.



**L R ADAMS**

*Judge of the High Court  
Gauteng Local Division, Johannesburg*

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HEARD ON: 9<sup>th</sup> and 11<sup>th</sup> December 2019

JUDGMENT DATE: 25<sup>th</sup> March 2020

FOR THE PLAINTIFF: Adv Jean Marais SC, together with  
Adv Chris Gibson

INSTRUCTED BY: Mooney Ford Attorneys, Durban

FOR THE RESPONDENT: Adv Panayiotis Stais SC

INSTRUCTED BY: Prinsloo Incorporated, Johannesburg

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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) [2021] 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

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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.

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**ORDER**

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**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.’

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**JUDGMENT**

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**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.<sup>1</sup>

[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,

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<sup>1</sup> 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.<sup>2</sup> 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

...

<sup>2</sup> 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.

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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*<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

<sup>4</sup> *Weinberg v Olivier* 1943 AD 181 at 188.

<sup>5</sup> *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*<sup>6</sup> 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,<sup>7</sup> '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.

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

<sup>7</sup> Concise Oxford English Dictionary Tenth ed (1999).

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[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.<sup>8</sup>

[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)*.<sup>9</sup> 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

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<sup>8</sup> Sub-clause 40.1.3.

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

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as it predated the decision of this Court in *Stallion Security (Pty) Ltd v Van Staden*.<sup>10</sup> 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*<sup>11</sup> 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, Rennies 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.<sup>12</sup>

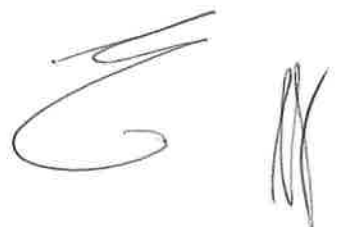
Significantly, at 96C-E the court said:

'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.'

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

<sup>11</sup> *First National Bank of Southern Africa Ltd* supra, para 22.

<sup>12</sup> *Goodman Brothers* at 94E-G.

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[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)*<sup>13</sup> 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.

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<sup>13</sup> *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.'



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M V PHATSHOANE  
ACTING JUDGE OF APPEAL



## Appearances

For the appellant:

P Stais SC

Instructed by:

Prinsloo Incorporated, Johannesburg

Rosendorff Reitz Barry Attorneys, Bloemfontein

For the respondent:

J Marais SC (with C Gibson)

Instructed by:

EVH Incorporated, Umhlanga

Lovius Block Incorporated, Bloemfontein

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