CONSTITUTIONAL COURT OF SOUTH AFRICA

Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited

CCT 32/22

Date of hearing: 01 November 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 01 November 2022 at 10h00, the Constitutional Court will hear an application for leave to appeal against the judgment and order of the Supreme Court of Appeal wherein that Court held that Fujitsu's cause of action was one which fell within the ambit of an exemption clause, absolving Schenker of liability arising from theft of Fujitsu's goods by an employee of Schenker.

At the heart of this matter is the proper interpretation of two exemption clauses and whether said clauses are against public policy. The applicant (Fujitsu) concluded an agreement with the respondent (Schenker), a warehouse operator, distributor, clearing and forwarding agent. The material terms of the agreement 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.

Between 19 and 23 June 2012, the South African Airways (SAA) carried three consignments of computers and related accessories belonging to Fujitsu from Munich, Germany, to Oliver Tambo International Airport. Fujitsu, as agreed upon, engaged Schenker's services for logistics, warehousing, clearing, and forwarding thereof. Schenker had employed a certain Mr Lerama as a drawing clerk who was, amongst other things, responsible for the collection of cargo at the SAA Cargo Warehouse. Mr Lerama had passed a vetting process, was issued with a security card and, from time to time, was given access to all relevant airway bills and customs clearance documents necessary for the cargo to be released from SAA Cargo Warehouse. Mr Lerama normally did not work on Saturdays. However, on Saturday 23 June 2012, he 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 is yet to be found. In simple terms, Mr Lerama stole the goods belonging to Fujitsu.

Fujitsu subsequently instituted a delictual claim in the High Court for damages against Schenker in relation to the theft. It contended that the respondent was vicariously liable for the loss suffered as a result of the theft. Schenker conceded that Mr Lerama acted within the course and scope of his employment when he committed the theft. It argued, however, that clauses 17 and 40 of the contract exempted it from liability.

Clause 17 of the agreement between the parties is titled: "Goods requiring Special Arrangements". It essentially provides that, except under special arrangements previously made in writing, Schenker will not incur liability whatsoever in respect of such goods or its negligent acts or omissions in respect of such goods. Clause 40, headed "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.

The question before the High Court was therefore whether Schenker is liable for damages arising from the theft and, if so, whether that liability is excluded by the provisions of the written contracts between the parties. The High Court held 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. The High Court thus held that 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. In other words, the Court was of the view that, if it was the parties' intention to exclude theft by an employee, they would have included such a provision in the agreement.

By the time the matter reached the Supreme Court of Appeal, the sole issue for determination was whether Fujitsu's delictual claim based on theft was excluded by clauses 17 and 40 of the standard terms. The Supreme Court of Appeal held that "Schenker was informed of the arrival of Fujitsu's goods [at the warehouse]" and Mr Lerama accessed said goods "using documents given to him by Schenker". In that regard, the Supreme Court of Appeal interpreted clause 17 of the standard terms as having wide application to any goods that are "handled" or "dealt with" regardless of whether the person handling or dealing with them is a thief. In doing so, the Court purported to apply the ordinary meaning of "handled" and "dealt with" without having regard to the overall contractual context in which those words appear. The Supreme Court of Appeal thus held that the two provisions excluded damages arising from intentional misconduct. It noted, in addition, that clause 17 specifies that it applies absent a special arrangement. The purpose of this provision, as

held by the Supreme Court of Appeal, was to completely exclude liability in circumstances where no special arrangements are made. This was to ensure that where Fujitsu was required to handle valuables, it would have adequate opportunity to take steps to mitigate the risk of theft or any other potential claim. The judgment of the Supreme Court of Appeal accorded with *Goodman Brothers* which the Supreme Court of Appeal explained was not challenged by the applicant and remains good law. Aggrieved by the decision of the Supreme Court of Appeal, Fujitsu now approaches this Court.

Before this Court, Fujitsu contends that this matter engages the Court's extended jurisdiction, as the matter raises an arguable point of law of general public importance. It submits that the question of whether the exemption clauses relied upon by Schenker exclude liability for a delictual claim for theft by one of its employees requires this Court to interpret key clauses in the South African Freight Forwarding Association's standard terms and conditions. It further argues that this raises "*a quintessential point of law*" that is one of general public importance. Fujitsu further argues that it is trite law that parties may contractually define and restrict the nature and scope of their obligations. And that the general approach is to construe indemnity clauses restrictively. Fujitsu contends that a party wishing to contract out of liability must do so in "clear and unequivocal terms". In the case of doubt, ambiguity or secondary meaning, the issue must be resolved against the *proferens*.

Fujitsu further argues that Clause 40 is silent on theft by an employee. Fujitsu argues that following the approach taken by Canadian and English courts, this silence alone – given that the theft of the goods is fundamentally contrary to the nature of the contract – warrants a finding that the exemption of liability does not apply to theft by an employee. It argues that the language of clauses 17 and 40 likewise suggests that the activity to which they apply is the activity of performing the contract according to the dictates of the contracting parties.

Furthermore, Fujitsu argues that if exemption clauses are not interpreted in the manner it suggests, their effect will be that liability is excluded for wrongful acts by employees committed outside the contractual context, including theft. Fujitsu argues that although a similar exclusion was deemed compatible with public policy in *Goodman Brothers*, there are compelling public policy considerations which warrant a reconsideration of that finding. In addition, Fujitsu argues that, apart from being a decision of the Full Court which does not bind this Court, *Goodman Brothers* had a narrow focus and pre-dated this Court's seminal ruling on public policy in *Barkhuizen*.

Schenker contends that it is apparent from this Court's jurisprudence, that this matter does not engage this Court's non-constitutional appellate jurisdiction under section 167(3)(b)(ii) of the Constitution. Schenker further opposes the appeal on the basis that the Supreme Court of Appeal's interpretation of the disputed exemption clauses is correct, in that, properly interpreted, these clauses exclude liability for the theft of Schenker's employees, and this exclusion of liability is not contrary to public policy. Schenker submits that the public-policy argument advanced by the Fujitsu is fatally defective. This is so because, first, on a proper reading of *Goodman Brothers*, it is clear that Fujitsu's

characterisation of its *ratio* is incorrect; second, Fujitsu is incorrect that the exemption clause undermines the essence of the contract between it and Schenker. It is Schenker's case that the Supreme Court of Appeal correctly interpreted clause 17 read with clauses 40 and 41.

In the circumstance, Schenker prays that leave to appeal be dismissed on the basis that this matter does not engage the jurisdiction of this Court. In the alternative, Schenker argues that should leave to appeal be granted, that the matter ought to be dismissed on the ground that the exemption clauses in question, properly interpreted, exclude liability for theft by an employee of Schenker. Schenker asks that the order in both circumstances include the cost of two counsel.