

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
HELD AT BRAAMFONTEIN**

**CCT CASE No: 32/2022**

In the matter between:

**FUJITSU SERVICES CORE (PTY) LIMITED**

Applicant

and

**SCHENKER SOUTH AFRICA (PTY) LIMITED**

Respondent

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**RESPONDENT'S PRACTICE NOTE**

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**Appearances**

1 Counsel for the applicant:

1.1 Gilbert Marcus SC; [gilbert@gilbertmarcus.com](mailto:gilbert@gilbertmarcus.com); 083 452 5105

1.2 Jean Marais SC; [jean@law.co.za](mailto:jean@law.co.za); 083 675 3103

1.3 Christopher Gibson; [chris.gibsonc@gmail.com](mailto:chris.gibsonc@gmail.com); 084 231 4650

1.4 Nassir Ali; [ali@rsabar.org](mailto:ali@rsabar.org); 072 892 1776

2 Counsel for the respondent:

2.1 Panayiotis Stais SC; [stais@maisels.co.za](mailto:stais@maisels.co.za); 082 550 6398

2.2 Nick Ferreira; [nferreira@law.co.za](mailto:nferreira@law.co.za); 076 391 3228

## **Nature of the proceedings**

- 3 This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal, 9 November 2021, upholding the respondent's appeal against the judgment and order of Adams J in Gauteng Local Division of the High Court.

## **Issue to be determined**

- 4 This application concerns provisions in the South African Association of Freight Forwarders ("**SAAFF**") terms and conditions--version 7 of 2008, applicable when the applicant ("**Fujitsu**") and respondent ("**Schenker**") contracted in 2009, and at the time of the theft, in 2012, that gave rise to this application—which exclude Schenker's liability for specified losses suffered by Fujitsu.
- 5 The issues to be determined are:
  - 5.1 Does the Court have jurisdiction, in terms of section 167(3)(b)(ii) of the Constitution or otherwise?
  - 5.2 As regards the merits:
    - 5.2.1 Does clause 17, read with clause 40, of the SAAFF terms and conditions, in the circumstances exclude Schenker's liability for the theft of its employee of Fujitsu's goods?
    - 5.2.2 If liability is excluded, does public policy render the exemption clause unenforceable?

## Summary of the respondent's submissions

- 6 The respondent opposes the application for leave to appeal on the basis that:
  - 6.1 it does not engage this Court's jurisdiction, in that it raises no arguable point of law of general public importance which ought to be considered by this Court; and
  - 6.2 the SCA'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.
  
- 7 Regarding jurisdiction:
  - 7.1 The only issue in the Court *a quo* and SCA was whether the exemption clauses, properly interpreted, excluded Schenker's liability.
  - 7.2 In *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd and Others* 2019 (7) BCLR 850 (CC), this Court held that an appeal concerning the interpretation of a contract between two parties does not fall within section 167(3)(b)(iii) of the Constitution, as it does not raise an arguable point of law of public importance.
  - 7.3 Because there is no evidence before this Court, nor a basis in case law to conclude, that the exemption clauses are incorporated, by reference, across the freight-forwarding industry, the issues in dispute are not of significant public importance.
  - 7.4 The argument that an exemption clause excluding liability for the theft

of an employee is contrary to public policy was not made in the Court *a quo* or the SCA. As this Court held in *Tiekiedraai*, to justify hearing points of law not previously considered, there must be something extra to make doing so in the interests of justice. Nothing extra exists here, so this last ground for establishing jurisdiction fails too.

8 Regarding the merits:

8.1 The SCA's interpretation of the exemption clauses was correct:

8.1.1 The exemption clauses in question exclude a party's liability if the other party does not give prior written notice that the goods being transported are valuable.

8.1.2 In *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) it was held that the purpose of such clauses is to provide the party that will be dealing with the goods an opportunity to get fidelity insurance or take other measures to protect itself against the dishonesty of its employees.

8.1.3 Once the clause's purpose is understood, it is plain that theft may not be excluded from the limitation of liability. In fact, excluding liability for theft is an essential purpose of the clause.

8.1.4 Factually, it is not in dispute that the stolen goods were valuables, and that Fujitsu did not give prior written notice. Not in the Court *a quo* nor in the SCA did Fujitsu argue that

*Goodman Brothers* was wrongly decided. Therefore, the SCA's judgment and order cannot be faulted.

8.2 Further, Fujitsu is incorrect that the exemption clause is contrary to public policy:

8.2.1 It argues that the clause undermines the essence of the contract between the parties, i.e., the transportation of Fujitsu's goods, as it permits Schenker's employees not to carry out their duties and it permits them to steal goods.

8.2.2 This is not correct. If Fujitsu had provided Schenker prior written notice, its delictual claim for the theft would not face any limitation of liability. It did not. This is why its loss cannot be recovered. As such, the commercial essence of the contract is not undermined by the exemption clause.

8.2.3 In fact, by fairly allocating risk between parties, and so reducing the costs of business and enhancing access to freight services, it promotes one element of public policy, i.e., facilitating access to services often essential to doing business, on terms that are fair, efficient and reasonable.

### **Estimated duration of argument**

9 3 hours

### **Record**

10 It is only necessary to read volume 4 of the record:

10.1 Fujitsu does not in its heads of argument refer to any part of the record other than volume 4.

10.2 To extent that Schenker references portions other than volume 4, the context is sufficiently dealt with in the heads of argument.

**Cases upon which special reliance will be placed**

1. *Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (6) SA 1 (CC).
2. *First National Bank of South Africa Ltd v Rosenblum & Anor* 2001 (4) SA 189 (SCA).
3. *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W).
4. *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA).
5. *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC).
6. *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd and Others* 2019 (7) BCLR 850 (CC).
7. *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA).

**Panayiotis Stais SC  
Nick Ferreira**

Respondent's counsel  
Chambers, Sandton

6 September 2022