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

RESPONDENT'S HEADS OF ARGUMENT

Table of Contents

INTRODUCTION 2

NO JURISDICTION 4

The Test for Section 167(3)(b)(ii) – *Paulsen*, *Tiekiedraai*and *Big G* 4

The alleged 'public importance' of the SAAFF terms and conditions 12

The exemption clauses allegedly contrary to public policy 16

Conclusion 20

THE INTERPRETATION OF THE EXEMPTION CLAUSES 21

Clauses 17 and 40 22

Court *a quo* and SCA judgments 23

Interpretation and application 26

Public policy 30

CONCLUSION 36

INTRODUCTION

1 In 2009, the applicant ("**Fujitsu**") and the respondent ("**Schenker**") concluded a commercial distribution services agreement, in terms of which Schenker undertook to clear, forward and transport goods imported by Fujitsu into South Africa. In part, their agreement was regulated by the South African Association of Freight Forwarders ("**SAAFF**") standard terms and conditions, version 7 of January 2008.[1]

2 In 2012, a Schenker employee, Mr Lerama, stole imported computerised goods ("**Goods**") to the value of US$516,877.44 and belonging to Fujitsu, from a warehouse at OR Tambo International Airport.[2]

3 Fujitsu instituted a delictual action against Schenker, arguing that it was vicariously liable for the theft.[3]

4 Whilst Schenker initially disputed that it was vicariously liable for the theft,[4] this ceased to be an issue between the parties.[5] The quantum was also not in issue.[6] In the result, the sole issue before the Court *a quo* was whether the SAAFF standard terms and conditions, which contain exemption clauses limiting

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[1] FA paras 9-11 (vol 4 p 359); SAAFF standard terms and conditions Vol 4 pp392 *in fin* – 402 *in fin.*

[2] FA paras 12-16 (vol 4 p 359-360) and AA para 8 (vol 4 p 451).

[3] FA para 18 (vol 4 pp 360-361) and AA para 9 (vol 4 p 451).

[4] HC judgment para 2 (vol 4 pp 404-405).

[5] HC leave to appeal judgment para 3 (vol 3 p 279-280) and SCA judgment para 6 (vol 4 pp 423-424) – vicarious liability had been conceded by Schenker and was a non-issue [see Fujitsu's heads of argument in the application for leave to appeal to the SCA (vol 3 pp 321 – 322 para 3).

[6] Pre-trial minute para 7 (vol 3 p 293).

liability,[7] when *"properly interpreted"*,[8] exempt Schenker from liability for Mr Lerama's theft.

5 The Court *a quo* found for Fujitsu, but the Supreme Court of Appeal, before which the proper interpretation of the exemption clauses was the only issue,[9] set aside the order of the Court *a quo* and dismissed Fujitsu's claim.

6 Fujitsu now seeks the leave of this Court in terms of section 167(3)(b)(ii) of the Constitution[10] to appeal the judgment and order of the SCA, on two grounds: First, it argues that the SCA misinterpreted the exemption clause;[11] and second, if the SCA's interpretation is correct, it argues that public policy renders the clause unenforceable.[12] The latter argument is clothed also as a constitutional issue.

7 Schenker opposes the application for leave to appeal on the basis that the appeal raises no arguable point of law of general public importance which ought to be considered by this Court. Moreover and in any event, the SCA's interpretation is correct, and the clause is not contrary to public policy.

8 The submissions are structured as follows:

8.1 First, we explain why this Court's jurisdiction is not engaged.

8.2 Second, we consider the exemption clause, explaining why:

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7 AA para 10 (vol 4 p 451).

8 HC judgment para 2 (vol 4 pp 404-405).

9 FA para 20 (vol 4 p 361) and SCA judgment para 11 (vol 4 p 426).

10 FA para 27 (vol 4 p 362).

11 FA paras 34-53 (vol 4 pp 364-370), read with Fujitsu HOA paras 17 and 79-81.

12 FA para 28(e) (vol 4 p 363), read with Fujitsu HOA paras 18 and 82-94.

8.2.1 the SCA's interpretation is correct; and

8.2.2 it is not contrary to public policy.

NO JURISDICTION

9 Fujitsu comes to this Court, arguing that the matter raises an arguable point of law of general public importance which ought to be considered by this Court.[13]

10 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.

The Test for Section 167(3)(b)(ii) – *Paulsen*,[14] *Tiekiedraai*[15] and *Big G*[16]

11 In ***Paulsen***, this Court explained the meaning of section 167(3)(b)(ii):

11.1 Point of law: The issues raised on appeal must be ones of law and not based purely on factual matters.[17]

11.2 Arguable: They must have prospects of success in the sense that there is a degree of merit in the argument, i.e., some measure of plausibility or substance in the argument advanced.[18]

[13] FA para 27 (vol 4 p 362).

[14] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC).

[15] *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd and Others* 2019 (7) BCLR 850 (CC).

[16] *Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (6) SA 1 (CC).

[17] *Paulsen* at para 20.

[18] *Paulsen* at paras 21-22.

11.3 General public importance: The determination of the points of law must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public.[19]

11.4 Ought to be considered: If it is not in the interests of justice to entertain what is otherwise an arguable point of law of general public importance, then this Court lacks jurisdiction.[20]

12 In summary, the Court will only entertain an appeal in terms of section 167(3)(b)(ii) if it raises an arguable point of law that implicates a significant part of the public, the determination thereof being in the interests of justice. This much is apparent from two seminal judgments of this Court.

13 ***Tiekiedraai*** also did not raise any constitutional issues,[21] but concerned a right of pre-emption in a lease agreement:[22]

13.1 Before the matter reached this Court, the only issue that was on appeal before the SCA was "*the meaning of clause 21*" of the lease agreement, i.e., the pre-emption clause, with the SCA dismissing the appeal against the Court *a quo's* order after it relied "*on well-accepted principles of interpretation*".[23]

13.2 In this Court, the applicant (as Fujitsu *in casu*) persisted with the contractual argument but advanced, for the first time, arguments

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[19] *Paulsen* at paras 25-26.

[20] *Paulsen* at paras 29-30.

[21] *Tiekiedraai*at para 10.

[22] *Tiekiedraai*at para 3.

[23] *Tiekiedraai* at para 8.

relating to "*radically different*" questions and "*new common law arguments*".[24]

13.3 This Court dismissed the application for leave to appeal. It held:

13.3.1 As for the contractual argument that was rejected by the SCA, where the issue concerned only the interpretation of a contract between the parties, this did not raise an arguable point of law of general public importance.[25]

13.3.2 Regarding the "*novel points not raised before*",[26] this Court held that the interests of justice did not require them to be decided in the present litigation:

(a) Whilst these were questions of real and wide substance,[27] it was not in the interests of justice to hear them, because the applicants gave no persuasive reason why this Court should override the compunction to operate as a court of first and last instance.[28]

(b) This Court was deprived of well-reasoned judgments of the Court *a quo* and the SCA on the new issues, and explained the reason for the lack of such judgments as follows:

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[24] *Tiekiedraai* at paras 13 and 15.

[25] *Tiekiedraai* at paras 13 and 14.

[26] *Tiekiedraai* at para 24.

[27] *Tiekiedraai* at para 15.

[28] *Tiekiedraai* at para 19.

"The only reason is that Tiekiedraai did not raise the points it now wants to argue when the matter was before the High Court and the Supreme Court of Appeal. And the only reason for this seems to be that counsel did not think of them then. They occurred only after the Supreme Court of Appeal rejected what was then [the applicant's] only argument. This is an incident of professional service that should not be allowed to affect the best functioning of the appellate process.

…..

This Court cannot be taxed to consider novel points not raised before simply because of its position as a super-appellate body over all other courts. Generally speaking, apart from its power to afford direct access, this Court's appellate powers exist not to determine novel issues raised for the first time before it, but to intervene in and correct determinations by lower courts."[29]

and concluded:

"Obviously cases arise where this Court should consider points of law not considered before. But there must be something extra. There is none here. Hall and Shell were contractants dealing at arm's length with each other, as were Tiekiedraai and Hall. So far it may appear, the parties had enough legal resources to enable each of them to secure their best interests in the courts below. That must be the end of the matter."[30]

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29 *Tiekiedraai* at para 21.

30 *Tiekiedraai* at para 25.

13.4 In Tiekiedraai, the new arguments before this Court related *inter alia* to rights of pre-emption and their impact on the law of property.[31] *In casu*, Fujitsu raises new arguments in an attempt to overthrow the well-established authoritative precedent for the SCA's judgment (*Goodman Brothers*,[32] which had not been challenged in the SCA) and establish constitutionally-directed policy considerations allegedly applicable to an entire industry (without supporting evidence).

14 ***Big G***, upon which Fujitsu places particular reliance, sought leave to appeal from this Court in a matter that concerned two "*interlinked*" issues involving the interplay between franchise agreements and contracts with customers for sale of food, and section 24C(2) of the Income Tax Act, 1962 ("**the ITA**"):[33]

14.1 In terms of the franchise agreements, the franchisee had an obligation to revamp its premises periodically. On the basis of this, it claimed an allowance in terms of section 24C(2) of the ITA, arguing that revamping costs are "*future expenditure*" as contemplated therein, which could be off-set against income received from the contracts with individual customers for sale of food pursuant to its operations in terms of the franchise agreement.[34] SARS rejected the claim on the ground that the income and expenditure must accrue from the same contract.[35]

14.2 Whereas the Tax Court found in the franchisee-applicant's favour and held that the proximate cause of the income was the franchise

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[31] *Tiekiedraai* at para 15.

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

[33] *Big G* at paras 1 and 4-5.

[34] *Big G* at para 2.

[35] *Big G* at para 3.

agreement,[36] the SCA held that the income accrued due to contracts that were concluded with individual patrons.[37]

14.3 In this Court, the applicant argued that "*the matter turns on the interpretation of the words 'in terms of' in s 24C*", and "*an interpretation of the franchise agreements and the contracts of sale of food to customers in an attempt to demonstrate that s 24C does, indeed, find application.*"[38]

14.4 This Court held that it had jurisdiction because the matter involved an arguable point of law:

> *"This matter involves the interpretation of the franchise agreements and the individual contracts of sale of food. In this regard, the question is whether the franchise agreements and the contracts of sale of food are so interlinked that the sale-of-food income may be held to be income that accrues in terms of each franchise contract; each franchise agreement, of course, being the contract that imposes the obligation to revamp in future and thus creates the future expenditure. This interpretative question is a quintessential point of law. This question is also closely bound up with the interpretation of s 24C(2): what is the nature of the contract envisaged in the section? This element of interpretation adds to the legal character of the question to be determined."*[39] *[emphasis added]*

14.5. This Court in *Big G*, did not depart from Tiekiedraai when it held that a point of law existed because of the link between the franchise and food

[36] *Big G* at para 6.

[37] *Big G* at para 7.

[38] *Big G* at para 8.

[39] *Big G* at para 11.

agreements, and the interplay between the franchise agreement and section 24C(2) of the ITA.

14.6. Fujitsu's contention that *Big G* is authority for the proposition that interpretation of clauses in the SAAFF terms and conditions is a point of law that is of general public importance, is therefore misguided.[40]

15 Therefore, the law on section 167(3)(b)(iii) is this: An issue that concerns only the interpretation of a contract between two particular parties, does not raise an arguable point of law of public importance.

15.1 This Court in *Tiekiedraai*, an appeal that also concerned the interpretation of a contract between two parties, unanimously rejected the legal proposition that is being advanced by Fujitsu.

15.2 This Court did not depart from Tiekiedraai when it held in *Big G* that a point of law existed because of the correlation (if any) between an obligation-imposing franchise agreement and income-earning food contracts, and section 24C(2) of the ITA.

16 As a result, it is clear that this Court lacks jurisdiction:

16.1 The only issue in the Court *a quo* and SCA was whether the exemption clause, *"properly interpreted*",[41] on a "*proper construction*",[42] excluded the liability of Schenker.

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40 Fujitsu HOA para 20.

41 HC judgment para 2 (vol 4 pp 404-405).

42 SCA judgment para 11 (vol 4 p 426).

16.2 On the authority of *Tiekiedraai*, this does not involve a question of law, as contemplated by section 167(3)(b)(ii) of the Constitution.

16.3 Thus, the application for leave to appeal must be dismissed.

New Case before this Court

17 Ultimately aware that "the sole issue for determination [being] whether Fujitsu's delictual claim based on theft was excluded by clauses 17 and 40 of the standard terms" does not raise a point of law,[43] in the application for leave to appeal Fujitsu raises two new arguments, neither of which were in issue before the Court a quo or the SCA:

17.1 First, Fujitsu says that the SAAFF terms and conditions containing the exemption clauses is "*incorporated, by reference, across the freight-forwarding industry*",[44] which it says makes the issues in the application "*of significant public importance*".[45]

17.2 Second, it says that if the exemption clauses do in fact exclude liability for loss suffered through the theft of Schenker's employees, then they are contrary to public policy.[46]

18 We address both issues sequentially below, neither of which engages this Court's jurisdiction.

[43] Fujitsu HOA para 14.

[44] FA para 31 (vol 4 p 363-364).

[45] FA para 30 (vol 4 p 363).

[46] FA para 28(e) (vol 4 p 363) and Fujitsu HOA paras 18 and 82-94.

The alleged 'public importance' of the SAAFF terms and conditions

19 In this Court, Fujitsu alleges that the SAAFF terms and conditions which contain the exemption clauses are "*incorporated, by reference, across the freight-forwarding industry*",[47] which it says makes the issues raised in the application "*of significant public importance*".[48]

20 This allegation of fact is raised for the first time in this Court by Fujitsu's attorney who deposed to its founding affidavit, seeking leave to appeal from this Court.[49] It was never pleaded or relied on in evidence or in argument in the Court *a quo* or the SCA. It is disputed by Schenker:

20.1 The allegation is inadmissible hearsay evidence by the attorney, who also relies on what he was "*given to understand … has already become a talking point in the industry*" through his "*engagement with at least one attorney*".[50]

20.2 There is no evidence that the January 2008 Version 7 of the SAAFF terms and conditions that applied at the time the parties contracted (in 2009) and at the time of the theft (2012), still operates today.

20.3 There is also no evidence that freight forwarders must use them, or that they generally do so.[51]

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47 FA para 31 (vol 4 p 363-364).

48 FA para 30 (vol 4 p 363).

49 FA para 1 (vol 4 pp 357-358).

50 FA para 31 (vol 4 pp 363).

51 AA paras 30-34 (vol 4 pp 457-458).

21 Fujitsu has failed to establish that this specific commercial contract relied on more than a decade ago, is extant and in widespread use within the industry, or even that the disputed exemption clauses are to be found in unaltered form in such contracts today and therefore transcend the narrow litigation interests of the parties.[52]

22 Acutely aware of these defects, Fujitsu in its heads of argument changes tack. Referencing judgments of this Court,[53] it argues that this Court can take "*judicial notice of the fact that a certain form of contract is commonplace*",[54] for the sake of determining that a point of law is substantial and therefore is of general public importance.[55]

23 In support of this, Fujitsu cites three judgments where courts considered SAAFF terms and conditions: *World Net Logistics*,[56] *Kuehne*,[57] and *Freitan*.[58] But none of these judgments serve their intended purpose – none dealt with the "*particular contractual term[s]*",[59] i.e. the disputed exemption clauses:

23.1 Whilst *World Net Logistics* does make reference to the SAAFF terms and conditions,[60] the issue in that case concerned a submission to jurisdiction clause in the SAAFF terms and conditions, with argument pivoting on a special plea that the Magistrate's Court did not have

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52 *Tiekiedraai* at para 14; *Mokone v Tassos Properties CC* 2017 (5) SA 456 (CC) paras 16 and 17.

53 Fujitsu relies on *Tiekiedraai* at para 13, *Big G* at para 14, and *Mokone* para 16.

54 Fujitsu HOA para 21.

55 Fujitsu HOA paras 22-23.

56 *World Net Logistics (Pty) Ltd v Donsantel 133 CC* [2020] 1 All SA 593 (KZP); 2020 (3) SA 542 (KZP).

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

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

59 Fujitsu HOA para 21. The reference to Mokone v Tassos Properties CC 2017 (5) SA 456 (CC) at note 33 is not helpful.

60 *World Net Logistics* at para 5.

jurisdiction as a court of first instance to entertain a maritime claim by virtue of that clause.[61] The case was not concerned with exemption clauses generally or the disputed clauses in particular.[62] *World Net Logistics* does not support the argument that this Court should taking judicial notice of the widespread operation of such clauses.

23.2 The issue in *Kuehne* did not concern the interpretation of any provisions of the SAAFF terms and conditions. The dispute turned on whether the SAAFF terms and conditions formed part of the agreement between the parties.[63] What was in issue there was not an exemption clause but rather the integration and parol evidence rules.[64] Thus, this case is also no basis for the contention that this Court can take judicial notice of the alleged widespread use of the disputed exemption clauses. Further, the terms and conditions relevant to that case were from March 2001[65] and as there is no evidence that these still operate, *Kuehne* is irrelevant to whether this Court may take judicial notice of them.

23.3 Fujitsu faces the same obstacles with regards to *Freitan*. That judgment concerns credit facilities whose terms and conditions were subject to the SAAFF terms and conditions.[66] Not only do the terms relevant to that judgment not concern exemption clauses,[67] the issue

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[61] *World Net Logistics* at paras 10, 16(c) and 18(a).

[62] *World Net Logistics* at para 28.

[63] *Kuehne* at paras 2 and 4.

[64] *Kuehne* at paras 5-6.

[65] *Kuehne* at para 1.

[66] *Freitan* at para 2.

[67] *Freitan* at paras 3 and 11.

was whether an agreement existed at all;[68] and in any event the SAAFF terms and conditions were those that existed in 2002.[69]

24 Therefore, *World Net Logistics*, *Kuehne*, and *Freitan*, for various reasons, simply do not provide any basis for this Court to conclude that exemption clauses of the kind with which this Court is concerned are "*commonplace*" and "*used across the freight forwarding industry in this country*".[70]

25 Thus, even assuming that the issue raised here involves a question of law, there is no reason to conclude that it is of general public importance, for there is nothing in the papers or submissions to sustain the conclusion that that its resolution would "*transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public*".[71] Fujitsu, in the words of this Court in *Tiekiedraai –"did not and could not make this case*".[72]

26 Finally, it bears mention that Fujitsu does not (and cannot) contend that the matter ought to be considered, in the present litigation, in the interests of justice.[73]

27 There are no interests of justice considerations raised by Fujitsu, save for the belated constitutionally-driven public policy argument that we address immediately below.

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68 *Freitan* at paras 7 and 18.

69 *Freitan* at paras 4 and 14.

70 Fujitsu HOA para 22.

71 *Paulsen* at para 26.

72 *Tiekiedraai* at para 13.

73 *Tiekiedraai* at para 18.

The exemption clauses allegedly contrary to public policy

28 In a last-ditch effort to found jurisdiction, Fujitsu belatedly attempts to raise a constitutional issue and argues that:

28.1 if the exemption clauses properly interpreted exclude liability for theft by Schenker's employees, then its enforcement would be contrary to public policy; and

28.2 because enforcement of a contract would be contrary to public policy, it is a constitutional issue, and this Court has jurisdiction.[74]

29 This argument is unsustainable for all the reasons that this Court articulated in *Tiekiedraai*:[75]

29.1 Whatever the merits of this argument, it is not in the interests of justice to hear it, because Fujitsu offers no persuasive reason why this Court should override the compunction to operate as a court of first and last instance.[76]

29.2 This argument was not advanced in the Court *a quo* or the SCA,[77] which means that this Court has been deprived of the views of those courts on this substantial question.

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[74] Fujitsu HOA paras 24-26.

[75] *Tiekiedraai* at paras 17, 19-20, 24-25.

[76] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 (5) BCLR 422 (CC) paras 16-24 and *Cherangani Trade & Invest 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) paras 12-17 and 22.

[77] Pre-trial minute para 15 (vol 3 p 296), Fujitsu HC HOA (vol 3 pp 299-320), Fujitsu HC HOA leave to appeal (vol 3 pp 321-334), Fujitsu SCA HOA (vol 3 pp 335-349). See also the practice note in the SCA, where under "*Constitutional issues*", the word "*None*" appears (vol 3 p 351).

29.3 And just as was the case in *Tiekiedraai*, the only reason for this is that Fujitsu did not think of this argument then.

29.4 Whilst there might be cases where this Court should consider points of law not previously considered, there must be something extra. Nothing extra exists here. The parties contracted at arm's length, and each had resources that enabled them to secure their best interests in the courts below. That, we submit, is the end of the matter.

30 The importance of ventilating arguments in the lower courts is illustrated well by Fujitsu's extensive heads of argument:

30.1 The argument advanced for the first time before this Court, is that Goodman Brothers was "narrowly" decided; that "No mention was made of the Constitution"; "nor was any other public policy rationale for refusing to enforce the clause considered"; and it is "is incompatible with the notion of public policy infused with constitutional values."[78]

30.2 In its heads of argument, Fujitsu relies on a scholarly review article and 38 judgments to sustain its argument that the SCA's interpretation of the exemption clauses is not correct: 30 from South Africa, four from Australia, three from Canada, and one from England.

30.3 Most of the principles articulated in these judgments are relevant to its argument that exemption clauses that exclude liability for theft are contrary to public policy. This finding, though, would require this Court to overrule the settled judgement of *Goodman Brothers*, despite Fujitsu

[78] Fujitsu HOA paras 87-88.

not contending before the SCA that this judgment was wrongly decided.[79]

30.4 The reasoning of the full bench in *Goodman Brothers* was subsequently endorsed in *Rosenblum*, where the SCA expressly held that considerations of public policy which require adoption of the principle that prohibits an employer from protecting itself effectively against vicarious liability for thefts or other wilful misconduct committed by its employees in the course and within the scope of their employment, are absent in situations such as *Goodman Brothers* (and, by analogy, *in casu*).[80] This *dicta* too, must be overturned to satisfy Fujitsu's new argument.

30.5 Several of the foreign authorities relied on by Fujitsu essentially hold that Schenker should have expressly stipulated that it would not be liable for theft by its employees.[81] We have been unable to find any cases where our courts have set such a requirement, despite an exemption clause containing the phrase "*no liability whatsoever*" or "*no liability howsoever arising*" or similar.

30.6 On the contrary, the SCA has refused to endorse authority[82] that "an exclusion clause in a contract that did not express terms exempt a contracting party from liability for negligence, and could be interpreted to cover another cause of action, was not effective to exclude liability

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[79] SCA judgment para 20 (vol 4 p 430).

[80] *First National Bank of South Africa Ltd v Rosenblum & Anor* 2001 (4) SA 189 (SCA) at para 22

[81] *Punch v Savoy's Jewellers Ltd et al* (1986) 14 O.A.C. 4 (CA; *Aurora TV and Radio Ltd v Gelco Express Limited* (1991) 72 Man. R. (2d) 234 (CA); *Kishinchand & Sons (Hong Kong) Ltd v Wellcorp Container Lines Ltd* (1994) 88 F.T.R. 301 (CA); *Morris v C.W. Martin & Sons Ltd* [1966] 2 Q.B.716.

[82] *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C)

for negligent conduct", and held that the question as to what is excluded is always interpretative – "dependent on the very specific wording of the contract – and followed precedent where the SCA has "held quite the contrary".[83]

30.7 Fujitsu raises yet another issue that has not been considered by our courts. It refers to the well-established principle of interpretation that reference in a statute to any action or conduct will be presumed to mean lawful action or conduct, unless the contrary intention appears from the statute. It then contends, without more, that this principle should also apply to contracts.[84] However, the cases relied on, all deal with the interpretation of statutes.

31 Fujitsu asks this Court to over-rule well-established authority and consider (and determine) several issues as a court of first and last instance.

31.1 Despite the absence of analysis by the lower courts, Fujitsu, having not thought about the argument until filing its application for leave to appeal in this Court, wants this Court to assume jurisdiction over an issue that is so complex that Fujitsu needs to rely on more than three dozen cases over four international jurisdictions to sustain its claim that the decision in *Goodman Brothers* is, post-*Barkhuizen*, no longer good law.[85]

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[83] *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) paras 15-17.

[84] Fujitsu HOA paras 34 and 61.

[85] Fujitsu HOA para 89.

32 Fujitsu's reliance on *Johannesburg Country Club* in support of its 'contrary to public policy' argument, [86] illustrates Schenker's objection.

32.1 The *Johannesburg Country Club* relied on an exemption clause in defence of its liability for the death of a member.

32.2 The SCA requested and was provided with argument on the question whether such "*exclusion would be against public policy because it runs counter to the high value the common law and, now, the Constitution place on the sanctity of life … The conduct sought to be exempted from liability may involve criminal liability, however, and the question is whether a contractual regime that permits such exemption is compatible with constitutional values, and whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation*."[87]

32.3 However, the SCA found it unnecessary to determine the issue because it decided the matter on "*a proper reading of the contractual exclusion*".[88]

33 Plainly, we submit, it is not in the interests of justice to permit Fujitsu to raise this constitutional argument for the first time in this Court.

Conclusion

34 Fujitsu advances three grounds for why this Court has jurisdiction:

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[86] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA); – Fujitsu HOA para 32 note 51.

[87] *Johannesburg Country Club* para 12 (references omitted)

[88] *Ibid.*

34.1 First, Fujitsu argues that *Big G* is authority for the proposition that interpretation of clauses in a contract is a point of law that is of general public importance. This argument, though, ignores *Tiekiedraai* and rests on a misreading of *Big G*.

34.2 Second, Fujitsu argues that determining the meaning of the SAAFF terms and conditions is of public importance:

34.2.1 This argument neglects the separate requirement in section 167(3)(b)(ii) that the issue be one of law.

34.2.2 There is also no evidence on the papers, or basis in case law that warrants this Court taking judicial notice of the claim that the exemption clause is in widespread use.

34.3 Third, Fujitsu argues that the exemption clause, as interpreted by the SCA, is contrary to public policy. This argument is raised for the first time in this Court. No reasons are provided for why this Court should act as a court of first and last instance. It should refuse to do so.

35 Therefore, we submit that the application for leave to appeal falls to be dismissed because it does not engage this Court's jurisdiction.

THE INTERPRETATION OF THE EXEMPTION CLAUSES

36 Schenker's exemption from liability is regulated by clauses 17,[89] 40 and 41,[90] of the SAAFF standard terms and conditions.

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[89] Vol 4 p 396.

[90] Vol 4 p 400-401.

Clauses 17 and 40

37 Clause 17 provides:

> "***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.*" [Emphases added]

38 In relevant part, clause 40 provides:

> "***40. LIMITATION OF [SCHENKER'S] LIABILITY***
>
> *40.1 Subject to the provisions of clause 40.2 and clause 41, [Schenker] shall not be liable for any claim of whatsoever nature (whether in contract or in delict) and whether for damages or otherwise, howsoever arising including but without limiting the generality of the aforesaid –*
>
> *40.1.1 any negligent act or omission or statement by [Schenker] or its servants, agents and nominees; and/or*
>
> *. . .*
>
> *40.1.3 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." [Emphases added]

39 Clause 41 concerns the monetary limitation of liability. As it was not an issue in the Court *a quo* or SCA, it can be ignored.

Court *a quo* and SCA judgments

40 In the Court *a quo*:

40.1 It was held that "[t]o determine whether or not [Fujitsu's] delictual claim is excluded, it is necessary to interpret the agreements and in particular clauses 40 and 41".[91]

40.2 After initially mentioning but putting aside by virtue of lack of evidence surrounding circumstances, subsequent conduct, and purpose, it was emphasised that the "*commercial purpose*" of the agreement was for Schenker to provide services to Fujitsu.[92]

40.3 Given this purpose, clauses 40 and 41 only exclude liability for damage arising out of the execution of Schenker's duties to Fujitsu.[93]

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[91] HC judgment para 39 (vol 4 p 415).

[92] HC judgment paras 39-41 (vol 4 pp 415-416).

[93] HC judgment para 43 (vol 4 p 416).

40.4 As theft of goods is not part of the performance of these duties, clauses 40 and 41 did not apply and Schenker was liable.[94]

41 The SCA set aside the Court *a quo's* judgment and order:

41.1 Whereas the Court *a quo's* order turns on clauses 40 and 41, the SCA's turns primarily on clause 17.[95]

41.2 Citing *Goodman Brothers*, the SCA held that the purpose of an "almost identical" clause enables a party to "protect itself against the dishonesty of its employees by taking out fidelity insurance or by taking additional precautions" around "valuables".[96]

41.3 Since it was not argued that *Goodman Brothers* was wrongly decided,[97] and since it was not disputed that the stolen goods were "*valuables*" as contemplated in clause 17 and because Fujitsu had not made special arrangements in writing,[98] it follows that clause 17, interpreted properly, excluded Schenker's liability for its employee's theft.[99]

42 In its founding affidavit in this Court, Fujitsu argues that the SCA *"applied incorrect legal principles*" and "*departed from settled law*" pertaining to exemption clauses of this nature.[100]

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94 HC judgment para 46 (vol 4 pp 416-417).

95 SCA judgment para 11 (vol 4 p 426).

96 SCA judgment para 19 (vol 4 p 430).

97 SCA judgment para 20 (vol 4 p 430).

98 SCA judgment para 16 (vol 4 p 429). For the factual averments in the court *a quo* proceedings, see amended plea para 8 (vol 1 pp 45-46), the witness statement of Schenker's Mr Ricardo da Cunha (vol 2 p 140 para 5), and the transcripts of the testimony by SAA's Mr Pieter Mare (vol 2 p 222 lines 18-20) and Mr da Cunha (vol 3 pp 262-263).

99 SCA judgment para 20 (vol 4 p 430).

100 FA para 29 (vol 4 p 363).

43 In its heads of argument, Fujitsu expands upon this claim through an extensive analysis of domestic and foreign jurisprudence. In summary Fujitsu contends that:

43.1 Exemption clauses alter the common law rights and duties that regulate interpersonal relations, so they must be interpreted restrictively, i.e., if the wording of a clause permits an interpretation that does not exclude liability, it must be adopted.[101]

43.2 One application of these principles is the enquiry by courts to determine if the common intention of the parties to an agreement was to exclude liability only when the party is substantially performing in terms of their contractual obligations.[102]

43.3 Australian, Canadian and English courts all follow similar approaches to exemption clauses.[103]

44 The content of these submissions pertaining to domestic and foreign law are not in dispute. The law has never been in issue between the parties, which is exactly why this Court's jurisdiction is not engaged in this matter.

45 But these jurisdictional issues aside, the law itself does not assist Fujitsu. On a proper interpretation of clause 17, there is no ambiguity regarding Schenker's non-liability to Fujitsu in the circumstances.

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[101] Fujitsu HOA paras 29-31.

[102] Fujitsu HOA para 33.

[103] Fujitsu HOA para 37, 38-43 (Australia), 44-47 (Canada) and 48 (English).

Interpretation and application

46 As noted above, whereas the Court *a quo's* order turns on clauses 40 and 41, the SCA's order turns primarily on clause 17.

47 In their heads of argument, Fujitsu makes submissions on both:

47.1 They say that neither clause 17 nor 40 exclude liability for theft.[104] Their argument for this proposition is as follows:

47.1.1 Clause 3 of the SAAFF terms and conditions limits their applicability to the undertaking of business or giving of advice, information or services. Since theft does not fall within these categories, neither clause 17 nor 40 applies.[105]

47.1.2 Clause 17 concerns liability in respect of "*goods*", which term refers to goods "*handled*" or "*dealt with*", an action or conduct that must *prima facie* be presumed to refer to lawful action or conduct.[106] And since the definition of 'goods' refers to handling or dealing "*on the instructions of the customer*", it must be that clause 17 only contemplates legitimate and authorised forms of dealing and handling, i.e., not theft.[107]

47.1.3 Clause 40 does not refer to theft by an employee, and in light of Fujitsu's restrictive approach to interpreting exemption clauses, as articulated above, it follows that this particular

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[104] Fujitsu HOA para 65.

[105] Fujitsu HOA paras 55-56.

[106] Fujitsu HOA paras 58-61, read with paras 34-36.

[107] Fujitsu HOA para 62.

clause does not apply to theft that is committed by an employee.[108] Whilst "*handle*", "*dealt with*", "*any*" and "*howsoever arising*" can on a literal reading include theft, the words can reasonably be read as referring only to losses incurred during the performance of duties under the contract.[109]

47.2 Fujitsu, in a comparative analysis, further argues that exemption clauses do not apply to intentional wrongs like theft. Their argument proceeds as follows:

47.2.1 Whilst clause 40 uses the phrases "*of whatsoever nature*" and "*any*",[110] the clause only refers to negligent acts or omissions that cause loss or damage.[111]

47.2.2 Even if phrases like "*of whatsoever nature*" and "*howsoever arising*" can be interpreted to include intentional acts, it is not fanciful to read clause 40 restrictively, so as to limit exclusion from liability to negligent conduct.[112]

47.3 Since Mr Lerama's theft of Fujitsu's goods does not involve undertaking business or giving of advice, information or services, and as this wrong

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[108] Fujitsu HOA paras 63-64.

[109] Fujitsu HOA paras 69-70.

[110] Fujitsu HOA para 76.

[111] Fujitsu HOA para 77. But as noted in the SCA judgment at para 15: "*A delict can arise through intentional or negligent acts.*"

[112] Fujitsu HOA para 78.

was intentional not negligent, it follows that clause 17 and clause 40 do not exclude Schenker's liability for this theft.[113]

48 Fujitsu's argument wholly neglects the finding of the SCA, which as we explained above rests on two premises, factual and legal:

48.1 Factually, the stolen goods were valuables as contemplated in clause 17 and Fujitsu did not make special arrangements in writing.[114] These facts were undisputed.

48.2 Legally, in *Goodman Brothers* it was held that the purpose of provisions like clause 17 is to provide a party that will deal with valuable goods an opportunity to get fidelity insurance or take other measures to protect itself against the dishonesty of its employees.[115] Fujitsu did not contend that *Goodman Brothers* was wrongly decided and does not address the purpose of this provision.

49 Once the purpose of clause 17 is understood, it becomes clear that all of Fujitsu's interpretative arguments are unsustainable:

49.1 It is not a coincidence that for all of Fujitsu's analysis of clauses 17 and 40 in their heads of argument, it neglects their purpose.[116]

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[113] Fujitsu HOA paras 79-81.

[114] SCA judgment para 16 (vol 4 p 428).

[115] SCA judgment para 19 (vol 4 p 430). As explained by Mr da Cunha, if Schenker had been informed that the goods were high value, he would have arranged for them to be escorted by unmarked security (vol 2 p 140 para 7).

[116] In FA para 43(b) (vol 4 p 366), it is said that their "*purpose is to limit the contractual party's exposure obviously only during the 'fetch, carry, store and deliver exercise'*". This is an interpretation of the effect of the provisions, not an analysis of their purpose. As we explain below, this interpretation is also wrong.

49.2 This omission obscures the obvious point that theft cannot be excluded from the limitation of liability that is prescribed by clause 17, since its purpose is to protect Schenker from theft by employees, by giving it an opportunity to protect itself through insurance or other preventative measures. That is the reason, we submit, why clause 17 exists at all.[117]

50 As it was not argued before the SCA that *Goodman Brothers* was wrongly decided,[118] it follows that its decision to set aside the judgment and order of the High Court was correct:

50.1 Since the stolen goods were valuables and since Fujitsu failed to make special arrangements in writing, clause 17 states that Schenker incurs *"no liability whatsoever*".

50.2 Further, clause 17 provides that clauses 40 and 41 apply if there is "*a claim*" in respect of goods requiring special arrangements. In that event (and in all other events), clause 40 then provides that Schenker "*shall not be liable for any claim of whatsoever nature (whether in contract or in delict) … howsoever arising including … any loss … arising from or in any way connected with … non-delivery … of any goods*".

50.3 Therefore, the SCA was right to focus on clause 17, read with clauses 40 and 41, rather than interpret exclusively, or at least primarily, clauses 40 and 41, at the expense of clause 17, as was done by the Court *a quo*.

[117] *Goodman Brothers* at 103C-E.

[118] SCA judgment para 20 (vol 4 p 430).

50.4 As was the case in *Goodman Brothers*, where the full court of the High Court dealt with an almost identical clause, whatever limitation on liability clause 40 establishes (which we submit is all-encompassing), clause 17 creates a "*further limitation on the respondent's liability where, inter alia, valuables are to be conveyed*". If special arrangements have not been made, "*all grounds of liability are excluded*".[119]

51 Therefore, if this Court does not dismiss the application on the grounds of lack of jurisdiction, we submit that on a proper interpretation and application of clause 17, it nonetheless falls to be dismissed on the merits.

Public policy

52 Having rightly lost in the SCA on the "*sole issue for determination*" that was before that Court,[120] Fujitsu in its application for leave to appeal now advances a new argument, namely, if the SCA's interpretation of clause 17 is correct, then its enforcement would be contrary to public policy.[121]

53 For the reasons articulated above, it is impermissible for Fujitsu to raise this novel argument here. But even if this Court were inclined to consider it, this argument is unsustainable.

54 Fujitsu's public policy argument is as follows:

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[119] *Goodman Brothers* at 96I-J. As was the case in *Goodman Brothers* at 103E-G, "*the theft by the respondent's employees was . . . not the theft of the respondent*", meaning "*[t]he general principle stated by Innes CJ in the Wells case - that the law will, on grounds of public policy, not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other - does not apply in the present case*". Both Fujitsu and Schenker are innocent of wrongdoing.

[120] Fujitsu HOA para 14.

[121] FA para 28(e) (vol 4 p 363), read with Fujitsu HOA paras 18 and 82-94.

54.1 The *ratio* of *Goodman Brothers* is that as long as an exemption clause does not allow a party to benefit from its intentional wrongdoing, per *Wells*,[122] it does not offend public policy.[123]

54.2 This general proposition is not sustainable in light of the constitutional values that, since *Goodman Brothers* was delivered, must now inform public policy. Following *Barkhuizen*,[124] when an exemption clause serves to undermine the essence of the contract, there is good reason to be wary of it.[125]

54.3 Clause 17 undermines the essence of the agreement between Fujitsu and Schenker, for it "*undermin[es] the reciprocity between the essential obligations envisaged by the parties*", by thwarting the purpose of the contract, which clause 17 does by stating that "*Schenker's employees can not only fail to carry out such collection and delivery but can in fact steal the goods*".[126]

54.4 So, this Court should create a *"substantive rule that a contractual term which . . . excludes liability for theft by an employee is against public policy",* for public policy does not "*countenance an exemption . . . that would so erode the fundamental bargain between the parties*."[127]

55 There are at least two fatal defects in Fujitsu's argument:

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

123 Fujitsu HOA para 87.

124 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

125 Fujitsu HOA paras 88-90.

126 Fujitsu HOA paras 91-92.

127 Fujitsu HOA para 94.

55.1 First, on a proper reading of *Goodman Brothers*, it is clear that Fujitsu's characterisation of its *ratio* is incorrect:

55.1.1 The primary issue was not whether the doctrine articulated in *Wells*[128] – *i.e.*, public policy does not recognise undertakings by a contracting party to bind itself to condone and submit to the fraudulent action of another—applied in cases involving theft by an employee.

55.1.2 Cloete J's analysis of *Wells* was secondary, only coming after the decisive finding, which was articulated as follows:

> *"If two contracting parties can, as in the Fibre Spinners & Weavers case, validly agree to exempt the one from liability for the dishonesty of his employees in exchange for arranging a policy of insurance which would indemnify the other for the consequences of a theft by the former's employees, I see no reason in principle or public policy why contracting parties could not simply agree without more on the exemption of the one from such liability and leave it to the other to take out a policy of insurance, should he wish to do so."*[129]

55.1.3 Therefore, the judgment turned on the principle of freedom of contract, with the doctrine in *Wells* then discussed to explain that because a contracting party that benefits from exemption clauses of this kind is not themselves a thief, that doctrine is not applicable.[130]

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[128] *Wells v South African Aluminite Co* 1927 AD 69

[129] *Goodman Brothers* at 102B-E.

[130] *Goodman Brothers* at 103E-G.

55.2 Second, Fujitsu is incorrect that the exemption clause undermines the essence of the contract between it and Schenker:

55.2.1 Whilst it is correct that the commercial purpose of the contract, as the High Court put it,[131] is the provision of freight forwarding services, that purpose is not undermined by clause 17.

55.2.2 Clause 17 does not permit Schenker's employees not to carry out their duties, nor does it permit them to steal the goods.[132] Clause 17 says:

(a) if the goods are valuable, Fujitsu must make prior special arrangements in writing;

(b) if Fujitsu does, the limitation on liability in clause 17 does not apply; but

(c) when it fails to make prior special arrangements in writing Schenker's liability will be limited.

55.2.3 Clause 17 does not permit employees to abandon their duties, nor does it permit them to steal:

(a) if Fujitsu had made prior special arrangements in writing, its delictual claim for the theft would not face the limitation of liability that is created by clause 17;

[131] HC judgment paras 39-41 (vol 4 pp 415-416).

[132] Fujitsu HOA para 92.

(b) however, it failed to do so. This is why its loss cannot be recovered;[133]

(c) the commercial essence of the contract, therefore, is not undermined by clause 17.

55.2.4 In fact, such clauses facilitate the existence of the commercial services offered by Schenker:

(a) as explained in *Goodman Brothers*, this clause enables parties like Schenker to protect themselves against the dishonesty of employees by taking out fidelity insurance, or by taking further precautions for the safe conveyance of valuable goods;[134]

(b) with this protection, which is not at the expense of parties like Fujitsu provided they give prior written notice, freight forwarders can offer services at lower prices, and thus to more parties, than they otherwise would;

(c) this is because they do not have to build directly into the costs of services the risk of theft and liability; or purchase the same insurance for transporting all goods, valuable and non-valuable; nor hire security for all transits – which wasted expenditure in each case would indiscriminately be passed onto all the contracting parties.

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[133] SCA judgment para 16 (vol 4 p 429).

[134] *Goodman Brothers* at 103D-E.

55.2.5 Thus, the clause functions as a risk-allocation device, typically between commercial parties contracting at arms-length.[135] Such clauses are essential to commercial services of the kind that Schenker provided to Fujitsu.

56 Rather than undermine public policy, clause 17, by fairly allocating risk between parties, and thereby reducing costs of business and enhancing access to freight forwarding services, functions to promote one element of public policy, namely, facilitating access to services often essential to doing business, on terms that are fair, efficient and reasonable.

57 Thus, Fujitsu's belated argument on the merits also falls to be dismissed.

[135] *Goodman Brothers* at 103G; SCA judgment at para 19. See also *Joint Venture Aveng (Africa) (Pty) Ltd/Strabag International GmbH v South African National Roads Agency SOC Ltd* 2021 (2) SA 137 (SCA) at paras 12-14.

CONCLUSION

58 In the circumstances:

58.1 the application for leave to appeal ought to be dismissed on the ground that this Court's jurisdiction is not engaged;

58.2 *alternatively*, in the event leave to appeal is granted, the appeal ought to be dismissed on the ground that the exemption clauses, properly interpreted and applied to the facts, exclude liability for the theft by Schenker's employee; and

58.3 in either event, the order ought to include the costs of two counsel.

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6 September 2022