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INSURANCE LAW UPDATE

Fujitsu Services Core (Pty) Limited

vs

Schenker South Africa (Pty) Limited

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IS AN EXCLUSION OF LIABILITY CLAUSE IN A CONTRACT AGAINST PUBLIC POLICY?

The Constitutional Court considered this and delivered a split decision on the debate.

Can public policy considerations exclude the enforceability of an exclusion of liability clause? The Constitutional Court, by a narrow majority, says no in this case.

On 28 June 2023, the Constitutional Court handed down judgment in the matter of *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* [2003] ZACC.

This case deals with the proper interpretation of an exemption clause in the context of liability for losses suffered as a result of an employee's theft of a consignment of laptops.

The legal considerations in the case were:

1. whether the exemption clauses relied upon can be interpreted as excluding liability for wrongful acts committed outside the contractual context (i.e. theft by an employee); and
2. whether an exemption clause in the contract between parties was contrary to public policy, and therefore unenforceable.

FACTS:

Fujitsu, an importer, seller and distributor of laptops and related goods concluded a national distribution agreement with Schenker, a company which carries on business as a warehouse operator, freight forwarder, distributor and forwarding agent. The distribution agreement (which was subject to the terms of the South African Association of Freight Forwarders trading terms and conditions) provided that Schenker would collect, clear and carry goods and, thereafter, deliver them to Fujitsu in accordance with Fujitsu's instructions.

The agreement essentially identified two categories of goods which Schenker was permitted to deal with on behalf of Fujitsu: high value and normal, non-high value goods. High value goods included jewellery, precious stones and valuables, amongst other things.

Clause 17 of the agreement recorded that Schenker would not accept or deal with high value goods on behalf of Fujitsu unless under special arrangements made in writing in advance. In the event Schenker was required to handle or deal with high value goods without prior written special arrangements, Schenker would not incur any liability "whatsoever", specifically in respect of its negligent acts or omissions when handling such goods.[1]

In 2012, Fujitsu purchased a consignment of laptops and in doing so, it engaged Schenker's services to assist with the logistics of the consignment, by importing the goods into South Africa and receiving them from the airline.

[1] Clause 17 reads:

"Goods Requiring Special Arrangements

Except under special arrangements previously in writing the Company will not accept or deal with… valuables… 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…"

Importantly, no prior special arrangements were made in writing permitting Schenker to deal with the high value goods for Fujitsu.

When Fujitsu's consignment arrived, one of Schenker's employees collected the consignment of laptops, loaded them into an unmarked car, and never returned to work.

Fujitsu instituted a delictual claim against Schenker for damages on the basis that Schenker was vicariously liable for the loss it suffered because of the theft. Schenker argued that it was not liable having regard to the exclusion of liability in clause 17 of the distribution agreement. Fujitsu argued that the exclusion of liability did not apply to intentional conduct such as theft.

HIGH COURT

The court, of first instance, rejected Schenker's argument that it was excluded from liability for theft and upheld Fujitsu's argument that clause 17 did not apply to intentional conduct such as theft. The court held that theft was an act outside the performance of the parties' contract and the exemption clause did not apply. Put another way, Schenker could not rely on the exemption clause where the contract was not being executed, and if Schenker intended the exclusion clauses to apply to the delictual claim of theft, it ought to have made this clear in the contractual terms, which it held was not contemplated by clause 17.

THE SUPREME COURT OF APPEAL ("SCA")

On appeal, the SCA held that the claim against Schenker in respect of the valuable goods was governed by the contractual clauses which excluded liability for any claim of "whatsoever" nature (whether in contract or delict) and whether for damages or otherwise "howsoever arising". The SCA was of the view that these words should be accorded their ordinary and literal meaning and reasoned that they were "*sufficiently wide enough in their ordinary import to draw into the protective scope of the exemption the deliberate and intentional conduct of the employees of Schenke*r".

The SCA also held that, because the goods were valuables, commercial rationale required that the goods be specified and special arrangements be made with Schenker to enable it to take steps to mitigate the risk of theft or any other potential claim. In the absence of any special arrangements, Schenker would not be liable "whatsoever" (whether in contract or delict) in respect of such goods nor incur liability in respect of its negligent acts or omission. Accordingly, the SCA overturned the decision of the High Court.

CONSTITUTIONAL COURT

On appeal to the Constitutional Court, the pertinent issue was whether exemption clauses, properly interpreted, exclude liability for a delictual claim for theft by employees.

Fujitsu contended that the exemption clause should not be interpreted to exclude liability for theft by Schenker's employee, especially where the employee's actions were unlawful and not in accordance with the contract. Fujitsu submitted that on a proper interpretation of the contract, the words no claim "whatsoever" and "howsoever arising" do not include intentional acts.

Finally, and although the point was not raised before the High Court or SCA, Fujitsu argued that enforcing a contractual term such as the exclusion from liability would bring exemption clauses out of step with the *boni mores* of the community and would be contrary to public policy.

CONSTITUTIONAL COURT: MAJORITY JUDGMENT

Zondo CJ. for the majority held that, on a proper reading of the clause, the loss for which Fujitsu sought to hold Schenker liable was the loss of goods which fell within the goods listed in clause 17.

The majority considered Fujitsu's position (that the clause does not apply to cases of deliberate or intentional conduct such as theft) against the commercial context in which the agreement was concluded and noted the peculiarity of the notion that a freight forwarder, which wanted to protect itself against the risk that may be posed by its employees in the course of dealing or handling the consumer's goods, would want a clause in a contract that protects it against the risk of negligent conduct by its employees but does not protect it against the risk of intentional conduct such as theft on the part of its employees.

On Fujitsu's logic, Schenker sought to protect itself against a lesser risk and not protect itself against a bigger risk. The majority held that this construction of the agreement was neither sound nor sustainable, as it was not business-like and would not make sense for a businessperson or entity to protect itself against the negligent conduct but not against intentional conduct such as theft.

The Court accepted that in terms of clause 17, the parties agreed that prior special arrangements had to have been made in writing before Fujitsu sent valuable goods to Schenker. Put differently, Schenker's liability in respect of the special category of goods would depend on special arrangements being made before Fujitsu could send such goods to Schenker. The majority was of the view that this deal must be upheld unless there were valid reasons to the contrary.

Zondo CJ. for the majority considered Fujitsu's argument that clause 17 only applies in the execution of the agreement. He held that there was no merit in this submission as, if it were valid, it would mean that Clause 17 would protect Schenker from liability when, for example, its employee acts in accordance with the contract but not so when he or she acts in breach of the contract. The majority held that exemption from liability is required for conduct that is in breach of the contract or law and not for conduct that is in line with the contract and with the law.

Even though it was only raised on appeal for the first time, Zondo CJ., considered Fujitsu's contention that to the extent that clause 17 exempts Schenker from liability for loss arising from the theft of its employees, it is contrary to public policy and is therefore unenforceable.

In doing so, he relied on *Barkhuizen v Napier*[2] in which the Constitutional Court gave meaning to the phrase "public policy" and stated that:

"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provision of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our constitution is contrary to public policy and is therefore unenforceable"[3].

In addition, the Court elaborated on the public policy considerations and provided that:

[2] *Barkhuizen v Napier* [2007] ZACC5; 2007 (5) SA 323 (CC).
[3] *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* [2003] ZACC at para 119; *Barkhuizen* above n 2 at para 29.

"Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu. It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.[4]

Having regard to Barkhuizen, the majority held that there was nothing unfair or unreasonable about the terms of clause 17. On the contrary, it found that clause 17 was fair to both parties as Schenker agreed not to handle goods generally other than where there were special prior arrangements. This was to avoid the risk in doing so. If Fujitsu chose not to make prior special arrangements in writing with Schenker to handle the special goods, it chose to voluntarily assume the risk that, if something happened to the goods (including if they were stolen), it would be responsible for its choice.

On the other hand, if Fujitsu made prior special arrangements with Schenker, Schenker could take out an insurance policy to cover the risk and pass on the cost to its customer by way of a higher fee, but if Fujitsu elected to send high value goods without prior written arrangement, Fujitsu bore that risk.

The majority confirmed, as per Barkhuizen, that contracts that have been voluntarily and freely concluded should, as a general rule, be enforced unless there is something contrary to public policy about them. The Court also noted that there was nothing to suggest Fujitsu was in a weaker bargaining position than Schenker when the agreement was concluded.

Accordingly, the majority held that there was nothing unfair or unreasonable about clause 17 and for that reason, it was found not to be contrary to public policy.

In arriving at this conclusion, the Court considered various authorities which reject the proposition that it is contrary to public policy to have a clause in a contract which exempts one of the parties from liability for loss arising from the intentional conduct of its employees such as theft.

In *Goodman Brothers*[5] the clause in the contract was similar to clause 17 in substance, and the question was whether the clause absolved a contracting party (the respondent) from any liability to the other when goods were stolen by employees of the respondent. The Court in *Goodman* held that the theft by the servant is not theft by the employer - the theft is not for the benefit of the employer but for the benefit of the employee. To allow the employer to rely on a clause excluding liability for theft of an employee would not encourage theft, as the risk of theft being committed is the same regardless of whether the exemption clause is in place.

The Court (in agreement with the Full Court in *Goodman Brothers*) held that there was nothing contrary to public policy with two contracting parties agreeing on exemption of the one party to the agreement from liability and leaving it to the other party to take out an insurance policy, should it wish to do so.

Further, the majority relied on the decision in *Fibre Spinners v Weavers*[6] where the SCA drew a distinction between an exemption clause purporting to exempt a party from liability for loss or damage arising from its own wilful conduct (in which such a clause would not be enforceable as it would be contrary to public policy) versus a situation where an exemption clause exempted an employer for liability for loss or damage to property arising from the wilful misconduct (e.g. theft) of its employees or

[4] *Barkhuizen* above n 2 at para 51.
[5] *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91(W).
[6] *Government of the Republic of South Africa v Fibre Spinners & Weavers* 1978 (2) SA 794 (A).

agents. The SCA accepted, even by implication, that a clause in a contract that exempted a contracting party from liability for loss arising from the wilful misconduct of its employees such as theft is not contrary to public policy.

Zondo CJ., for the majority, concluded that the making of prior special arrangements in writing by Fujitsu with Schenker before Fujitsu could send valuable goods to Schenker was a condition precedent to Schenker's liability for anything that happened to those goods, including theft. Once it is accepted (as it was), that Schenker did not make prior written special arrangements, the condition precedent for Schenker's liability has not been met or complied with and therefore Schenker is not liable. Accordingly, the Constitutional Court ruled that the SCA's decision was correct and the appeal was dismissed.

CONSTITUTIONAL COURT: MINORITY JUDGMENT

Although the majority dismissed the appeal, the minority judgment penned by Mathopo J. held that, had he commanded the majority, he would have set aside the decision of the SCA.

Mathopo J. disagreed with the majority's interpretation of clause 17, which in his view was not anchored in the proper interpretation of contractual principles.

He noted that the matter was essentially one of interpretation and the common intention of the parties must be ascertained from the language of the contract, which must be given its ordinary and grammatical meaning unless it would result in absurdity, repugnancy or inconsistency with the rest of the instrument.[7]

The minority, per Mathopo J., were of the view that it was remiss to focus on individual elements of the contract and interpret them in piecemeal fashion. In order to ascertain the purpose of the clause under consideration, the correct approach was to consider the purpose of the agreement on the one hand and on the other, to ensure that a contextual approach to the proper interpretation of the exemption clause was not ignored.

The minority took the view that the literal interpretation of clause 17 involved a radical departure from the proper interpretation of the contract as it would have allowed Schenker to benefit from the unlawful conduct of its employees, in conflict with other provisions of the contract.

Dealing with the qualifying phrases "of whatsoever" nature, "any such goods" and "howsoever arising", the minority disagreed with Schenker's submission that the words should be understood to mean that no liability for any claim of whatsoever nature – whether in contract or delict – would arise under such circumstances.

The minority held that even if it was accepted that the qualifying words or phrases limited the liability of Schenker, there was no compelling reason to include theft from the exclusion of liability prescribed in the contract, as theft did not constitute the performance of the contract that required Schenker to collect and deliver the goods to or on behalf of Fujitsu.

Ultimately, the minority concluded that Schenker's appeal ought to be dismissed as clause 17 was not applicable to intentional conduct such as theft and it only applied to situations where the loss occurred in the performance or execution of the contract between the parties. If clause 17 applied, the minority reasoned it would be contrary to public policy as the clause would operate to prevent Fujitsu from obtaining judicial redress which would otherwise have been available to it, and enforcing an agreement in such circumstances would offend the principles of good faith and fairness. Further, any contract which envisioned and tolerated theft would be contrary to the doctrine of legality and public policy.

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

CONCLUSION

In conclusion, although the majority found that the exemption clause was not contrary to public policy, and was therefore enforceable, it is evident from the minority's judgment that future circumstances and facts may very well present another opportunity for the Court to depart from this judgment and find that an exemption clause may be unenforceable.

It is also evident from this judgment that broad and generic wording which aims to cast the net as wide as possible is not always the prudent approach. Contracting parties ought to ensure that any exemption or limitation of liability clauses are clear and unambiguous. The wording should also make it clear that the clause excludes liability for wrongful acts committed outside the contractual context, if this is the intention of the parties.

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