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Maritime, International Trade and Insurance Law Team

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Our Cox Yeats Maritime, International Trade and Insurance Law Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.

LIABILITY OF FREIGHT FORWARDERS AND OTHERS FOR THEFT PERPETRATED BY EMPLOYEES

In the shipping and logistics industry one of the greatest risks of loss in respect of goods is theft during transit or warehousing incidental to transit. In regard to freight forwarders, warehousemen, bailees and road hauliers, there is a risk that their employees may perpetrate, or be complicit in, the theft of goods in their custody or control.

Historically, entities engaged in logistics have relied upon contractual exclusions or limitations of liability, commonly referred to as "exemption clauses", in order to avoid liability to the owner of goods in respect of such losses. However, in a recent decision of the High Court of South Africa, Gauteng Local Division, Johannesburg, the court did not uphold the freight forwarder's defence to the claim based upon certain exemption clauses, in circumstances where an employee of the freight forwarder was responsible for the theft of goods.

The facts in the case of *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* were not complicated. Fujitsu had purchased and imported a consignment of laptops and accessories from Fujitsu, Germany to the value of USD516,877.00. The goods were to be carried to South Africa by air and Fujitsu entered into an agreement with Schenker in terms of which the latter would attend to the usual functions of a freight forwarder in regard to the goods, namely the logistics in respect of the carriage by air, warehousing incidental thereto and the clearing and forwarding of the goods through Customs in South Africa.

Upon arrival at OR Tambo International Airport (ORTIA) in Johannesburg, the goods were placed in storage at the SAA Cargo Warehouse. One **"L"**, an employee of Schenker, arrived at the warehouse and presented the original master air waybill and Customs declaration form in order to take delivery of the goods. However, instead of delivering the goods to Fujitsu, L proceeded to steal the goods in what appeared to be a carefully planned and well-orchestrated theft.

In its judgment, the court had to deal with what it described as the vexed issue of vicarious liability on the part of Schenker for the conduct of its employee, L, and, further, the question of whether Schenker was entitled to rely upon exemption clauses in order to avoid liability for the claim.

Vicarious Liability

The court noted that, 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/her employment. An employee is regarded as "the hand" of its employer. Such liability is extended to the scenario where an employee is engaged in any activity reasonably incidental to his/her employment.

Referring to the judgment in *F v Minister of Safety and Security,* the court noted that where an employee was acting outside the course and scope of his/her employment, as L was doing in the present case, it was to be regarded as a "*deviation case*". The court further noted the developments in our law regarding deviation cases, in particular with respect to the connection between the deviant conduct and the employment relationship. The court referred to the recent decision of the Supreme Court of Appeal (SCA) in *Stallion Security (Pty) Ltd v Van Staden* where the SCA held that an employer would not be liable in circumstances where an employee committed the act wholly for his/her own purposes, unless there was a sufficiently close link between the employee's conduct and the business of the employer.

On the facts of *Fujitsu v Schenker*, the court held that L's actions were sufficiently closely related to the functions that he was required to perform such that Schenker should be held vicariously liable for L's conduct. In this respect, the court placed emphasis on the fact that L was employed by Schenker as a cargo drawer, enjoyed unfettered access to the SAA security cargo area and was given a specific security clearance, as well as the necessary Customs clearing documentation, in order to take delivery of the goods from SAA Cargo.

Contractual Exclusion of Liability

On this issue, the court noted that it is a well-established principle of our law that exemption clauses should be strictly interpreted in contractual instruments. Furthermore, the court found that, as a general rule, a party should not be allowed to rely upon an exemption clause in cases where the loss occurred in circumstances where the contract was not being executed, unless the clear intention of the contracting parties was to such effect.

Interpreting the wording of the Schenker exemption clauses – which, it must be noted, were drafted in a standard, widely used form - the court found that the ambit of the wording was not broad enough to exclude liability for theft by employees of Schenker. The court found that the wording of the exemption clauses was intended to restrict Schenker's liability for loss or damage suffered by a client pursuant to or during the provision of services by Schenker to such client. It did not contemplate excluding liability on the part of Schenker for claims based on theft perpetrated by an employee of Schenker.

Importantly, the court expressed the view that the 1997 judgment in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* had been overtaken by recent developments in our law, specifically following the judgment of the SCA in *Stallion Security*. In *Goodman Brothers*, the Witwatersrand Local Division of the High Court, as it was then known, held that the delictual liability of a road carrier for theft perpetrated by its employees was excluded by exemption clauses similarly worded to those of Schenker's.

The important takeaway is that our courts are moving towards holding employers vicariously liable for acts perpetrated by their employees, whether committed within the course and scope of their employment or within the deviation cases mentioned. Furthermore, it appears that our courts will not readily allow an employer to avoid such liability via exemption clauses, especially in circumstances where the goods are in the custody or control of the employer at the time of the loss.

It is also worth noting the 2005 decision of the SCA in *SARS v TFN Diamond Cutting Works (Pty) Ltd*. Briefly, in that case, a diamond was stolen whilst in the possession of SARS in a secure vault at ORTIA. The SCA held that the inescapable conclusion was that an employee of SARS responsible for safe custody of the diamond, had stolen it, and that SARS was liable to the owner of the diamond for the "*theftuous conduct*" of the SARS employee.

Logistics and Marine Insurance Industry Response

What, then, is the relevance of these developments in the law to the South African logistics and insurance industry?

Freight forwarders, road carriers, warehousemen and bailees need to carefully consider exemption clauses contained in their contracts and standard trading terms and conditions (stc's) with a view to including wording that may assist in such exemption clauses being upheld by our courts. They cannot simply expect that the standard exemption clauses will allow them to avoid, or limit, liability for such claims.

Importantly, consideration must be given to whether these parties have sufficient liability cover in circumstances where a claim by the owner of goods succeeds against them, wide of any limitation of liability applicable under their stc's. In this respect, there is a risk that these parties may have insufficient insurance cover in respect of such claims. Many marine insurance liability policies provide that liability of the insurer is conditional upon the stc's having application. Will such policies respond where a claim is not limited by an exemption clause contained in stc's, such as in *Fujitsu v Schenker?*

Marine insurers, underwriting managers and brokers need to review policy wording to ascertain the extent of liability cover given in such circumstances.

In summary, this is an issue that deserves serious attention by the various role players in the logistics and marine insurance industry.

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