



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

Date of Judgment: 28 June 2023

MEDIA SUMMARY

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

[1] On Wednesday 28 June 2023 the Constitutional Court handed down its judgment in a matter between a company called Fujitsu Services Core (Pty) Ltd (Fujitsu) and Schenker South Africa (Pty) Ltd (Schenker) concerning a dispute whether Schenker was liable to Fujitsu for the loss suffered by Fujitsu arising from the theft of Fujitsu's consignment of laptop computers in 2012 by an employee of Schenker, one Mr William Bongani Lerama.

[2] Fujitsu imports, sells and distributes laptop computers and accessories. Schenker conducts the business of a warehouse operator, freight forwarder, logistics manager, distributor and forwarding agent. On 10 July 2009 the two companies concluded an agreement called the National Distribution Agreement. That agreement incorporated the Standard Trading Terms and Conditions of the South African Association of Freight Forwarders. The agreement between the parties contemplated that Schenker would

collect, clear and carry Fujitsu's goods and deliver them in accordance with Fujitsu's instructions.

[3] Clause 17 of the agreement between the parties effectively identified two categories of goods that Schenker could deal with on behalf of Fujitsu, namely, high value goods and normal or non-high value goods. High value goods included jewellery, precious stones, valuables and others. Clause 17 provided that Schenker would not accept or deal with high value goods on behalf of Fujitsu except under special arrangements made in writing in advance. The clause further provided that, should Fujitsu, nevertheless, require Schenker or cause Schenker to handle or deal with goods of high value otherwise than under special arrangements made in writing in advance, Schenker would incur no liability, particularly in respect of its negligent acts or omissions in respect of such goods.

[4] In 2012 Fujitsu caused Schenker to handle or deal with goods of high value or goods listed in clause 17 without having made special arrangements with Schenker in writing in advance. This is when Mr Lerama stole the consignment of laptops belonging to Fujitsu from an SAA Warehouse. Mr Lerama had been instructed by Schenker to collect the goods and bring them to Schenker.

[5] Fujitsu instituted an action in the High Court against Schenker for the recovery of the loss it had suffered as a result of the theft. Fujitsu argued that Schenker was vicariously liable for its loss. Schenker argued in the High Court that it was not liable for Fujitsu's loss because the laptops that were stolen fell within the list of goods in clause 17 or were goods of high value to which clause 17 of the agreement between the parties applied. Schenker contended that, as Fujitsu had failed to make special arrangements in advance with Schenker about such goods before requiring Schenker to deal with them or to handle them excused Schenker from liability. Fujitsu argued that clause 17 did not apply to intentional conduct such as theft. Fujitsu argued that clause

17 would apply where the conduct giving rise to the loss was conduct in execution of the contract. The High Court rejected Schenker's contention and upheld Fujitsu's argument. It, accordingly, ordered Schenker to pay damages to Fujitsu. Schenker appealed to the Supreme Court of Appeal. That Court heard the same arguments between the parties. It upheld Schenker's appeal with costs and set aside the order of the High Court which had ordered Schenker to compensate Fujitsu.

[6] Fujitsu then applied to the Constitutional Court for leave to appeal against the judgment and order of the Supreme Court of Appeal which Schenker opposed. The parties advanced the same arguments before the Constitutional Court as they had done in the High Court and the Supreme Court of Appeal except that Fujitsu added an argument to the effect that, if clause 17 was applicable to this case, then it (i.e. clause 17) was contrary to public policy and the Court should not enforce it.

[7] The Constitutional Court produced two judgments, one written by Justice R Mathopo, and the other, by the Chief Justice. Justice Mathopo concluded that Schenker's appeal should be dismissed because clause 17 of the agreement did not apply to intentional conduct such as theft and it only applies to situations where the loss occurs in the performance or execution of the contract between the parties. Justice Mathopo also concluded that, if clause 17 applied to the situation in this case, it would be contrary to public policy.

[8] The Chief Justice held that clause 17 was applicable in this case because the loss related to goods listed in clause 17 or goods of high value. He held that clause 17 was not contrary to public policy because it was legitimate for a business entity to resort to an exemption clause to seek to protect its interests against theft. The Chief Justice said that this is much more the case where the requirement that a party such as Fujitsu had to comply with in order to ensure that Schenker would be liable if Fujitsu's high value goods were stolen. The Chief Justice said that Fujitsu failed to make special

arrangements in advance before it required or caused Schenker to handle or deal with its high value goods and the consequence was that Schenker would not be liable. The Chief Justice said that there is no reason why clause 17 should not apply to intentional conduct because it is legitimate for a business entity to seek to protect itself by way of an exemption clause against intentional conduct such as theft.

[9] The Chief Justice concluded that clause 17 applied even if the conduct giving rise to the loss did not constitute the performance or execution of the agreement.

[10] In the end Justice Mathopo's judgment was concurred in by Madlanga J, Kollapen J, Majiedt J and Baqwa AJ. Justice Mathopo would have dismissed the appeal. Maya DCJ, Mhlantla J, Rogers J, Tshiqi J and Mbatha AJ concurred in the Chief Justice's judgment, thus rendering it the majority judgment. Accordingly, the Chief Justice dismissed the appeal with costs including the costs of two Counsel.