CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 32/22

In the matter between:

FUJITSU SERVICES CORE (PTY) LIMITED Applicant

and

SCHENKER SOUTH AFRICA (PTY) LIMITED Respondent

Neutral citation:	*Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* [2023] ZACC 20
Coram:	Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J
Judgments:	Mathopo J (minority): [1] to [79] Zondo CJ (majority): [80] to [143]
Heard on:	1 November 2022
Decided on:	28 June 2023
Summary:	[Interpretation of contracts] — [Exemption clauses] — [Exclusion of liability] — [Public Policy]

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MATHOPO J (Baqwa AJ, Kollapen J, Madlanga J and Majiedt J concurring):

[1] This application for leave to appeal raises two issues on the merits: first, whether the exemption clauses relied upon by Schenker South Africa (Pty) Limited (Schenker), the respondent, can be interpreted as excluding liability for wrongful acts committed outside the contractual context, including theft by an employee; and second, whether the exemption clause offends public policy. The issues surface in this application for leave to appeal by Fujitsu Services Core (Pty) Limited (Fujitsu), the applicant, against the judgment and order of the Supreme Court of Appeal. That Court reversed the decision of the High Court, Gauteng Local Division, Johannesburg, which held that, properly interpreted, the exemption clause relied upon by Schenker did not apply in circumstances where the contract is not being executed.

Background facts

[2] On 10 July 2009, Fujitsu, an importer, seller and distributor of laptops, computers and accessories concluded a national distribution agreement with Schenker, a company conducting business as a warehouse operator, freight forwarder, logistics

manager, distributor and forwarding agent.[1] This agreement was subject to the South African Association of Freight Forwarders (SAAFF) trading terms and conditions. It was a material term of the agreement that Schenker would collect, clear and carry goods and thereafter deliver them to Fujitsu after attending to the necessary custom clearance.

[3] In April 2012, Fujitsu purchased and imported a consignment of laptops from Germany, whereupon it engaged the services of Schenker to assist it with the logistics, freight forwarding, warehousing and clearing of the consignment. This would entail Schenker importing the goods into South Africa, and receiving them from the airline. A consignment of Fujitsu's laptops and accessories arrived at the South African Airways Cargo Warehouse (SAA Cargo Warehouse) at OR Tambo International Airport (ORTIA) on 21 and 22 June 2012.

[4] At all material times Mr Wilfred Bongani Lerama, was employed by Schenker as a drawing clerk responsible for, among other things, the collection of cargo at the SAA Cargo Warehouse. Mr Lerama, having passed a vetting process was issued with a security card known as an identity verification (IVS) card, was given all relevant airways bills and custom clearances necessary for the cargo to be released from the SAA Cargo Warehouse. On 23 June 2012, driving an unmarked hired truck, Mr Lerama collected the consignment of laptops and accessories after producing the company's security and release documents. He disappeared with the goods and never returned to work, thus effectively stealing the goods. As a result of the theft, Fujitsu instituted an action for damages against Schenker.

[5] The central issue before the High Court and the Supreme Court of Appeal was the proper interpretation of the exemption clauses. Schenker initially resisted the case on the basis that Mr Lerama was acting on a frolic of his own and not within the

[1] *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No. 27830/2014 (25 March 2020) (High Court Judgment).

course and scope of his employment. Later, it became common cause in those courts that at the time of the theft, Mr Lerama had acted within the course and scope of his employment with Schenker and that, unless liability was excluded in terms of the contract, Schenker was vicariously liable for the loss suffered as a result of Mr Lerama's theft. Even though vicarious liability was conceded, the High Court conducted a comprehensive analysis of the principle and concluded that:

> "[I]t follows from the aforegoing that Lerama's actions were sufficiently and so closely related to the functions he was required to perform that vicariously liability should be visited on Schenker. Moreover, the aforegoing also, in my judgment, demonstrates that Schenker created or enhanced the risk which, when applying the *Stallion* principles, makes Schenker vicariously liable for the damages arising from the theft. If regard is had to the recent development of the law relating to vicarious liability in 'deviation cases' and the approach adopted in *Stallion Security*, there can in my view be no doubt that the defendant is vicariously liable for the theft perpetrated by Lerama."[2]

[6] The issues in this Court were expanded to include an attack on the exemption clause on the basis that it is contrary to public policy. Accordingly, at the heart of the matter is the proper interpretation of clauses 17, 40, and 41 of the SAAFF standard terms and conditions.

[7] Clause 17 provides:

> "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."

[2] Id at para 29.

[8] Clause 40, in relevant part, provides:

"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 of 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 claims arise 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 control."

[9] Clause 41 provides that:

"41.1 In those cases where [Schenker] is liable to the customer in terms of clause 40.1, in no such case whatsoever shall any liability of [Schenker], howsoever arising, exceed whichever is the least of the following respective amounts:

41.1.1 the value of the goods evidenced by the relevant documentation or declared by the customer for customs purposes or for any purpose connected with their transportation;

41.1.2 the value of the goods declared for insurance purposes;

41.1.3 double the amount of the fees raised by [Schenker] for its services in connection with the goods, but excluding any amounts payable to sub- contractors, agents and third parties.

41.2 If it is desired that the liability of [Schenker] in those cases where it is liable to the customer in terms of clause 40.1 should not be governed by the limits

> referred to in clause 41.1 written notice thereof must be received by [Schenker] before any goods or documents are entrusted to or delivered to or into the control of [Schenker] (or its agent or sub-contractor), together with a statement of the value of the goods. Upon receipt of such notice [Schenker] may in the exercise of its absolute discretion agree in writing to its liability being increased to a maximum amount equivalent to the amount stated in the notice, in which case it will be entitled to effect special insurance to cover its maximum liability and the party giving the notice shall be deemed, by so doing, to have agreed and undertaken to pay to [Schenker] the amount of the premium payable by [Schenker] for such insurance. If [Schenker] does not so agree the limits referred to in clause 41.1 shall apply."

Litigation history

High Court

[10] Fujitsu instituted a delictual claim for damages against Schenker on the basis that Schenker was vicariously liable for the loss suffered as a result of the theft. Schenker disputed the claim on the ground that clause 17, read with clauses 40 and 41, exempted it from liability.

[11] The High Court held that theft was an act outside the performance of the parties' contract and that the exemption clause did not apply. The High Court reasoned that Schenker should not be allowed to rely on the exemption clause in circumstances where the contract was not being executed. It concluded that, if Schenker intended the exclusion clauses to apply to the delictual claim of theft, it ought to have spelt it out with the necessary precision and clarity. It held that the parties did not contemplate that clauses 17, 40 and 41 would encompass a delictual claim based on theft. The Court found that the clauses did not exclude liability for theft. It relied on *Hotels, Inns and Resorts*,[3] where it was held that, absent a clear contrary intention, an exemption clause should be restrictively interpreted, and should not be interpreted to apply to conduct which does not constitute execution of the contract. Having found that the clauses did not exclude liability for theft, it upheld

[3] *Hotels, Inns and Resorts (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C).

Fujitsu's arguments. The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[12] Before the Supreme Court of Appeal, the sole issue for determination was whether Fujitsu's delictual claim based on theft was excluded by clauses 17 and 40 of the standard terms.[4] The Court expressed itself as follows:

> "Consequently, Fujitsu instituted a delictual action for damages against Schenker in relation to the theft. Schenker conceded in the High Court that, at the time of theft, Mr Lerama had acted within the course and scope of his employment and that, unless liability was excluded in terms of the contract, Schenker was vicariously liable for the loss suffered as a result of Mr Lerama's deviant conduct. The quantum was not contested."

[13] It accepted that the evidence established that Schenker was informed of the arrival of Fujitsu's goods at ORTIA and SAA Cargo Warehouse and the goods were checked by Freight Surveillance International on the instructions of Schenker. Mr Lerama had been issued with the IVS card; customs cleared the goods using the documents prepared by Schenker and the goods were handed to him on the basis of these documents. It further held that the goods were "handled", "transported" or "dealt with" by or on behalf of Schenker as contemplated in clause 1.3.3[5] of the contract.

[14] The Supreme Court of Appeal held that a claim against Schenker in respect of the valuable goods, in terms of clause 17, was governed by clauses 40 and 41 with

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[4] *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd* [2022] ZASCA 7 (Supreme Court of Appeal Judgment).

[5] Clause 1.3.3 states:

> "Goods' means any goods, handled, transported or dealt with by or on behalf of or at the instance of (Schenker) or which come under the control of the Company or its agents, servants, or nominees on the instructions of the customer, and includes any container, transportable tank, flat pallet, package or any other form of covering, packaging, container or equipment used in connection with or in relation to such goods."

sub-clause 40.1 excluding Schenker's liability for any claim of "whatsoever" nature (whether in contract or delict) and whether for damages or otherwise "howsoever arising". The Supreme Court of Appeal held 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 Schenker".[6] I pause to state that in reaching its conclusion, the Supreme Court of Appeal was aware of its earlier decision in *G4S*[7] where that Court, in interpreting similar or identical words – "any loss or damage", "any consequential loss or damage", "howsoever arising" ,"for any reason whatsoever" and "however arising"– held that even though the words are broad they should not be divorced from their context. Notwithstanding this ratio, it held that the facts and issues raised in *G4S* are distinguishable from the present case.

[15] The Supreme Court of Appeal further 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. The Supreme Court of Appeal concluded that in the absence of any written special arrangement, Schenker would not be liable "whatsoever" in respect of such goods nor incur liability in respect of its negligent acts or omission. It relied on the decision of *Goodman Brothers*.[8] In that case, the Full Court interpreted an exemption clause, worded in terms almost identical to clause 17, as excluding liability. The Supreme Court of Appeal did not consider the contractual context in which the exemption clause in *Goodman Brothers* operated nor did it interrogate whether there were other public policy considerations which militated against the enforcement of the exemption clause. In light of its holdings on the issues, the Supreme Court of Appeal reversed the decision of the High Court.

[6] Supreme Court of Appeal judgment above n 5 at para 15.

[7] *G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash and Carry (Pty) Ltd* [2016] ZASCA 113; 2017 (2) SA 24 (SCA).

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

Before this Court

Fujitsu's submissions

[16] Fujitsu contends that this matter engages this Court's jurisdiction as the matter raises an arguable point of law of general public importance. It submits that the question of whether the exemption clauses relied upon by Schenker exclude liability for a delictual claim for theft by one of its employees thus interpreting key clauses in the SAAFF's standard terms and conditions. It further argues that this raises "a quintessential point of law" that is of general public importance.[9]

[17] Fujitsu argues that in *Tiekiedraai*[10] this Court held that the correct interpretation of a contractual provision might be one of "general public importance" when it is contained "in a standard form document in widespread use, affecting a large number of [persons]".[11] It argues that the distribution agreement incorporates the SAAFF terms and conditions, which are used across the freight forwarding industry in this country.

[18] Fujitsu argues that the judgment of the Supreme Court of Appeal must be overturned and that the exemption clause should not be interpreted to exclude theft by Schenker's employee, Mr Lerama. It submits that the approach adopted by the Supreme Court of Appeal has a number of shortcomings. First, it interpreted the words "dealt with" and "handled" without regard to the contractual context. This is regardless of whether the person handling the goods is a thief. In so doing, it ignored the fact that Mr Lerama's actions were unlawful and not in accordance with the contract. Second, Fujitsu argues that clauses 17 and 40, read in the context of the agreement, must be understood to apply to goods in transit that are "handled" or "dealt with" in the performance of a contract. Third, that the absurdity in that interpretation

[9] For this submission, Fujitsu relies on *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC) at para 11.

[10] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC).

[11] Id at para 13.

is that it ignores that clause 17 does not encourage employees to steal but at the same time indemnifies the employer once the theft has been committed by the employee. Fujitsu argues that clause 17 cannot be permitted to create impunity for Schenker to benefit from its employee's unlawful conduct. This is especially so because it conceded that it was vicariously liable for the actions of Mr Lerama in the High Court, Supreme Court of Appeal and before this Court.

[19] Fourth, Fujitsu contends that on a proper interpretation of clauses 17 and 40, the words no claim "whatsoever" and "howsoever arising" do not include intentional acts. To shore up its argument, Fujitsu contends that if Schenker could "deal with" the goods in any manner "whatsoever" it must correspondingly owe some duty to Fujitsu. To argue that Fujitsu has no rights and Schenker no duties is incongruent with the common intention of the parties and the contractual terms.

[20] Fifth, Fujitsu further contends that the Supreme Court of Appeal failed to take into account clause 3[12] of the standard terms and conditions which indicates that the standard terms only apply to conduct in the course of legitimately executing or performing a contract. This clause, according to Fujitsu, essentially means that the standard terms apply to "business undertaken, advice, information or services" provided by Schenker. If an activity falls outside of any of these terms, the standard terms will not apply.

[21] Fujitsu contends further that the Supreme Court of Appeal failed to properly discern that theft of goods does not constitute a business undertaking, giving advice, information or providing services. It submits that although clause 40.1 indicates that it is silent on theft by an employee and theft of the goods runs against the spirit, purport and nature of the contract. It relied on the Canadian case of *Punch*[13] where the Court reasoned that "[i]f an employer wishes to be exempted from any

[12] Clause 3 states that: "all and any business undertaken or advice, information or services provided by the Company, whether gratuitous or not, is undertaken or provided on these trading terms and conditions".

[13] *Punch v Savoy's Jewellers Ltd et al* (1986) 14 O.A.C. 4 (CA).

responsibility for loss arising from theft by his own employees then good conscience requires that such an exclusion be spelt out with clarity and precision."

[22] Again, relying on *Barkhuizen*[14] and *Beadica*,[15] Fujitsu argues that *Goodman Brothers* is incompatible with public policy and requires reconsideration by this Court because an endorsement of clause 17 will deprive Fujitsu of its judicial redress in circumstances inimical to constitutional values and contrary to public policy. Fujitsu further contends that enforcing a contractual term like this one would bring exemption clauses out of step with the *boni mores* (values) of the community and erode the very essence of the fundamental agreement between the parties.

Schenker's submissions

[23] Schenker contends that this matter does not engage this Court's jurisdiction as it does not raise an arguable point of law of general public importance which ought to be considered by this Court. Schenker relies on *Tiekiedraai*, where this Court held that an appeal concerning the interpretation of a contract between two parties does not fall within section 167(3)(b)(ii) of the Constitution, as it does not raise an arguable point of law of general public importance. It contends that there is no evidence before this Court nor a basis in 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, but relate only to these two contracting parties.

[24] Regarding the merits, Schenker argues that the Supreme Court of Appeal's interpretation of the exemption clauses is correct. In support of this, Schenker submits that the exemption clauses in question are clear, unambiguous and exclude a party's liability if the other party does not make special arrangements in advance and in writing where the goods being transported are valuable. Schenker contends that the stolen goods were valuables in terms of clause 17 (this was not disputed) and Fujitsu

[14] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[15] *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

was required to make special arrangements in writing. By not making special arrangements, Fujitsu assumed the risk and it was incumbent upon it to arrange its own insurance. It further submits that clause 17 does not require acts or omissions in the performance of the contract. The exemption clause applies regardless of whether the company handled the goods. Put simply, it does not matter whether the thief is connected to the company or not. Schenker relies on *Goodman Brothers* where 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.[16]

[25] Relying on the ratio of the Supreme Court of Appeal, Schenker submits that the words "whatsoever" nature and "howsoever arising" do not limit liability, and the phrase "any loss" are wide enough and must be given their ordinary and literal meaning as being intended to exempt Schenker from liability and this includes loss or damage caused by its own deliberate wrongdoing or negligent conduct or by that of its servants. It submits that this is so irrespective of whether Fujitsu seeks to assert a claim in delict or contract.

[26] Finally, Schenker submits that there is no merit in Fujitsu's public policy argument because it was not pleaded in the High Court and the Supreme Court of Appeal. It argues that the commercial essence of the contract is not undermined by the exemption clause. Had Fujitsu provided Schenker with prior written notice, its delictual claim for the theft would not face any limitation of liability. Relying on *Goodman Brothers*, Schenker contends that public policy considerations do not preclude it from relying on the exemption clauses.

Leave to Appeal

[27] It is axiomatic that in order for leave to appeal to be granted, a matter must engage this Court's jurisdiction and it must be in the interests of justice to grant leave

[16] *Goodman Brothers* above n 8 at para 107.

to appeal. A matter engages this Court's jurisdiction when it raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court.[17]

[28] There is no doubt that our jurisdiction is engaged and that it is in the interests of justice to grant leave to appeal. This matter raises an arguable point of law of general public importance, the consideration of which transcends the narrow interests of the litigants. In addition, the public policy question raised by Fujitsu raises a constitutional issue.

[29] I have had the benefit of reading the second judgment penned by Zondo CJ (second judgment). The second judgment agrees that this Court's jurisdiction is triggered in view of Fujitsu's contention that clause 17 is contrary to public policy and, as a consequence, raises a constitutional issue. Although the second judgment acknowledges that the matter raises an arguable point of law, it disagrees with the view that it is one of general public importance. I disagree with this interpretation.

[30] *Paulsen*[18] tells us that "a point of law is arguable if it entails a degree of merit. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility".[19] The arguable point in this case is whether an exemption clause of this kind can be construed as excluding liability for theft by an employee. The argument by Fujitsu does have some degree of merit or a measure of plausibility as I will demonstrate later in the judgment. To the extent that the Supreme Court of Appeal dismissed the argument on the basis of *Goodman Brothers*, it behoves this Court to reconsider the rationale of that judgment and decide whether it can coexist with the decisions of this Court in *Barkhuizen* and *Beadica*.

[17] Section 167(3)(b) of the Constitution. See also *National Union of Metal Workers of South Africa v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd)* [2020] ZACC 23; [2021] 1 BLLR 1 (CC); (2021) 42 ILJ 67 (CC); 2021 (2) BCLR 168 (CC) at para 26.

[18] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[19] Id at para 21.

[31] *What* is squarely implicated in this case is whether the SAAFF terms and conditions transcend the narrow interest of the litigants. Contrary to the argument advanced by Schenker, this issue implicates a significant part of the general public. According to the membership directory on the SAAFF website, it has over 406 members. The SAAFF lists each of these companies, including their addresses and contact details. The site further informs us that the member companies manage over 80% of South Africa's international trade. A membership this large unquestionably demonstrates a far wide interest in this litigation. This essentially means that this matter transcends the narrow interest of the parties before us. Freight forwarders and counterparties who make use of the standard terms constitute a significant segment of the public which has an interest in a definitive judgment on the proper interpretation of the exclusion of liability in these terms. The divergent approaches by different courts afford this Court an opportunity to resolve the uncertainty or confusion in respect of exemption clauses.

[32] More recently, Khampepe J in *Auckland Park Theological Seminary* held that:

> "A point is of general public importance if its resolution transcends the interests of the parties to a particular litigation. In other words, its resolution must benefit the general public. There is no doubt in my mind that it is of general public importance that this Court, amongst other things, clarifies the correct approach to contractual interpretation."[20]

[33] In *Tiekiedraai*, the Court found that the intricacies of the disputes frustrated only the litigants, and this included the implications and practical effects. In a similar vein, Cameron J expressly stated that if the lease agreement in question had been a standard document in widespread use, affecting a large number of consumers, then *Tiekiedraai*'s position would have been different. In other words, had that been the case, then this Court's jurisdiction would have been engaged. *Tiekiedraai* dispelled any misconception and buttressed the view that in matters where standard form terms

[20] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 51.

of a document are in widespread use and affecting a large number of corporations, the matter transcends the interests of the litigants.

[34] Another strongly compelling argument is whether considerations of public policy militate against the enforcement of the exemption clause of the kind asserted by Schenker. This is no doubt a constitutional issue that engages this Court's constitutional jurisdiction. During argument, counsel for Schenker conceded that it would not suffer prejudice or unfairness if Fujitsu were to be given the opportunity to present its argument regarding public policy for the first time before us. In an attempt to row away from this concession, counsel for Schenker contended that it was impermissible for this point to be raised because it was not canvassed before the High Court and the Supreme Court of Appeal. I do not agree, and I will demonstrate why later.

[35] This Court in *Barkhuizen* held:

> "The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point."[21]

[36] Furthermore, in *Alexkor*[22] this Court, relying on *Fraser*,[23] held that "in terms of that rule it is open to a party to raise a *new point of law on appeal for the first time* if it involves no unfairness . . . and raises no new factual issues".[24]

[37] Cameron J held that—

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[21] *Barkhuizen* above n 14 at para 39.

[22] *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

[23] *Naude v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558A; 1998 (8) BCLR 945 (SCA) at para 960.

[24] *Alexkor* above n 22 at para 44 (emphasis added.)

> "[o]bviously 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."[25]

[38] The second judgment rightly holds that—

> "[o]ne of the requirements which must be met before this Court may entertain a point of law raised by a litigant for the first time on appeal is that the point must be 'covered by the pleadings.' Another requirement is that the consideration of that point of law must not involve any unfairness to the other party against whom it is directed. This Court said that 'unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.'"[26]

[39] In *Tuta*, in the context of a criminal law matter, this Court held that it may still continue to hear arguments raised by applicants for the first time where it is not only in the interests of justice that it does so but that there is also no prejudice to the parties. Unterhalter AJ, writing for the majority, held:

> "*I cannot see any basis why this reasoning should not be extended to the situation where an error of law is raised for the first time in oral argument*. If the error of law raises a constitutional issue or an arguable point of law of general public importance and the interests of justice require our intervention because of the risk of an unsound conviction, *then if the issue can be determined on the papers as they stand and no prejudice arises,* this Court should not be precluded from considering the matter."[27] (Emphasis added.)

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[25] *Tiekiedraai* above n 10 at para 25.

[26] Second judgment at [93].

[27] *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC) at para 12.

[40] Similarly, in this case, no prejudice would be suffered by Schenker as the constitutional issue can be determined on the papers and the interests of justice demand that the position in *Goodman Brothers* be reassessed. Recently, this Court in *Beadica* held that "[w]hether the enforcement of a contractual clause would be contrary to public policy, *in that it is inimical to constitutional values, is a constitutional issue*".[28] I align myself with the remarks made in *Beadica* that, in ensuring that contracts are governed by good faith, courts would have to ensure that constitutional challenges to contractual terms are properly interpreted to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.

[41] In these circumstances, it will be in the interests of justice to grant leave to appeal.

Issues for determination

[42] As stated earlier, the main issue is whether the exemption clauses, properly interpreted, exclude liability for a delictual claim for theft by employees. At the heart of this matter is the proper interpretation of clauses 17, 40, and 41 of the standard agreement.

Analysis

Do the exemption clauses apply to activity or conduct that includes theft by an employee?

[43] It was argued on behalf of Schenker that for liability to arise, Fujitsu must have made special arrangements in writing regarding the valuable goods it delivered to Schenker. Absent any special arrangements, Schenker will not be liable or incur liability in respect of its negligent acts or omissions in respect of such goods. It was submitted that Fujitsu bore the onus of proving that theft does not fall within the qualifying phrases "whatsoever" and "howsoever arising". If it succeeded in proving

[28] *Beadica* at above n 15 at para 16.

that, Schenker would then bear an evidential burden to prove that it was exempt from liability by virtue of the exemption clauses.

[44] Dealing first with the qualifying phrases "any such goods whatsoever" and "howsoever arising", Schenker argued that the words should be understood to mean that no liability for any claim of whatsoever nature (whether in delict or contract), howsoever arising, would arise under such circumstances. The argument was articulated in this way. The commercial purpose of the agreement was for Schenker to provide services to Fujitsu. The stolen goods were valuables in terms of clause 17. Fujitsu was required to make special arrangements in writing and, absent any special arrangement, clause 17 excluded Schenker's liability for its employees' theft. In essence, if any valuables are to be conveyed or transported, and special arrangements for such conveyance have not been made, clause 17 is triggered and Schenker shall bear no responsibility whatsoever for any loss.

[45] I do not agree with the submissions made by counsel for Schenker on this issue. Even if it is accepted that the qualifying words or phrases limit the liability of Schenker, there is no compelling reason to include theft from the exclusion of liability prescribed by clause 17. Theft does not constitute the performance of the contract that requires Schenker to collect and deliver the goods to or on behalf of Fujitsu. Furthermore, theft of goods does not constitute an undertaking of business or the giving of advice, information or services.

[46] The Supreme Court of Appeal obfuscated the issues by focusing too intently on the dictionary meaning of the words "handle" or "dealt with". The material flaw in the Supreme Court of Appeal judgment is three-fold. First, it interpreted the words "handle" or "dealt with" irrespective of whether the person handling or dealing with them is a thief. Second, it applied the ordinary meaning of the words without any consideration to the overall context in which those words appear in the agreement. Third, it rejected Fujitsu's case that clauses 17 and 40, read in context, must be understood to apply to goods in transit or dealt with in the course of Schenker's

performance of the contract. It is inconceivable that the words must be construed outside the terms of the contract. What must be gleaned from the contract is that the parties intended that the terms or interpretation must fall in line with the terms of the contract. Clauses 17 and 40 were intended to cover Schenker against acts or omissions falling within the terms of the contract, not theft.

[47] The second judgment holds that the heading in clause 17, "Goods requiring special arrangements", tells the reader that the goods stolen by Mr Lerama required special arrangements.[29] This interpretation has its own shortcomings and fails to take into account the established principles of interpretation. The manner in which the second judgment would have us interpret the clauses to achieve their meaning cannot produce the outcome contemplated by the parties. What, in my view, tends to diminish the force of this argument is that it is not anchored in the proper interpretation of contractual principles. This matter is essentially one of interpretation and the common intention of the parties must be ascertained from the language used in the instrument. There are various canons of interpretation that can be used to ascertain the parties' common intention at the time of concluding an agreement – one of which is the language used in the document.

[48] As I understand *Endumeni*,[30] the language used in the document should be given its grammatical and ordinary meaning unless this would result in some absurdity, repugnancy or inconsistency with the rest of the instrument.[31] The mode of construction, however, should never be to interpret the particular word or phrase in isolation. It is remiss to focus on individual aspects of the agreement and to read the entire agreement in a piecemeal fashion. The purpose of the impugned clauses requires a court to counterpoise the purpose of the agreement, on the one hand, on the other to ensure that the contextual approach to the proper interpretation of the exemption clause is not ignored.

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[29] Second judgment [99].

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

[31] Id at para 25.

[49] It is apparent that the agreement requires a proper examination and understanding of the context within which clause 17 operates, giving effect to a sensible, business-like meaning. This means that if conduct does not fall within the performance of the contract or in the undertaking of business or the giving of advice, information or services, the exemption of liability in clauses 17 and 40 does not arise. On these grounds, the exemption clause (clause 17) can only apply when the contract is being lawfully performed by Schenker.

[50] In *Cinema City* the following words of Lord Wilberforce in *Reardon Smith Line*[32] were quoted with approval:

> "No contracts are made in vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."[33]

[51] It is now accepted in our law that a contract such as the one under consideration, in which different interpretations are attached to the meaning of the contested clauses, ought to be interpreted against the background of the factual context in which it was concluded. The literal or dictionary interpretation of clause 17 involves a radical departure from the proper interpretation of the contract. As I have said, it would allow Schenker to benefit from the unlawful conduct of its employees especially where it is in conflict with other provisions of the contract. I would have expected clause 17 to have been unambiguously formulated with precision and clarity. Counsel for Schenker sought to persuade us that clause 17 is a stand-alone provision. We must resist the invitation, the provision of clause 17 cannot be read without regard

[32] *Reardon Smith Line v Hansen Tangen; Hansen Tangen v Sanko Steamship Co* (1976) 3 All E 570 (HL).

[33] *Cinema City (Pty) Limited v Morgenstern Family Estates (Pty) Limited* 1980 (1) SA 796 (A) at 805A-B.

to other clauses of the agreement. Similarly, clause 40 cannot be construed as a carve out.

[52] I have also considered whether there is perhaps another rule of interpretation which might, in the circumstances of this case, justify a result different from the one which I have favoured. I could not find any compelling reason to the contrary to my position. On my interpretation, the argument foisted upon us is not only undesirable but also difficult to understand, would create anomalous results and would also lead to unbusiness-like consequences. In *Bothma-Batho Transport*,[34] the Supreme Court of Appeal said that the interpretation of contractual terms does not stop at the literal meaning of words, but considers them in light of all relevant and admissible context.[35] Therefore, one cannot interpret the exemption clause by way of defining words alone. Interpretation is to be approached holistically: simultaneously considering the text, context and purpose. *Chisuse* reiterated that interpretation is a unitary exercise.[36] Intentional wrongful conduct by an employee cannot be covered under the exemption clause. I find it hard to accept that Mr Lerama was enforcing the contractual terms between his employer and Fujitsu.

[53] In *Capitec Bank Holdings*,[37] the Supreme Court of Appeal stated that:

> "*[T]he meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose*. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It

[34] *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA).

[35] Id at para 12. See also *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52 and *University of Johannesburg* above n 20 at para 63.

[36] *Chisuse* above n 35 at para 52.

[37] *Capitec Bank Holdings Limited v Coral Lagoon Investments* 194 (Pty) Ltd [2021] ZASCA 99; 2022 (1) SA 100 SCA.

> is not a partial selection of interpretational materials directed at a predetermined result."[38] (Emphasis added.)

[54] In the present case, the phrases "of whatsoever" nature, "any such goods", "howsoever arising", "any loss damage or expense arising" and "whatsoever shall any liability" are words of wide compass and meaning. In the context of the clause under consideration, one can hardly state without reservation that the phrases will, under all circumstances, encompass a total exemption of liability. In drafting this clause, the contracting parties probably had in mind precisely what the qualification and phrases set out to do, which is to exclude liability for wrongful acts by employees committed outside the contractual context.

[55] The broad language used in the exemption clause of words or phrases such as "of whatsoever" nature, "any such goods", "howsoever arising", "any loss damage or expense arising" and "whatsoever shall any liability" does not extend to the unauthorised execution of the contract. In *Punch*, the Court reasoned that if an employer wishes to exclude any responsibility for loss arising from theft by his own employees, then good conscience requires that such an exclusion be spelt out with clarity and precision.[39]

[56] Contractual clauses that limit liability must be interpreted narrowly, particularly if the harm in question arises outside of the contract, unless the parties expressly agree otherwise. It is a trite principle – that indemnity clauses are to be construed restrictively.[40] Related to this – if a party wishes to contract out of liability, it must do so in clear and unequivocal terms.[41] In the case of doubt, ambiguity or secondary meaning, the issue must be resolved against the *proferens* (the drafter of the contract).[42] Absent a clear intention to the contrary, exemption clauses should not be

[38] Id at para 50.

[39] *Punch* above n 13.

[40] Hutchison and Pretorius *Law of Contract* at 3ed (Oxford University Press, 2017) at 283.

[41] Id at 281-2.

[42] Id.

construed in a way that would excuse or limit the consequences of wrongful actions undertaken outside the operation or authority of the contract. And where an exemption clause purports to exclude liability in general terms, the exemption clause must be given the minimum degree of effectiveness by only excluding liability involving the minimum degree of blameworthiness. More particularly for the purposes of this case, if a party seeks to exclude liability for theft, it must do so in express terms.

[57] Another trite principle that must find application here is that a reference in a statute or a contract to any action or conduct will be presumed, in the absence of any clear indication to the contrary, to be a reference to lawful action or conduct. Properly construed, the words "handled" and "dealt with" in clauses 1.3.3 and 17 must be taken to mean "lawfully handled" and "lawfully dealt with".

Whether the exemption clause applies to intentional conduct

[58] I next address the issue of whether the exemption clause applies to intentional conduct. The Supreme Court of Appeal construed clause 40.1 as including intentional acts. This approach is incorrect. In my view, a proper reading of clause 40.1 indicates that the clause is silent on the basis of this liability but only states liability in contract or delict. A further reading of the clause speaks of negligent acts or omissions causing loss or damage. It is difficult to comprehend how or why the parties could have intended that where there is deliberate or intentional conduct such as theft and/or liability would be excluded yet a different position is catered for in respect of negligent acts or omissions. To expect clause 40 to exclude liability for theft but not for gross negligence defies logic. On the accepted principles of interpretation, clauses 17 and 40 make no reference to intentional acts like theft. The argument advanced by Schenker is therefore a radical departure from the contractual terms. Clause 17 cannot create impunity for Schenker or permit it to profit from or benefit from the unlawful actions of its employees. I reiterate that had Schenker intended or wished to cover itself against this kind of loss, it should have specifically included theft. A clearer clause could have avoided any absurdity or uncertainty.

[59] The second judgment further states —

> "Schenker's liability is not excluded because clause 17 only excludes Schenker's liability where its employee is executing the agreement between the parties is in essence similar to an argument that Police Officers who raped a member of the public to whom they had given a lift were not executing their duties and, that, therefore, the Minister of Police was not vicariously liable for their unlawful conduct."[43]

[60] The example posited by the second judgment is unfortunately inapt. I do not find *K*[44] applicable to the current matter. *K* dealt with deviation cases in determining vicarious liability, a test which has since been developed more recently in *F*[45] and *Stallion.*

[61] What is clear is that a person cannot escape liability for fraud or dishonesty by inserting an exemption clause to cover such conduct. By parity of reasoning, this also applies to theft. If Schenker's argument prevails, it would encourage parties to contract out of liability for fraud, dishonesty and or theft. None of the clauses Schenker relied upon support such a construction. Courts have repeatedly held that exemption clauses should be interpreted restrictively. The rationale is to protect a party against more extensive potential liability by confining the clause within reasonable bounds. In *Rosenblum*, the Supreme Court of Appeal reasoned that, where a party to a contract wishes to be exempted from an obligation, they have to clearly state their intention without any ambiguity.[46]

[62] Marais JA stated that —

> "In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and

[43] Second judgment at [116].

[44] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

[45] *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC).

[46] *First National Bank of Southern Africa Ltd v Rosenblum* [2001] ZASCA 77; 2001 (4) SA 189 (SCA).

> unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out."[47]

[63] I have already indicated that the ordinary and literal interpretation as favoured by the Supreme Court of Appeal is fraught with difficulties. It is not supported by the text of the exemption clause read in its context. Schenker's submissions are misguided. It means the clauses would permit the enforcement of the exemption clause in circumstances where the factual matrix, context and interpretation do not bear out such enforcement. Furthermore, on Schenker's interpretation, if the goods are stolen in its custody, it would escape liability and point to the thief, regardless of whether the thief is connected to it or not. This is unconscionable. Even if one adopts the literalist approach, which sits on the extreme opposite end of the purposive interpretation, one is bound to ask what happens when goods are stored and then stolen by employees. Does the contract encourage a custodian party to simply shrug its shoulders and walk away? I think not.

[64] In my view, Fujitsu's argument not only bears out but also reinforces the text and context of the agreement. It establishes the basic contractual principles: the intention of the parties, the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in which the parties are operating. All of these factors must be given effect to. To my mind, the parties deliberately applied their minds to the different forms of culpa and its impact on liability and distinguished between gross negligence (for which Schenker would be liable if the goods were in its possession) and ordinary negligence (for which Schenker contracted out of liability). They were silent as to deliberate conduct. It must follow that if they did not contract out of gross negligence, it is inconceivable to infer that they contracted out of deliberate and intentional conduct. It stretches the

[47] Id at para 6.

canons of interpretation simply too far – it is illogical, not business-like and leads to absurd results. On this basis, Schenker would be liable for loss by theft if an employee acted with gross negligence in leaving a warehouse unlocked. It would not, however, attract liability if the loss was caused by an employee deliberately leaving the warehouse open as part of a plan to steal the goods housed therein. This is another fallacy in Schenker's argument.

[65] Another issue that requires attention is the Supreme Court of Appeal's decision in *G4S*. This relates to the Supreme Court of Appeal's finding that *G4S* is distinguishable. In that matter, the retailers had concluded cash management and ancillary services agreements with G4S. The issue on appeal was whether a time-limitation clause in written agreements concluded by the parties precluded the retailers from instituting delictual claims for damages against G4S.[48] G4S submitted that the employment of the phrases "howsoever arising or for any reason whatsoever suffered", "whatsoever and howsoever caused", "such loss or damage whatsoever" and "howsoever arising", supports the broader interpretation.[49] On a proper construction of clause 9, the commercially sensible intention was to exclude liability on the part of G4S for all claims related to the cash management services, save for claims arising from acts of gross negligence or theft by G4S's employees.[50] In the result, clause 9.9 was given a wide and unrestricted meaning, encompassing the respondents' delictual claims.

[66] Fourie AJA held that the main difficulty with this method of interpretation is that the words and phrases emphasised by G4S "are read in isolation and not within the contractual setting as appears from the agreements as a whole."[51] The Court

[48] *G4S* above n 7 at para 1.

[49] Id at para 17.

[50] *G4S* above n 7 at para 18.

[51] Id.

further held that "to single out words and phrases in an attempt to arrive at a different conclusion simply means that the context in which they are used is ignored".[52]

[67] The principles enunciated in *G4S* are sound and support the correct interpretation advanced by Fujitsu. The Supreme Court of Appeal erred in not following its own jurisprudence. It is clear to me that the interpretation contended for by Schenker would deprive the exemption clause of its business efficacy. It will be difficult for the client, upon whom the onus on this aspect rests, to be able to prove or disprove the theft by the service provider's employees. I do not accept that it could have been the intention of the parties to have placed this unusual, difficult and unreasonable burden of proof on Fujitsu. I conclude that the stance taken by Schenker that, in the absence of special written arrangements, Fujitsu has no rights "whatsoever", is misconceived. If Fujitsu could deal with the goods in any manner whatsoever, surely it must owe some duty to a party whose goods it has agreed to handle and exercise control over. If this is not a duty that arises out of contract, can one say considerations of public policy support the stance taken by Schenker? I now deal with this issue.

Does the exemption clause offend public policy?

[68] In *Brisley*,[53] describing public policy, Cameron JA said: "[i]n its modern guise 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."[54]

[69] This principle was confirmed by this Court in *Barkhuizen* where Ngcobo CJ said:

[52] Id.

[53] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA).

[54] Id at para 91.

> "Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country'."[55]

[70] Whether a contractual term is contrary to public policy is determined by the values that underpin the Constitution. A term in a contract that is contrary to the values protected by the Constitution is contrary to public policy and will not be enforceable. In *Sasfin*, the Appellate Division stated that the power to declare contracts against public policy should be exercised "sparingly and only in the clearest of cases."[56] In that matter, the appellant, Sasfin (Pty) Limited and the respondent, Dr Hendrik Beukes, entered into a deed of cession which contained various provisions that had far-reaching consequences for Dr Beukes. The majority held that the provisions in the deed of cession were so unreasonable and unfair that their enforcement would be contrary to public policy. The rationale was that Dr Beukes would have been virtually a slave working for the benefit of Sasfin.[57]

[71] The values that underlie our Constitution should be taken as a benchmark to measure the validity of the exemption clauses. I accept that fairness and reasonableness do not qualify as free-standing requirements. Courts have a duty to

[55] *Barkhuize*n above n 14 at para 28.

[56] *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A) at para 2.

[57] Id at 13H.

express their disapproval where a term in a contract deprives a party of the right to seek judicial redress. In *Schierhout*[58] the Court held:

> "If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land."59

[72] The proper approach is therefore to determine whether the exemption clauses contended for by Schenker are inimical to the values of our Constitutional democracy. The question to be asked is whether the Supreme Court of Appeal's endorsement of *Goodman Brothers* can coexist with our current jurisprudence. In *Goodman Brothers*, the Court held that a clause similar to that in the instant matter was compatible with public policy. In *Beadica* this Court held that "[f]reedom of contract can thus never be absolute. It is constrained, inevitably. Modern remedies for regulating unfairness are found primarily in doctrines of unconscionability and good faith."[60]

[73] This Court in *Barkhuizen* held that "[t]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[61] Ngcobo CJ emphasised 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 provisions 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."[62]

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[58] *Schierhout v Minister of Justice* 1925 AD 417.

[59] Id at 424.

[60] *Beadica* above n 15 at para 123.

[61] *Barkhuizen* n 14 at para 30.

[62] Id at para 29.

[74] The Supreme Court of Appeal endorsed the ratio in *Goodman Brothers* and held that the legal position articulated there still holds sway and applies with equal force. Although it did not express itself clearly, it would be wrong to hold that it did not consider the public policy argument. In my view, it did so by explicitly endorsing *Goodman Brothers*. It now remains to be considered whether *Goodman Brothers* can co-exist with *Barkhuizen* and *Beadica.*

[75] In *Goodman Brothers*, the applicant instituted action against the respondent for damages suffered as a result of the theft of its watches which was committed by the employees of the respondent, a carriage company. Clause 9 of the contract between the parties stipulated that the respondent would not accept liability for the handling of any one of a series of goods, including "bullion coins, precious stones, jewellery (and) valuables' unless "special arrangements" were made beforehand. The clause went on to state that, if a customer nevertheless delivered any such goods to the respondent or caused the respondent to deal with them "otherwise than under (such) special arrangements, the respondent would bear 'no liability whatsoever for . . . any loss or damage to the goods'". The principal issue was whether clause 9 absolved the respondent from liability for the loss. The court *a quo* held that it did. The applicant contended that the watches were not "valuables" as intended in clause 9 and that special arrangements were in fact made when the applicant mentioned (in its application for credit facilities with respondent) that it would be importing "watches, silverware, pens etc".

[76] On appeal, the Full Court held that allowing the employer to rely on a clause excluding liability in the case of theft would not have the effect of encouraging theft. That Court, in distinguishing *Wells*,[63] held that the latter case involved fraudulent conduct as opposed to theft. It reasoned that, because theft is not for the benefit of the

[63] *Wells v South African Alumenite Co* 1927 AD 69 at 72 where Innes CJ stated that:

> "On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud."

employer, the exemption clause is permissible. The rationale of this case is that for as long as an exemption clause does not allow a party to benefit from intentional wrongdoing, the clause will not offend public policy. In that case, no mention was made of the Constitution, nor was any other policy rationale for enforcing the clause considered.

[77] *Beadica* and *Barkhuizen* are milestones in the history of the South African law of contract. They are the most extensive engagement by this Court on the rules that govern the power of courts to set aside or refuse to enforce terms, and the underlying constitutional values that influence these determinations. Both matters provided clarity regarding the proper constitutional approach to the judicial enforcement of contractual terms, thus putting to rest the burning question of the court's intervention between contracting parties. In doing so, this Court established principles of fairness, reasonableness, justice and ubuntu, and found that these constitutional values play a fundamental role in the application and development of the rules of contract law in such a manner as to give effect to the spirit, purport and objects of the Bill of Rights. The important constitutional issue of public policy should not be lost or diluted by a straitjacketed approach which borders on a narrow interpretation of contracts.

[78] The narrow approach in *Goodman Brothers* fails to take into account the constitutional values of fairness, reasonableness and justice. It undermines the essence of the contract and negates the contractual purpose of the contracting parties. In this instance, Schenker agreed to collect and deliver the goods belonging to Fujitsu. A clause that allows employees to steal goods in such circumstances and exculpates the employer from liability on the basis of the phrases "of whatsoever" nature, "any such goods", "howsoever arising", "any loss damage or expense arising" and "whatsoever shall any liability" offends the values of human dignity, the achievement of equality, the advancement of human rights and most importantly, the rule of law.

[79] It is important to underscore that *Goodman Brothers* fails to recognise that in some instances, as in the present case, exemption clauses may be unfair and

unreasonable from a customer's perspective. In my view, the impugned clauses clearly serve to prevent Fujitsu from obtaining judicial redress which would otherwise be available to it. Enforcing an agreement in such circumstances would deprive the contracting party (Fujitsu) of its basic contractual rights and offend the principles of good faith and fairness. In my view, an act of theft can never be said to be in furtherance of a legally valid and enforceable contract. Any contract which envisioned, tolerated or provided for the furtherance of theft would be contrary to the doctrine of legality and public policy. Consequently, had I commanded majority, I would set aside the decision of the Supreme Court of Appeal.

ZONDO CJ (Maya DCJ, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

[80] I have had the benefit of reading the judgment by my Colleague, Mathopo J, in this matter (first judgment). My Colleague concludes that this Court has jurisdiction. He also concludes that leave to appeal should be granted, the appeal should be upheld and the decision of the Supreme Court of Appeal set aside. I agree that this Court has jurisdiction and that leave to appeal should be granted. However, I am unable to agree that the appeal should be upheld. In my view, the appeal should be dismissed.

Brief background

[81] Although the first judgment has set out the background, I set out a very brief background that I consider necessary for the proper understanding of my approach in this judgment. Fujitsu Services Core (Pty) Ltd (Fujitsu), the applicant in this matter, is a registered company that imports, sells and distributes laptops and accessories. Schenker South Africa (Pty) Ltd (Schenker) conducts the business of a warehouse operator, freight forwarder, logistics manager, distributor and forwarding agent.

[82] Before the dispute that led to these proceedings between Fujitsu and Schenker arose, the two parties had done business with each other for some time which was based on different agreements. The present dispute is governed by an agreement concluded between the parties dated 10 July 2009. That agreement was called the National Distribution Agreement. It incorporated the Standard Trading Terms and Conditions of the SAAFF (Standard Trading Terms and Conditions).

[83] Clause 17 of the Standard Trading Terms and Conditions reads:

> "GOODS REQUIRING SPECIAL ARRANGEMENTS
> Except under special arrangements previously made in writing the Company will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. 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. A claim, if any, against the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clause 40 and 41."

In this judgment I shall refer to the goods listed in clause 17 either as goods falling within the list in clause 17 or as goods of high-value.

[84] Fujitsu sent to Schenker goods falling within the list of goods in clause 17 without making any prior special arrangements in writing with Schenker as required by clause 17. An employee of Schenker, one Mr Lerama, stole those goods and disappeared forever. It is common cause that Mr Lerama was sent by Schenker to the airport to collect Fujitsu's goods that he stole after he had collected them. He was supposed to bring them to Schenker but he stole them and never returned. Fujitsu contends that Schenker is liable for its loss. Schenker disputes liability and contends that, since the goods in question fell within the goods described in clause 17, Fujitsu was obliged to have made prior written special arrangements with Schenker before it

could send those goods to Schenker and, as Fujitsu failed to make such special written arrangements in terms of clause 17, Schenker is not liable for Fujitsu's loss.

High Court and Supreme Court of Appeal

[85] The High Court found for Fujitsu. The Supreme Court of Appeal found for Schenker.

In this Court

Jurisdiction

[86] The first judgment concludes that this Court has jurisdiction on both bases upon which this Court may have jurisdiction. The one is that the matter raises a constitutional matter or issue and the other is that this matter raises an arguable point of law of general public importance which deserves to be considered by this Court.

[87] I am unable to agree that this matter raises an arguable point of law of general public importance which deserves to be considered by this Court. In this regard I note that, although the first judgment says that this matter raises such a point of law, it does not articulate the point of law. Such a point of law should be stated without reference to the particular parties before the Court. An example would be a case that raises the following question: does the *audi alteram partem* rule apply to private relationships? In this case the question of law is whether clause 17 of the Standard Trading Terms and Conditions exempts Schenker from liability for loss arising out of the theft of Fujitsu's high-value goods by Mr Lerama. Although this may be an arguable point of law, it is not one of general public importance.

[88] There was a suggestion by Fujitsu that, since clause 17 is to be found in the agreement of the SAAFF, it stood to reason that it affected a large section of the population. I cannot accept this because there is no evidence before us of even how many members the SAAFF has. It may have 5, 10 or 15 entities under it. Schenker also submitted, correctly in my view, that we do not know even whether the Standard

Trading Terms and Conditions which the parties incorporated in the present case are still current. There is no evidence that this version of the Standard Trading Terms and Conditions is in widespread use or that the relevant terms in the version now in use are the same as those used in the present case. That would not be enough to make it a point of law of general public importance. Therefore, in my view, there is not enough before us to enable us to say that the matter raises a point of law of general public importance.

[89] There is a reason why the drafters of the Constitution Seventeenth Amendment Act, which expanded this Court's jurisdiction, chose to draft section 167(3)(b)(ii) of the Constitution in the way they did. They sought to make sure that, where a matter does not raise a constitutional issue but raises a point of law, that alone should not be enough to give this Court jurisdiction. If they considered that, if a matter raised a point of law, that should be enough to give this Court jurisdiction, they would have said so. They did not say so but decided to add other requirements that would need to be met before this Court could have jurisdiction where a matter does not raise a constitutional issue. Those additional requirements are that the point of law must—

(a) be arguable;
(b) be of general public importance; and
(c) be a point of law that ought to be considered by this Court.

[90] The whole point that the drafters of the Constitution Seventeenth Amendment Act sought to make was that, if a matter does not raise a constitutional issue, there should be stringent requirements before it can be entertained by this Court. These stringent requirements serve a good purpose to ensure that non-constitutional matters that come before this Court truly deserve the attention of the highest Court in the land. In this case the requirements of section 167(3)(b)(ii) have not been met. Accordingly, we do not have jurisdiction on the basis of section 167(3)(b)(ii) of the Constitution.

[91] The next question is whether the matter raises a constitutional issue. That takes me to a point which Fujitsu raised for the first time in this Court which it had not raised in any of the lower courts. That is Fujitsu's contention that, if clause 17 means that Schenker is exempted from liability for loss suffered by Fujitsu due to the theft of its goods by Mr Lerama, it will be contrary to public policy and should, for that reason, not be enforced. It is common cause that Fujitsu did not raise this point in any of the courts below and that, in raising it in this Court, it was raising this point for the first time. Counsel for Schenker contended that we should not entertain this point because it had not been raised in the lower courts. In support of its contention, Schenker's counsel referred to the judgment of this Court in *Tiekiedraai*. In *Tiekiedraai* this Court refused to entertain a point of law which had not been raised before in the lower courts. This Court said that it would have been different "where a point of law is apparent on the papers and the parties simply misunderstood the law. There a court can raise the legal point of its own accord."[64] In the next paragraph this Court said:

> "That is not the case here. 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."[65]

[92] In *Barkhuizen* this Court had to consider when it could entertain a point of law raised for the first time before this Court. This Court said:

> "The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the

[64] *Tiekiedraai* above n 10 at para 23.

[65] Id at para 24.

> other party if the law point and all its ramifications were not canvassed and investigated at trial."[66]

[93] What is clear from this passage is that one of the requirements which must be met before this Court may entertain a point of law raised by a litigant for the first time on appeal is that the point must be "covered by the pleadings." Another requirement is that the consideration of that point of law must not involve any unfairness to the other party against whom it is directed. This Court said that:

> "unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial."[67]

In *Barkhuizen* this Court said that, when those requirements have been met, then "this Court may in the exercise of its discretion consider the point."[68]

[94] It emerges from both this Court's decisions in *Barkhuizen* and *Tiekiedraai* that, if the point of law being raised for the first time in this Court was not covered by the pleadings or was not foreshadowed in the pleadings, this Court will not entertain it. In *Barkhuizen* this Court entertained a point of law – which was the same as the one being raised in this case, namely, public policy argument – but in that case the point was covered by the pleadings.[69] In the present case the contract containing the clause that Fujitsu seeks to contend is contrary to public policy was annexed to the pleadings. It was not Schenker's case that there would be unfairness to it if Fujitsu was allowed to raise the public policy argument. Schenker's argument was firstly to baldly state without elaboration that it was impermissible for Fujitsu to raise this new argument

[66] *Barkhuizen* above n 14 at para 39.

[67] Id.

[68] Id at para 38.

[69] Id at para 40.

when it had not raised it in the courts below but secondly to challenge comprehensively the soundness of Fujitsu's argument based on public policy in case this Court allowed Fujitsu to raise this argument. With Schenker not having argued that there would be any unfairness if Fujitsu is allowed to argue this point, the matter must be decided on the basis that there will be no unfairness. In this case the point was foreshadowed in the pleadings.

[95] Furthermore, I think that the nature of the point of law that Fujitsu seeks to argue is a point of law that this Court would have been entitled to raise *mero motu*. Fujitsu's point of law is that, if the correct interpretation of clause 17 is that Schenker is exempted from liability for loss arising from the theft of Fujitsu's high-value goods by one of Schenker's employees, then clause 17 is contrary to public policy and unenforceable. A court that is asked to uphold any agreement or clause in an agreement has an obligation to satisfy itself that the agreement or clause is not contrary to public policy or is not illegal before it can uphold it because, if it is contrary to public policy or if it is illegal, it will not be enforceable.[70] Therefore, I think we should consider this point. I do not think that there would be any unfairness to Schenker because this is not a point which would have required any evidence to have been led in the court of first instance. This then is the point that gives this Court jurisdiction in this matter because, as is clear from this Court's judgment in *Barkhuizen*, a contention that an agreement or a clause in an agreement is contrary to public policy raises a constitutional issue.

Leave to appeal

[96] Fujitsu now applies to this Court for leave to appeal against the decision of the Supreme Court of Appeal. Leave to appeal should be granted because it is in the interests of justice to determine whether a contractual provision which seeks to exempt a contracting party from liability for loss caused by the deliberate wrongdoing of an employee is contrary to public policy. This legal question is one of general

[70] Id at para 29.

public importance, apart from also being a constitutional issue. In the course of answering the public policy question, it is first necessary to interpret clause 17 in order to decide whether it does, indeed, purport to exempt the contracting party, Schenker, from liability for loss caused by the deliberate wrongdoing of an employee because, only in that event, does the public policy issue arise. This question of interpretation is thus necessarily ancillary to the matter giving us jurisdiction. As I said earlier, the interpretation of clause 17 as a stand alone exercise is not a question of law of general public importance. However, it has to be addressed in this case in order to reach the public policy issue. Furthermore, there are reasonable prospects of success. It is, therefore, in the interests of justice that leave to appeal be granted.

The appeal

[97] Before us the issue is whether or not clause 17 of the Standard Trading Terms and Conditions means that Schenker is not liable for Fujitsu's loss occasioned by the theft of Fujitsu's high-value goods by Mr Lerama. If clause 17 means that Schenker is not liable, the appeal by Fujitsu must fail. If that is not what clause 17 means, Fujitsu's appeal must be upheld and the Supreme Court of Appeal's decision must be set aside and replaced with an order dismissing Schenker's appeal to that Court. If that is done, the decision of the High Court will stand.

[98] Clause 17 has been quoted above. Ordinarily, it would not be necessary to quote clause 17 again because it has been quoted above. However, given its centrality to the determination of the appeal, I consider it convenient to quote it again. It reads:

> "GOODS REQUIRING SPECIAL ARRANGEMENTS
> Except under special arrangements previously made in writing the Company will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. 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. A claim, if any, against the Company in respect of the goods to in this clause 17 shall be governed by the provisions of clause 40 and 41."

[99] I draw attention to the heading of clause 17. The heading is: "GOODS REQUIRING SPECIAL ARRANGEMENTS". That tells the reader that clause 17 is a clause that applies to goods that require special arrangements. In the first sentence of clause 17 a list of goods is given. Those are the goods that require special arrangements. This means that, once goods fall within the list of goods in the first sentence of clause 17, they are subject to clause 17. It is common cause that the goods that Mr Lerama stole fell within the list of the goods in the first sentence of clause 17. In other words, the loss for which Fujitsu seeks to hold Schenker liable is loss of goods which fell within the list of goods in the first sentence of clause 17.

[100] Fujitsu contends that clause 17 does not apply to cases of deliberate or intentional conduct such as theft which was the case in this matter. It refers to clauses 40 and 41 in support of its submission that the agreement could not cover a situation where an employee of Schenker stole a customer's goods that had been sent to Schenker. Schenker, by contrast, contends that clause 17 is a stand-alone clause that deals specifically with a certain category of goods which covered the goods to which Fujitsu's claim relates. Schenker contends that clause 17 is wide enough to cover a case of a loss of goods as a result of theft by one of its employees. Schenker contends that Fujitsu was required to make prior special arrangements in writing with Schenker before it sent the goods to Schenker but did not do so and that, for that reason, it could not look to Schenker for the recovery of goods listed in the first sentence of clause 17.

[101] It is difficult to understand why a freight forwarder which wants to protect itself against the risk that may be posed by its employees in the course of dealing with or handling or processing a customer'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. What

it would amount to is this: I will not be liable to you if any of my employees negligently drops one of your computers and it gets damaged but I will be liable to you if the same employee steals that computer. It is difficult to understand how any business person who wanted such an exemption clause would think such a clause would benefit them.

[102] In certain cases, the negligent act or omission may result in lesser damages than intentional conduct such as theft. Theft would entail stealing the whole computer. Negligent conduct may mean that a computer that is dropped gets damaged but may be repaired and can thereafter still be used whereas the theft of a computer will mean that the whole computer is gone and the costs of buying another one to replace it would be more than the costs of repairing the one that is dropped due to negligence. Logic dictates that, if a business person had to choose what to avoid in terms of liability, it would be the liability that might cost them more than that which would cost them less. On the approach of Fujitsu, Schenker sought to protect itself against a lesser risk and not to protect itself against a bigger risk. Taken to its logical conclusion, this approach means that Schenker would have wanted to take out an insurance policy to cover the risk of liability for negligent acts or omissions but would not have wanted to take out an insurance policy to cover itself against liability for theft on the part of its employees or any other third party. To my mind, it would not be business-like and would not make sense for a business person or entity to protect itself against the negligent conduct but not against intentional conduct such as theft. This construction of the agreement is neither sound nor sustainable.

[103] Once it is common cause that the goods to which the claim relates fall within the list in the first sentence of clause 17, then whether Schenker is or is not liable will depend upon whether Fujitsu satisfied the requirements of clause 17 which had to be satisfied before Schenker could be held liable.

[104] What requirements did clause 17 lay down or prescribe before Schenker could be liable for loss or damage or theft of goods listed therein? To answer that question,

a clear understanding of what clause 17 means is required. Clause 17 is a long clause. It is not broken into sub-clauses. It is easy to understand it if one breaks it up, for convenience, to three sub-clauses, namely sub-clauses 17(1), (2) and (3). I do this below.

With sub-clauses (1), (2) and (3), clause 17 reads as follows:

"**17. GOODS REQUIRING SPECIAL ARRANGEMENTS**

17.1. *Except under special arrangements previously made in writing the Company will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants.*

17.2. *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*.

17.3. A claim, if any, against the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clause 40 and 41". (Emphasis added.)

[105] From the above sub-clauses of clause 17, the following is apparent:

(a) Sub-clause (1) – which is the first sentence of clause 17 – makes it clear that the parties agreed that Schenker would not deal with the goods listed in that sentence except if Fujitsu made prior special arrangements in writing. This means that, if prior special arrangements in writing were not made, Schenker would not deal with such goods. If prior special arrangements were made with Schenker in writing, Schenker would deal with such goods and that would be on the terms and conditions of the special arrangements agreed upon between the parties.

(b) Sub-clause (2) – which is the second sentence of clause 17 – makes it clear that if, despite the fact that Schenker would not deal with the goods listed in the first sentence of clause 17 if no prior special arrangements were made in writing, Fujitsu, nevertheless, sent such goods to Schenker without complying with the requirement of prior special arrangements in writing and Schenker dealt with such goods, Schenker would not incur any liability whatsoever. This is understandable because Fujitsu would not have complied with the requirement of making prior special arrangements in writing with Schenker before sending such high-value goods to Schenker. Fujitsu agreed that, if it did not make prior special arrangements in writing with Schenker before it sent high-value goods to Schenker, Schenker would not be liable.

(c) Sub-clause (3) – which is the third sentence of clause 17 – deals with a situation where there is a claim under clause 17. It provides that, if there is a claim in terms of clause 17, such a claim will be governed by clauses 40 and 41. A claim under clause 17 would arise only if Fujitsu had made prior special arrangements in writing with Schenker as contemplated in clause 17 before it sent high- value goods to Schenker. If no prior special arrangements were made in writing with Schenker, no claim would arise under clause 17. In this case it is common cause that Fujitsu did not make any prior special arrangements in writing with Schenker before sending the goods in question to Schenker and that those goods fell within the list in the first sentence of clause 17. For that reason, clauses 40 and 41 have no application in the present case.

[106] The upshot of the agreement between the parties is that they decided to have one liability dispensation for normal goods that Fujitsu was entitled to send to Schenker in terms of their business dealings and a different liability dispensation for a special category of goods. The special category of goods was the category of goods listed in the first sentence of clause 17. The normal goods would be goods other than those listed in the first sentence of clause 17. The parties decided that in respect of normal goods that Fujitsu would send to Schenker, Fujitsu would not need to make any prior special arrangements in writing with Schenker in order for the latter to be liable for any loss or theft or damage to such goods. However, the parties decided that in respect of the special category of goods – goods of high-value – Schenker would only be liable if Fujitsu had made prior special arrangements in writing with Schenker before sending such goods to Schenker. The parties agreed that there would be a need for prior special arrangements to be made in writing first before Schenker could be liable. In other words, the parties agreed that Schenker's liability in respect of the special category of goods would depend on special arrangements that would have to be made between the parties in writing before Fujitsu could send such goods to Schenker.

[107] Clause 17 does not mean that Schenker was exempted from liability under all and any circumstances if goods falling within clause 17 were damaged or lost or stolen while they were being handled by it or by its employees. The clause allowed Schenker to be liable but only if Fujitsu had made prior special arrangements in writing with Schenker. However, if Fujitsu did not make prior special arrangements in writing with Schenker in respect of goods falling within the list of goods in clause 17, then Schenker would not be liable. That was the deal between Fujitsu and Schenker as reflected in clause 17. That deal between the parties must be upheld unless there are valid reasons why it should not be upheld.

[108] It also seems that clause 17 creates reciprocal obligations for the parties. Clause 17 only contemplates liability on the part of Schenker if Fujitsu had made prior

special arrangements in writing. Fujitsu has to show that it made special arrangements in writing with Schenker before Schenker can be held liable. No special arrangements, no liability for Schenker.

[109] I need to say something about the reference to negligence in clause 17 on which Fujitsu and the first judgment place some reliance. I do not think it was or is common cause that Mr Lerama was acting "in the course and scope of his employment". Vicarious liability was in dispute on the pleadings, at the pre-trial conference and at the trial. The High Court's judgment recorded Schenker's denial of vicarious liability[71] and the question was then addressed by the High Court.[72] The High Court found that Mr Lerama was not acting within the course and scope of his employment[73] but found against Schenker on the extended creation-of-risk basis. The Supreme Court of Appeal said that vicarious liability was conceded in the High Court. It seems to have been conceded by the time of the application for leave to appeal. Certainly, in its written submissions before this Court Schenker conceded vicarious liability. The finding and concession were not that Mr Lerama had acted within the course and scope of his employment but that there was vicarious liability.

[110] Given the approach to vicarious liability in *K*[74] as subsequently explained in *F*[75] it seems to me that "within the course and scope of employment" is no longer the test in deviation cases, the focus now being on whether there was a sufficient connection between the conduct of the delinquent employee and their employment to render the employer liable. The establishment of this connection is a normative assessment.[76]

[71] High Court Judgment above n 1 at paras 2 and 6.

[72] Id at paras 17-30.

[73] Id at para 19.

[74] *K* above n 43.

[75] *F* above n 44.

[76] Id at para 76.

[111] Fujitsu contended, which contention the first judgment accepts, that clause 17 cannot help Schenker because Mr Lerama was not executing the agreement between the parties when he stole Fujitsu's high-value goods. Fujitsu contends that clause 17 only applies in the execution of the agreement.

[112] In support of its contention Fujitsu referred to clause 3 of the agreement. Clause 3 reads:

> "**APPLICATION OF TRADING TERMS AND CONDITIONS**
> Subject to clause 5, all and any business undertaken or advice, information or services provided by the Company, whether gratuitous or not, is undertaken or provided on these trading terms and conditions (as amended from time to time)."

[113] Fujitsu then submitted that clause 3 means that the Standard Trading Terms and Conditions apply if the activity in issue can be said to be "business undertaken" or "advice" or "information" or "services provided by Schenker". It submitted that, if an activity falls outside any of these terms, the Standard Trading Terms and Conditions do not apply. Fujitsu said that, if the conduct is not the performance of the contract – that is, in the undertaking of business or giving advice, information or services – the exemption of liability in clauses 17 and 40 does not apply.

[114] There is no merit in this contention. If it were valid, it would mean that clause 17 protects Schenker from liability when, for example, its employee acts in accordance with the contract but not when he or she acts in breach of the contract. 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. A clause like 17 is required for criminal and wrongful conduct instead of lawful and acceptable conduct. An employer needs a clause that exempts him or her from liability arising from his or her employee's conduct not because he thinks that the employees will behave as expected in terms of the agreement with a client or customer but because there is a risk that they may behave contrary to what is expected of them in terms of

the agreement. If Fujitsu's argument were valid, there would be very little value in exemption clauses such as clause 17.

[115] Furthermore, even if it was permissible to have regard to whether Mr Lerama was executing the agreement when he stole Fujitsu's high-value goods, the position is that, until Mr Lerama deviated from the route he was supposed to follow in order to take the goods where he was supposed to take them, every step that he had taken was a step he would have taken in executing the agreement. In this regard it must be remembered that, in response to Fujitsu's request for further particulars for trial, Schenker said: "[Schenker] did request Lerama, in writing, to collect certain goods between 19 and 23 June 2012." This reference is a reference to goods that included Fujitsu's goods that Mr Lerama stole. So, except for the fact that Mr Lerama may have gone to collect the goods with the intention to steal them, the position is that he had been instructed by Schenker to collect them for Schenker's business but he decided to steal them. Therefore, there should be no suggestion that Schenker had not instructed Mr Lerama to collect the goods for Schenker's business.

[116] Fujitsu's contention and the first judgment's conclusion that Schenker's liability is not excluded because clause 17 only excludes Schenker's liability where its employee is executing the agreement between the parties is in essence similar to an argument that police officers who rape a member of the public to whom they have given a lift are not executing their duties and that, therefore, the Minister of Police is not vicariously liable for their unlawful conduct. However, in *K* and *F* this Court concluded that the police officers involved in raping K and F had acted within the course and scope of their employment or that their conduct was sufficiently connected with their employment as police officers to justify holding the Minister of Safety and Security vicariously liable for their unlawful conduct.

[117] In this regard reference can be made to what O'Regan J said in *K* including the excerpts she quoted from Watermeyer CJ's judgment in *Feldman.*[77] O'Regan J said in *K*:

> "It is clear that an intentional deviation from duty does not automatically mean that an employer will not be liable. In the early leading case of *Feldman v Mall*, a driver of the appellant's vehicle had, after delivering the parcels he had been instructed to deliver, driven to attend to some personal matters of his own during which time he consumed enough beer to render him unable to drive the vehicle safely. On his way back to his employer's garage, he negligently collided with and killed the father of two minor children. The case concerned a dependant's claim for damages and the court, by a majority, held the employer to be vicariously liable.
>
> In his judgment holding the employer liable, Watermeyer CJ captured the test for vicarious liability in deviation cases as follows:
>
> > 'If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.
> >
> > (a) If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm; there are several English cases which illustrate this situation and I shall presently refer to some of them. If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible.
> >
> > (b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the

[77] *Feldman (Pty) Ltd v Mall* 1945 AD 733.

> master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.'

In a later passage in the judgment, Watermeyer CJ continued as follows:

> 'This qualification is necessary because the servant, while on his frolic may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage.'

Watermeyer CJ explained the reason for the rule as follows:

> 'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.'

Tindall JA formulated the approach in slightly different terms:

> 'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of

> degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.'
>
> In subsequent cases the approaches advocated by Watermeyer CJ and Tindall JA and concurred in by Fischer AJA in *Feldman*'s case were held to constitute the majority judgment of the court. Both judgments have been repeatedly cited in subsequent cases and variations of the approach suggested have been adopted and applied."[78] (Footnotes omitted.)

[118] Of course, I appreciate that Fujitsu is raising this point to argue that Schenker is liable – not that it is not liable – but the principle is applicable. Fujitsu is advancing this argument to try and escape the consequences of its failure to make special arrangements with Schenker which clause 17 required it to make before it sent to Schenker the high-value goods if it wanted to look to Schenker for the recovery of its loss.

Fujitsu's public policy argument

[119] Fujitsu submitted that in so far as this Court may hold that clause 17 of the agreement exempts Schenker from liability for loss arising from the theft of its employees, it is contrary to public policy and is, therefore, unenforceable. It, therefore, urged this Court not to enforce the clause. In *Barkhuizen* this Court had this to say about public policy:

> "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 provisions 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."[79]

[120] The Court went on to say in the same case:

[78] *K* above n 43 at paras 26-30.

[79] Id at para 29.

> "In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. Broadly speaking, the test announced in *Mohlomi* is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. 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."[80]

[121] This Court went on deal with how fairness is to be determined in the context of public policy. It said:

> "There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.
>
> The first question involves the weighing-up of two considerations. *On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.* The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common law principles of contract.
>
> The second question involves an inquiry into the circumstances that *prevented compliance with the clause*. It was unreasonable to insist on compliance with the

[80] See *Barkhuizen* above n 14 at para 51.

> clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply.
>
> It follows, in my judgement, that the first inquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. In *Afrox*, the Supreme Court of Appeal *recognised that unequal bargaining power is indeed a factor which together with other factors, plays a role in the consideration of public policy. This is a recognition of the potential injustice that may be caused by inequality of bargaining power. Although the court found ultimately that on the facts* there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours."[81] (Emphasis added.)

[122] Applying the approach outlined by this Court in *Barkhuizen*, I would say that there is nothing unfair or unreasonable about the terms of clause 17. On the contrary, the terms of clause 17 are very fair to both parties. Schenker took the position that, as a general rule, it would not handle such goods unless Fujitsu made special prior arrangements in writing with it before it sent the goods. This was obviously to avoid the risk that would come with handling goods of such high-value. This meant that, without any prior special arrangements having been made in writing, there would be no handling of such high-value goods by Schenker. Then the parties realised that, notwithstanding the requirement that Schenker would only handle such high-value goods if prior special arrangements had been made in writing between the parties, there could be situations where Fujitsu sent high-value goods to Schenker without

[81] Id at paras 56-9.

having made prior special arrangements in writing with Schenker and Schenker did actually handle such goods. The parties agreed, as reflected in the second sentence of clause 17, that in such a case Schenker would not incur any liability whatsoever. If Fujitsu chose not to make prior special arrangements in writing with Schenker, it chose to voluntarily take the risk that, if something happened to the goods, including if they were stolen, it would take responsibility for its choice. Clause 17 means that, if Fujitsu made 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 to Schenker without making prior special arrangements in writing with Schenker, it and it alone bore the risk.

[123] As will have been seen in *Barkhuizen* the principle is 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. Furthermore, there is no suggestion that Fujitsu was in a weaker bargaining position than Schenker when the agreement was concluded. There is nothing unfair or unreasonable about clause 17. For that reason it is not contrary to public policy. Also, Fujitsu has not demonstrated why it did not comply with clause 17 by making prior special arrangements with Schenker before it sent the goods of high-value to Schenker. To make special arrangements would have been the easiest thing for Fujitsu to make but it did not make any and has offered no reason or explanation as to why it did not make the special arrangements with Schenker.

[124] Fujitsu's contention that clause 17 does not cover intentional conduct such as theft by Schenker's employees because that would be contrary to public policy is not supported by the authorities. Instead, the authorities 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. I refer to a few cases below in this regard.

[125] In *Wells*[82] the respondent had sued the appellant for the purchase price of a plant in respect of which the appellant had concluded a sale agreement with the respondent. The appellant sought to avoid liability by alleging that the conclusion of the sale agreement had been induced by certain misrepresentations made to him by the respondent's salesman. The appellant had signed an order which included the following:

> "I hereby acknowledge that I have signed the order irrespective of any representations made to me by any of your representatives, and same is not subject to cancellation by me."[83]

[126] On appeal the Appellate Division held that the appellant was bound by the undertaking he had signed. This means that the Appellate Division upheld an undertaking not to rely on misrepresentations. However, the Court said that, had the representations not only have been incorrect but also fraudulent, the appellant would have escaped liability because courts will not enforce a stipulation to condone fraudulent conduct. The Appellate Division said:

> "On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud."[84]

[127] It later said:

> "Had the appellant alleged that the representations were not only untrue but fraudulent, he might, as a matter of pleading, have escaped the operation of the obnoxious clause. But he has not done so. And the language of the undertaking which he subscribed covers all non-fraudulent representations."[85]

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[82] *Wells* above n 62.

[83] Id at 72.

[84] Id.

[85] Id at 73.

[128] In *Goodman Brothers*, Cloete J, with Streicher J concurring, pointed out, correctly in my view, that Innes CJ's statement in *Wells* referred to above could not be "interpreted as meaning that a fraud by a salesman would have been a fraud by the seller (as opposed to a fraud for which the seller would, in law and on grounds of public policy, have been liable) as such an interpretation would be contrary to other (and later) decisions of the Appellate Division".[86] In *Goodman Brothers* the court also said:

> "Where a servant, acting within the scope of his authority makes a fraudulent misrepresentation and thereby induces another party to contract with his master, the master is liable. But 'the liability of the principal is not based upon any constructive fraud on his part. Fraud is a wilful act, and therefore the principal cannot be held to be guilty of fraud of his servant even though he may be responsible for it' (per Wessels JA in *Ravene Plantations Ltd v Estate Abrey* 1928 AD 143 at 153, and see also the remarks of Centlivres CJ in *Levy v Central Mining & Investment Corporation Ltd* 1955 (1) SA 141 (a) at 148B – D)."[87]

[129] The Court also said in *Goodman Brothers*:

> "An agent who concludes a contract for and on behalf of his principal, does so for the benefit of his principal. To allow the principal to take advantage of fraudulent misrepresentations by relying on a clause excluding liability for misrepresentations by the servant or agent, would encourage fraud, as Innes CJ said in the *Wells* case supra at 72 in the passage already quoted."[88]

[130] It also went on to say:

> "The position is, however, different in the case of theft by an employee of goods that have been entrusted to his employer. Like the fraud, the theft by the servant is not theft by the employer; but, unlike the fraudulent misrepresentation, the theft is not for

[86] *Goodman Brothers* above n 8 at 98.

[87] Id.

[88] Id at 99.

> the benefit of the employer but for the benefit of the employee. To allow the employer to rely on a clause excluding liability in the case of a theft by an employee would not encourage theft. The reason is obvious; it is, *ex hypothesi*, the dishonest employee, and not the contracting party who stipulated for the exemption clause, who will benefit; and there is no greater risk of a theft being committed because the employer has stipulated for an exemption clause than there would be had he not done so."[89]

[131] In *Fibre Spinners & Weavers*[90] the defendant, which was the respondent on appeal, was unable to deliver to the plaintiff, the appellant on appeal, grainbags it had stored for reward in terms of a contract of deposit between itself and the plaintiff because the grainbags had been stolen by one of its employees. In terms of a letter that formed part of the contract between the parties the respondent was "absolved from all responsibility for loss or damage howsoever arising in respect of the grainbags, in consideration for the respondent, *inter alia*, arranging and maintaining all risks insurance policy, covering the grainbags."[91]

[132] Counsel for the Government of the Republic of South Africa in the *Fibre Spinners & Weavers* matter submitted that the above exemption could not be construed so as to exclude liability caused by wilful acts of the defendant whether of a delictual nature or constituting a breach of contract. The Court, through Wessels ACJ, said that the principle contended for by counsel for the Government was not relevant to the matter before it because it was not part of the Government's case that the defendant was in any manner guilty of any form of wilful misconduct. The Court said:

> "The defendant was unable to deliver the grainbags in question to the plaintiff because they had been stolen by its employee (the late RF Milburn) in the circumstances set out herein before. The theft was not an act committed by the defendant but one committed by its employee, who was required to attend to the

[89] Id.

[90] *Government of the Republic of South Africa v Fibre Spinners & Weavers* 1978 (2) SA 794 (A).

[91] Id at 794.

> safekeeping of the grainbags in the defendant's warehouse within the scope, and in the ordinary course, of his employment as its chief security officer. In the circumstances the defendant (as employer) may, under the common law, be liable as bailee to compensate the plaintiff for the loss or damage to, the property in question because it is vicariously responsible for the tortious conduct of its employee. See *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *South British Insurance Co v Du Toit* 1952 (4) SA 313 (SR) at 318 D – E. The question here is, however, whether or not such liability was excluded by the terms of paragraph 2 of the above mentioned letter dated 4 November 1969."[92]

[133] The Appellate Division[93] held that the exemption clause operated within a limited field, namely where the insurance policy was in force and where the bags were stored in the premises referred to in paragraph 2 of the letter dated 14 November 1969. What the Appellate Division did in *Fibre Spinners & Weavers* was to draw a distinction between an exemption clause which would exempt a contracting party from liability for loss arising from its own wilful misconduct such as theft and a case where an exemption clause sought to exempt a contracting party from liability for loss arising from the wilful misconduct of its employees such as theft. The Court made it clear that an exemption clause purporting to exempt a bailee from liability for loss or damage arising from its own wilful conduct would not be enforceable because it would be contrary to public policy. The Court did not extend that to a case where an exemption clause exempted an employer from liability for loss or damage to property arising from the wilful misconduct (for example theft) of its employees or agents.

[134] The Court accepted, even if 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. The Court construed paragraph 2 of the letter of 14 November 1969 and concluded that the wording was wide enough to exempt Fibre Spinners & Weavers from liability for loss arising from the theft of the grainbags by its employee. Wessels ACJ also added: "In construing

[92] Id at 803.

[93] As the current Supreme Court of Appeal was known then.

the agreement in question, it must be borne in mind that the exemption was made conditional upon the defendant 'arranging and keeping in force' prescribed insurance with plaintiff's 'interest properly noted in the policies'".[94] He later said: "As I see it, the intention of the parties was to substitute in plaintiff's favour a right of recourse against the insurance company in the place of such rights of recourse as plaintiff had against defendant as bailee."[95] This arrangement that was made by the parties in *Fibre Spinners & Weavers* is the kind of special arrangement that could have been agreed upon between Fujitsu and Schenker if, as required by clause 17, Fujitsu had made special arrangements with Schenker before it sent its high-value goods to Schenker.

[135] I agree with Cloete J in *Goodman Brothers* that Wessels ACJ did not in *Fibre Spinners & Weavers* say that Fibre Spinners & Weavers could not be exempted from liability for loss arising out of the intentional conduct of its employees.[96]

[136] In *Rosenblum* a client of the First National Bank (FNB) had concluded an agreement with FNB in terms of which he rented a safe deposit box from FNB in which he was allowed to store certain items for a small annual fee. The safe deposit box was kept in the bank. The client's contents in the safe deposit box were stolen by the bank's employees, and in terms of the agreed statement of facts it was recorded that those employees had been acting within the course and scope of their employment. The theft occurred as a result of the negligence of the bank's staff. Clause 2 of the agreement between the parties was relied upon by the bank to avoid liability. Clause 2 was an exemption clause. It read:

> "The bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause

[94] Id at 805.

[95] Id at 805-6.

[96] See *Goodman Brothers* above n 8 at 100-1.

whatsoever, including war or riot damage, and whether the loss or damage is due to the bank's negligence or not."[97]

[137] Clause 3 was contended to be also relevant. It read:

"The bank does not effect insurance on items deposited and/or moved at the depositor's request and the depositor should arrange suitable insurance cover."[98]

[138] In *Rosenblum* the Supreme Court of Appeal upheld clause 2. This means that the Court held that, while FNB may not have been entitled to protect itself from liability for loss arising from its own theft in the sense of theft committed by those who were the "controlling and directing minds" of the bank, it was permitted to protect itself from liability arising out of theft by its own employees. The Court said:

"As for the contention that the principle in the case of *Wells* (supra) prohibits the bank 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, I am unable to accept so widely formulated a proposition. It may well be that public policy will not countenance a situation in which an employer will derive a benefit from such conduct but where, as here, the bank does not seek to benefit, nor has it benefited, from the theft committed by its employee or employees, the position is very different. No authority was cited which clearly supports the proposition that in the latter situation the employer cannot validly seek protection against liability by way of an appropriately worded provision in the contract. Nor am I aware of any. On the contrary, there is authority to the contrary to be found in the decision of the Full Bench in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) at 97H – 103G and 106G – 107D. In such a situation the considerations of public policy which require adoption of the principle are absent. The liability is only vicarious and the bank itself (as represented by its controlling or directing minds) has not committed theft or otherwise been guilty of wilful misconduct. In any event, as has been pointed out in Government of the *Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 803B, the

[97] Id at para 3.

[98] Id.

> principle is not relevant to the proper construction of an agreement; it is in essence a rule of law affecting its enforceability."[99]

[139] In *Goodman Brothers*[100] a Full Court dealt with a clause in a contract that is similar to clause 17 in substance. In that case the clause in issue was clause 9 of the agreement. The question in that case was whether clause 9 of the agreement between the parties absolved the respondent in that case from any liability to the appellant when goods belonging to the appellant were stolen by employees of the respondent. Clause 9 read:

> "Exclusion of Liability
> The company shall not accept liability for the handling of any bullion, coins, precious stones, jewellery, valuables, antiques, pictures, bank notes, securities and other valuable documents or articles, livestock or plants, unless special arrangements have previously been made in writing with the company, whether or not it is aware of the nature of the goods, shall bear no liability whatsoever, for or in connection with any loss or damage to the goods."[101]

[140] In that case, too, employees of the respondent had collected valuable goods from Jan Smuts Airport – now OR Tambo International Airport – for delivery to the appellant's premises but they stole the goods en route. Talking about the cumulative effect of clauses 9, 28.1 and 28.2 in the *Goodman Brother*'s case Cloete J said:

> "The cumulative effect of the clauses just quoted is that the respondent can be liable (in limited and defined circumstances) only for gross negligence. Clause 9 places a further limitation on the respondent's liability where, *inter alia*, valuables are not to be conveyed: if 'special arrangements' for such conveyance are not made, clause 9 says explicitly that the respondent shall bear 'no liability whatsoever' – i.e. all grounds of liability are excluded in such a case."[102]

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[99] Id at para 22.

[100] *Goodman Brothers* above n 8.

[101] Id at 94.

[102] Id at 96.

[141] I am in agreement with the Full Court in *Goodman Brothers* that there is 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 he wish to do so. In *Goodman Brothers* the Full Court said:

> "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."[103]

[142] The making of prior special arrangements in writing by Fujitsu with Schenker before Fujitsu could send to Schenker goods falling within the list of goods given in the first sentence of clause 17 was a condition precedent to Schenker' s liability for anything that happened to such goods including theft. Once it is accepted, as it is, that Fujitsu did not make such any special prior arrangements in writing, that means that the condition precedent for Schenker' s liability has not been met or complied with and that, therefore, Schenker is not liable. That conclusion means that the Supreme Court of Appeal's decision was correct and the appeal must fail with costs including the costs of two counsel. In my view, *Goodman Brothers* was correctly decided.

Order

[143] In the circumstances I make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

[103] Id at 102.

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