IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***25th March 2020*** Signature: _____

COURT *A QUO* CASE NO: 21830/2014

DATE: 25th MARCH 2020

In the matter between:

FUJITSU SERVICES CORE (PTY) LIMITED Plaintiff

and

SCHENKER SOUTH AFRICA (PTY) LIMITED Defendant

Coram: Adams J
Heard: 9 and 11 December 2019
Delivered: 25 March 2020

Summary: Damages – *condictio furtiva* is a delictual claim for damages – used to vindicate the value of goods stolen by defendant's employee – defendant's vicarious liability for the intentional and wrongful conduct of its employee – recent development in the law discussed –

Contract – terms and conditions – interpretation of exclusionary clauses in light of recent developments – is liability excluded by the provisions of a written contract between the parties – to be interpreted to exclude the intentional wrongful acts of the defendant and delictual claims

ORDER

(1) The plaintiff shall pay the defendant's costs of its action against the defendant under case number: 18981/2014, which action the plaintiff formally withdrew during July 2019.

(2) Judgment is granted against the defendant in favour of the plaintiff for:

a) Payment of the sum of US$516 877.

b) Payment of interest on US$516 877 from the date of service of the summons, at the legal rate applicable then, to date of final payment.

c) The defendant shall pay the plaintiff's costs of this action, which costs shall include the costs consequent upon the employment of two Counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. The dispute in this matter raises the vexed issue of vicarious liability of the defendant ('Schenker') for the conduct of its employee who have deviated from the course and scope of his employment. A further issue relates to whether such vicarious liability on the part of Schenker, if any, is excluded by the terms and conditions of a written agreement between the parties.

[2]. This is an action in the Commercial Court of this division. The plaintiff ('Fujitsu') claims from the defendant ('Schenker') delictual damages on the basis of the theft by an employee of the defendant of certain goods belonging to the plaintiff. It is the plaintiff's case that the defendant is liable for its damages which arose from the theft because the defendant's employee stole property belonging to the plaintiff in circumstances in which the defendant should be held liable. The defendant denies being vicariously liable for the plaintiff's damages and, in any event, contends that its liability, if such exists, is excluded expressly

by the contractual relationship between the parties. The question is simply whether the written agreements concluded between the parties and which governed their contractual relationship, properly interpreted, excluded the defendant's liability for the wrongful conduct on the part of one of its employees.

[3]. The plaintiff claims the value of the goods that were stolen by one Wilfred Bongani Lerama ('Lerama') from the cargo warehouse of SAA at O R Tambo International Airport ('ORTIA') on the 23rd of June 2012. At the time Lerama was employed by Schenker as a 'drawing clerk' or 'drawer', whose duties entailed him uplifting and collecting from the warehouses at the airport goods on behalf of customers of Schenker. Schenker carries on business as a warehouse operator, a distributor and a clearing and freight forwarding agent. As part of its business, Schenker was responsible for the import into South Africa from Germany on behalf of the plaintiff of a consignment of laptops and other computer accessories. Schenker was obviously also responsible for the logistics and the paperwork relating to the importation of the goods.

[4]. The value of the stolen goods was agreed upon between the parties as US$516 877. This amount represents the damages suffered by the plaintiff as a result of the theft. The quantum of the plaintiff's claim is therefore not in issue. What needs to be decided *in casu* is whether, having regard to the contractual relationship between the parties and all things considered, the defendant is liable for such damages.

[5]. It is trite that theft – *condictio furtiva* – is a delictual remedy for damages. Lerama was at the time employed by Schenker *inter alia* to collect and deliver goods on behalf of its customers, including the laptops and accessories forming the subject matter of the claim, and he was at the relevant time acting within the course and scope of his employment with Schenker. Needless to say, it was not part of his duties to go around stealing from the customers of his employer.

[6]. Fujitsu alleges that the conduct of Lerama was sufficiently closely linked with the business of and/or his employment with and/or the risk created by Schenker, to render Schenker vicariously liable for the theft. Schenker disputes this.

[7]. Moreover, at the relevant time there was in existence between the parties a national distribution agreement concluded between them on the 10th of July 2009 ('the contract'), which was extant at the time of the theft of the goods. Schenker contends that Fujitsu's claim is excluded / limited by the contract. In that regard, clause 17 of the agreement reads as follows:

'17. Goods requiring Special Arrangements

Except under special arrangements previously made in writing, the company [Schenker] will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should the customer [Fujitsu] 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 clauses 40 and 41.'

[8]. Clause 40, under the heading 'Limitation of Company's Liability' in turn provides that 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 any negligent act or omission or statement by [Schenker] or its servants' unless the claim arises from a grossly negligent act or omission on the part of Schenker or its servants and such claim arises at a time when the goods were in the actual custody of Schenker and under its actual control. In view of its importance in this matter, it may be apposite to cite in full the *proviso* to clause 40, which reads as follows:

'unless –

a) such claim arises from a grossly negligent act or omission on the part of the Company or its servants; and

b) such claim arises at a time when the goods In question are In the actual custody of the company and under its actual control; and

c) in the instance provided in clause 40.1.7 above, the Company receives a written notice within 5 days after the end of the transit where the transit ends in the Republic of South Africa or within 14 days after the end of transit where the transit ends at any place outside the Republic of South Africa.'

[9]. Clause 41 reads as follows:

'**41. Monetary Limitation of Liability of the Company**

41.1 In those cases where the Company [Schenker] is liable to the customer [Fujitsu] in terms of clause 40.1, in no such case whatsoever shall any liability of the Company, 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 the Company 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 the Company 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 the Company before any goods or documents are entrusted to or delivered to or into the control of the Company (or its agent or sub-contractor), together with a statement of the value of the goods. Upon receipt of such notice the Company 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 the Company the amount of the premium payable by the Company for such insurance. If the Company does not so agree the limits referred to in clause 41.1 shall apply.'

[10]. As I indicated above, an employee of the defendant (Lerama), whilst about the business of the defendant, stole from the plaintiff a consignment of laptops and accessories. The question is this: Is the defendant liable for plaintiff's damages arising from the theft and, if so, is that liability excluded by the provisions of the written contracts between the parties? In order to answer that question, it may be necessary to refer briefly to the facts in this matter, which are by and large common cause.

The facts

[11]. The events giving rise to the plaintiff's claim against the defendant may be summarised as follows.

[12]. The plaintiff purchased and imported a consignment of laptops and accessories from Fujitsu-Germany to the value of US$516 877. The plaintiff engaged the services of the defendant to assist it with the logistics, freight forwarding, warehousing, clearing and forwarding of the consignment. This entailed the defendant importing the goods into South Africa, receiving it from the airline and thereafter delivering it to the plaintiff, after having attended to the necessary customs clearance and other logistical issues.

[13]. The aforegoing the defendant did pursuant to and in terms of the contract referred to *supra*.

[14]. By Saturday, the 23rd of June 2012, the goods had arrived in storage at the SAA Cargo Warehouse at ORTIA and were ready to be delivered to the plaintiff *via* its freight forwarding agent, the defendant. By then, the defendant had also issued to its 'drawer', Lerama, the necessary documentation which would have authorised him to collect the cargo on behalf of the plaintiff. Those documents consisted of the Master Air Waybill and the customs declaration form. On that day, being Saturday, the 23rd of June 2012, Lerama arrived at SAA Cargo, armed with the aforementioned documentation to collect the laptops ostensibly on behalf of Schenker and Fujitsu.

[15]. The goods were thereafter loaded onto Lerama's truck, which was not marked with the Schenker branding, and he thereafter drove off, never to be seen again. On exiting the premises of SAA Cargo he presented to security the delivery slip at the main gate. Lerama, like all drawing agents, had issued to him by Schenker an identity card which is issued by IVS and which allowed him almost unfettered access to SAA Cargo and its warehouses and storage facilities. SAA Cargo by then knew that Lerama was one of Schenker's drawers and on the day in question had no reason to suspect that Lerama was there for any unlawful business.

[16]. Therefore, on the evidence it is clear that on Saturday, the 23rd of June 2012, Lerama stole the laptops and other accessories belonging to Fujitsu. On the probabilities, he had carefully planned and orchestrated the theft with the assistance of one or more co-conspirators. Fujitsu had fallen victim to the theft perpetrated by an employee of Schenker, who, up to the point when he stole the goods, was acting in the course and scope of his employment with Schenker.

Analysis

[17]. The first enquiry is whether Schenker is vicariously liable to Fujitsu for Lerama's intentional misconduct in stealing the laptops.

[18]. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of his employment, or whilst the employee was engaged in any activity reasonably incidental to it. In *F v Minister of Safety and Security* 2012 (1) SA 536 (CC), Mogoeng J explained:

'Two tests apply to the determination of vicarious liability. One applies when an employee commits the deed while going about the employers business. This is generally regarded as the "standard test". The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as "deviation cases".'

[19]. *In casu* it is common cause that Lerama was not acting in the interests of his employer in any way, whether improperly or otherwise. By all accounts, he was 'on a frolic of his own'. He was not acting in the course and scope of his employment and this is accordingly a 'deviation case'.

[20]. The legal foundation of the test for vicarious liability in deviation cases was initially developed in two decisions of the SCA during the previous century: *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A). The test was further refined by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and in *F v Minister of Safety and Security* (supra). It is useful to have regard to these developments before seeking to apply the test to the facts of the present case.

[21]. In *Feldman* a servant of the defendant had been given custody of a motor vehicle and a number of parcels with instructions to drive the vehicle and to deliver the parcels to various customers in town. Having completed his deliveries he was to return the vehicle to a certain garage. Instead, however, he drove the vehicle to a place some distance away, on his own business, and there consumed alcohol which significantly impaired his driving ability. Shortly after departing from this location and on route back to the garage he collided with and killed the father of two minor children. This court held that he had never entirely abandoned his master's work as he had throughout retained the custody and control of the vehicle on behalf of his master and that the master was therefore liable for his negligence.

[22]. In the course of his judgment, however, Watermeyer CJ discussed the common law position relating to vicarious liability. He stated:

'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.

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 would naturally be legally responsible for that harm ... 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 would not be responsible.'

[23]. Watermeyer CJ also discussed the reasons for imposing vicarious liability on a master and explained:

'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 a 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 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 to that harm.'

[24]. Since *Feldman* and in the post-constitutional era the law relating to vicarious liability in the context of 'deviation cases' has evolved and has been developed so as to give further effect to the test which relates to the connection between the deviant conduct and the employment. The development of the law in that regard, approached with the spirit, purport and objects of the constitution in mind, was required by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) to be sufficiently flexible to incorporate not only constitutional norms but other norms as well. The test, so the ConCourt held, requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not.

[25]. The development of the applicable legal principles has culminated in the recent SCA decision in *Stallion Security (Pty) Ltd v Van Staden* 2020 (1) SA 64 (SCA), in which the SCA held that the fundamental question has always been whether the wrongful act was sufficiently related to the conduct authorised by the employer to justify the imposition of vicarious liability and that, in the determination of the sufficiency of connection, the employer's creation or enhancement of the risk and the wrong complained of may be relevant.

[26]. The SCA also held that an employer will not be liable where the employee commits the act while wholly about his own purposes, unless there is a sufficiently close link of the employee's act and the business of the employer. In evaluating whether there is a sufficiently close link, so the Court held, a criterion a court may use is whether the employer created the risk of the harm that eventuated. In that case the Supreme Court of Appeal found that the employee committed the act, the killing, wholly for his own purposes. The question was whether there was a sufficiently close link of his act and the appellant's business, to make the appellant liable therefor. Going against

sufficient closeness in the *Stallion Security* matter was the fact that the employee carried out the action while on sick leave, outside the workplace, and with a firearm unconnected to the business. But for sufficient closeness, was the fact that by employing the employee, the appellant had enabled him to enter the office, and so had created the risk that he might abuse this power, so the SCA found. And it was indeed by his abusing the power that Stallion's employee came to perform the wrongful act. Moreover, the appellant's business in that case, which it was contracted to perform, was to protect respondent's husband and to guarantee his safety. And it had put its employee in charge of doing so. Accordingly, the Supreme Court of Appeal concluded that a sufficiently close link was established to hold the appellant vicariously liable.

[27]. At paras 31 and 32 Van der Merwe JA held as follows:

'[31] These judgments show that it is now firmly established in Canada and the United Kingdom that the creation of a risk that eventuated is an important consideration in determining vicarious liability of an employer under the 'close connection' test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject. Leading South African academic commentators also support this proposition.

[32] For these reasons our law, as developed in *Rabie* and *K*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised must be determined objectively.'

[28]. Applying these principles in this matter, I find myself in agreement with the submissions made by Mr Marais, Counsel for the plaintiff, that the following considerations should be instructive in deciding whether or not to hold Schenker vicariously liable: Lerama was employed as a cargo drawer and he, as such, enjoyed unfettered access to the SAA security cargo area to uplift and remove goods belonging to clients; and he was given a specific security clearance, as well as the necessary customs and clearing documentation. On the occasion of the theft, Lerama was instructed and directed by the defendant to go and collect the laptops on the 19th and the 23rd of June 2012 and he followed his normal

protocol involved in the collection of goods from SAA Cargo. He gained access to the warehouse and to the plaintiff's goods by relying on and displaying his Schenker issued security clearance, which he presented to the SAA Freight Warehouse officials. He was also in possession of Schenker issued customs and clearance documentation. All of the aforegoing confirmed that he ostensibly performed the same procedures and went through the same motions as he would ordinarily have done with a lawful collection.

[29]. Borrowing from the *Stallion Security* matter, the point is this: The risk of theft arising from the access permitted and given the appearance of lawfulness by the defendant clearly demonstrates a sufficiently close link between the theft and the lawful business which Lerama was about on behalf of the defendant. Moreover, as a policy consideration, a finding of vicarious liability should follow if regard is had to the following: (a) the opportunity that Schenker afforded its employee to abuse his powers; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to and intimately and inherently connected to the business of Schenker; (d) the extent of power conferred on Lerama; and (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[30]. I am of the view that it 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.

[31]. All that remains is to consider whether liability is excluded by reason of the contract. In that regard, I have already referred to the relevant clauses of the written agreements.

[32]. It is a well-established principle that any limitations to liability fall to be strictly interpreted and that contractual instruments should not be allowed to restrict liability, even more so if they were to arise outside of the contract, unless expressly so provided for.

[33]. By all accounts Lerama was not executing the contract when he attended on SAA Cargo on Saturday, the 23rd July 2012, and proceeded to steal the plaintiff's goods. The exemption clause, which relates to damages arising from breach of contract, relied upon by the defendant does not apply in such circumstances.

[34]. Mr Marais referred me to *Weinberg v Oliver* 1943 AD 181 in which the Appellate Division considered the application of an exemption clause in the circumstance in which a garage owner had agreed to keep the plaintiff's car in safe custody. An employee of the garage had then taken the car out of the garage, driven and crashed the car. The Appellate Division held that the garage was under an obligation to keep the car under its control and that since it had delegated the performance of that obligation to its servant, who had not performed such obligation, the garage owner was liable for the damages. The exemption clause in this instance did not apply beyond the performance of the agreement, so the AD held.

[35]. In the present matter, the exemption clause relied upon by the defendant does not assist the defendant as the theft by Lerama was an act outside the performance of the contract concluded between the plaintiff and the defendant.

[36]. In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) the Court considered the application of an exemption clause which exempted a security company from liability for loss. The security company had been employed to prevent fires. However, the security company's own employee had started a fire. It was held as follows:

'In my view, upon the meaning of clause 5 as a whole read as part of the entire contract, clause 5.3 does not and cannot exclude liability for damages in circumstances where fire was deliberately started by FEND's security officers placed by FEND in the building to 'minimise' loss or damage. To hold otherwise would make a mockery of the other provisions of the contract, particularly clause 5.1 which imposed a duty on FEND

to provide security services and security personnel to minimise the risk of loss or damage by fire.'

[37]. Therefore, as a general rule a defendant should not be allowed to rely on an exemption clause in the circumstance where the contract was not being executed, unless the clear intention of the parties was to such effect.

[38]. Having said this, I now turn to interpret the terms and conditions of the agreement between the parties.

[39]. To determine whether or not the plaintiff's delictual claim is excluded, it is necessary to interpret the agreements and in particular clauses 40 and 41 cited above. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) ([2015] ZASCA 111) para 27, that the SCA has consistently held that the interpretative process is one of ascertaining the intention of the parties — in this case, what they meant to achieve by incorporating clauses 40 and 41 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, i e the factual matrix or context, including any relevant subsequent conduct of the parties.

[40]. In this matter there are very little facts available to the court in the interpretative process regarding the circumstances surrounding the conclusion of the agreements or of any relevant subsequent conduct of the parties. The only available evidence upon which the court has to determine what the parties meant to achieve by incorporating clauses 40 and 41 in the agreements, and in particular whether or not they intended including delictual claims within the ambit of those clauses, was the agreements themselves.

[41]. Turning to the wording of the agreements, and in particular clause 40 and 41 thereof read within the context of the agreements as a whole, it has to be borne in mind that the nature and commercial purpose of the contractual relationship between the parties are those of a service agreement in terms of which the defendant was to perform clearing and freight forwarding services for

the plaintiff, which would entail the import, collection, clearance, storage and distribution of goods by the defendant on behalf of the plaintiff.

[42]. The 'liability' clause of the contract conditions provided that 'no liability for loss in transit is accepted'. Clause 40 deals with 'Limitation of [Schenker's] Liability', providing for exclusions and limitations to the defendant's liability for loss or damage suffered by the plaintiff inter alia arising out of the execution or attempted execution of its obligations to the [plaintiff]. In particular, clause 40 provides that the defendant shall not be liable for any loss or damage unless it arises from a grossly negligent act or omission on the part of [Schenker] or its servants and arises at a time when the goods are in the 'actual custody of [Schenker] and under its actual control'.

[43]. In my view, this wording clearly conveys that the loss or damage in respect of which the defendant wished to restrict its liability is a loss or damage suffered by the plaintiff pursuant to or during the provision of services by the defendant to the plaintiff. Differently put, it is a loss or damage which has its genesis in the provision of services by the defendant to the plaintiff. This is not the case *in casu*. The loss arose independent from the performance by Lerama pursuant to the distribution contract.

[44]. This construction of clause 40 is fortified by clauses 17, cited in full *supra* as well as other provisions of the agreements. The clause headed 'Negligence' for example specifically provide that, should it be proven that they were negligent in the handling of the plaintiff's cargo leading to the loss or damage, their liability would be settled by their insurance company.

[45]. Also, clause 3 of the standard terms and conditions is headed 'Application of Trading Terms and Conditions'. This clause provides the scope of the agreement. The clause provides that the scope of the agreement is limited to: (i) business undertaken in terms of the agreement. or (ii) services provided by the defendant 'undertaken or provided on these trading terms and conditions'.

[46]. In my view the clear wording of the agreements shows that the parties did not contemplate that clauses 40 and 41 would encompass the delictual

claim (based on theft) of the nature averred in the plaintiff's particulars of claim. This delictual claim did not arise pursuant to or during the services rendered by the defendant, nor while the goods were in the custody or under the control of the defendant, but in circumstances where the defendant's employee stole the plaintiff's computers. Had the defendant intended the exclusion in clauses 40 and 41 to also apply to delictual claims of this nature, it could easily have drafted the agreements to include such claims. Its failure to do so justifies the inference that the parties did not intend clause 40 to encompass the plaintiff's delictual claim.

[47]. Mr Stais, Counsel for the defendant, referred me to *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (WLD), in which case the exclusion or exemption clauses were remarkably simirlar to those in the contract between Fujitsu and Schenker. There the full court of this division held that delictual liability for the theft by employees of a transport carrier – not unlike the facts *in casu* – was excluded by the exemption clauses. In my view, the judgment in Goodman Brothers has been overtaken by the recent development in the law to which I have alluded to *supra*, in particular the judgment in *Stallion Security*. In that regard, I have already found that the delict perpetrated by Schenker through the medium of its employee in the form of the theft fell outside of the scope and ambit of the contract and was not implicated in the contract. For this reason, the *Goodman Brothers* judgment does not find application in this matter.

[48]. The context which is ignored is the recurring theme that the loss or damage envisaged in the agreements, and in particular in clause 40, is a loss or damage suffered by the plaintiff pursuant to or during the provision of services by the defendant. Therefore the exclusion of the defendant's liability is in respect of loss or damage suffered by the plaintiff pursuant to or during the provision of such services.

[49]. For all of the above reasons I conclude that the defendant's liability for the plaintiff's claim for delictual damages is not excluded by the exclusion clauses of the contract.

[50]. In all the circumstances, I am of the view that the judgment should be granted in favour of the plaintiff against the defendant for payment of the amount claimed and interest thereon.

Order

In the result, I make the following order:

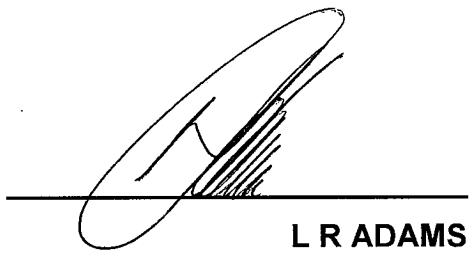
(1) The plaintiff shall pay the defendant's costs of its action against the defendant under case number: 18981/2014, which action the plaintiff formally withdrew during July 2019.

(2) Judgment is granted against the defendant in favour of the plaintiff for:

a) Payment of the sum of US$516 877.

b) Payment of interest on US$516 877 from the date of service of the summons, at the legal rate applicable then, to date of final payment.

c) The defendant shall pay the plaintiff's costs of this action, which costs shall include the costs consequent upon the employment of two Counsel, one being a Senior Counsel.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	9th and 11th December 2019
JUDGMENT DATE:	25th March 2020
FOR THE PLAINTIFF:	Adv Jean Marais SC, together with Adv Chris Gibson
INSTRUCTED BY:	Mooney Ford Attorneys, Durban
FOR THE RESPONDENT:	Adv Panayiotis Stais SC
INSTRUCTED BY:	Prinsloo Incorporated, Johannesburg