LUXION TACHIONA

And

NONTOKOZO DUBE

Versus

NATIONAL RAILWAYS OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 2 JUNE 2008 AND 15 JULY 2010

B Ndove, for the plaintiffs
T. Sibanda, for the defendant

Civil Trial

NDOU J: The parties have agreed that their dispute be resolved in terms of a stated special case pursuant to the provisions of Order 29 Rule 199. The parties concurred in a special case for the opinion of this court. The plaintiffs entered into a carriage contract with the defendant in terms of which the defendant was at a fee, to transport on behalf of the plaintiffs from Harare to Bulawayo one teak wardrobe and one x 3 piece teak room divider. The defendant only managed to deliver the wardrobe but has failed to deliver or account for the room divider which appears to have been lost by or stolen from the defendant in transit. The plaintiffs are claiming the current market value for the lost room divider as compensation. Alternatively, the plaintiffs claim for an order that the defendant specifically performs by delivering to them, the room divider tendered for transportation. The consignment note that was issued to and signed by 1st plaintiff for the transportation of the goods in question had a provision to the following effect.

> "Received and forwarded by ……..
>
> The under-mentioned goods to the said destination in accordance with the Bye-Laws, Regulations and Conditions published in the current edition of the Official Railway Tariff Books (or any amendment thereof or supplement thereto) of the administration specified above or regulations of any other Railway Administration over whose lines the goods may travel to reach their destination, and it is agreed that the said conditions and regulations shall be applicable to this contract in the same manner as though they were fully sent out herein.

……..
Signed by the Sender"

It is beyond dispute that the Bye-Laws, Regulations or the Official Railway Tariff Books referred to above, were not shown to the 1st plaintiff at the time of the signing of the consignment note. The 1st plaintiff, however, had the option of requesting such documents from the defendant. It is common cause that the defendant's insurance tariff for lost goods is based on the mass/weight of the lost goods for ordinary consignments and also, on the amount paid for insured consignments. *In casu*, the quantified amount for compensation for the plaintiffs' room divider is $3 282 363 an amount which is below the current value of the lost room divider even at the time of the loss.

The defendant accepts liability only to a limited amount in the sum of $3 282 363,00, which is the amount calculated in terms of its official insurance tariff.

The dispute: On the one hand, the amount tendered as compensation for the lost room divider is below the market value of the piece of furniture, but the defendant maintains that such an amount is contractually fair and binding against the plaintiffs who freely and voluntarily signed the consignment note.

On the other hand, whilst the plaintiffs accept that they freely and voluntarily signed the consignment note, they maintain that the consignment note did not contain enough details concerning the issue of compensation and, in any event, the contractual terms are unfair, unreasonable and oppressive hence unenforceable against them.

It is trite law that while carriers of goods may contract out the strict liability imposed on them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence – *Cotton Marketing Board* v *National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC) at 324-325; *Canada Steamship Lines Ltd* v *Regem* [1952] 1 ALL ER 18 (HL) and *Lewis* v *R R* 1921 SR 80. The defendant's original Tariff Book and Regulations fell foul of the above principle. The defendant has since changed its Tariff Book and Regulations to specifically include negligence. In clause (5)(e) of the current Tariff Book it is provided:-

> "The phrase "at the risk of the other", "at the sole risk of the owner," "at owners' risk" and any other phrases in this Tariff Book, the purport of which is that the risk of damage to or loss of goods in transit being carried by the Railways or in storage or being kept by the Railways for any reason and whether or not for a fee or charge levied by or paid to the Railways, is to be a risk by the owner, consignor or consignee of such goods, shall

> be so construed as to absolve the Railways of any and all responsibility for loss of damage to or any detriment to such goods whilst they are in Railways custody unless such damage, loss or detriment is due to gross negligence or willful malfeasance on the part of the Railways or their agents and servants whilst such agents and servants are acting within the course and scope of their duties as such agents and servants. For the avoidance of doubt, no claim against the Railways shall be capable, in circumstances where goods are carried or kept subject to such conditions as aforesaid, of being founded upon ordinary negligence on the part of the Railways or their agents or servants."

It is evident that the above-mentioned clauses are clear on the kind of negligence that the defendant is exempted from. It is trite that the excluding or limiting term must be brought to the attention of the party against whom its protection is sought or otherwise be within his knowledge – *Micor Shipping (Pty) Ltd* v *Treger Golf and Sports Ltd* 1977 (2) SA 709 (W) at 713H-714; *Tubb (Pvt) Ltd* v *Mwamuka* 1996(2) ZLR 27 (S) at 31F-32A-G and *Jiawu Manufacturers* v *Mitchell Cotts Freight Zimbabwe (Pvt) Ltd* 2003 (2) ZLR 396 (H) at 376F to 377F. Where, however, an "owner's risk" notice is displayed so conspicuously that a normal person could hardly have failed to see it, an inference that it was seen will be drawn. *In casu,* as alluded to above, the plaintiffs were not shown the excluding or limiting term in the Tariff Book. The consignment note that the first plaintiff signed alluded to the existence of some limiting or excluding terms in the Tariff Book. The Tariff Book or the terms thereof were not annexed to the consignment note. The defendant's position is that it was available for the other party to see on request. It is common cause that the plaintiffs did not request for it. From the size of the 3 piece teak room divider theft by the defendant's employees is the only probable explanation for its disappearance. The defendant cannot exempt itself from liability for theft by its employees – *Jiawu Manufacturers* v *Mitchell Cotts Freight – supr*a. Theft or loss of a big item like a room divider can only be attributed to "gross negligence or willful malfeasance" as defined in clause 5(e) of Tariff Book, *supra*, and the defendant cannot therefore, be exempted from liability. On this finding alone I will rule in favour of the plaintiffs. If, however, I am wrong in this finding, alternatively, I find that this contract of carriage (by land) is consumer contract as defined in section 2 of the Consumer Contract Act [chapter 8:03]. I say so on the basis that the explanation or limiting clause in the Tariff Book is a product subordinate legislation which cannot limit, alter or amend statutory provisions of the Consumer Contract Act, *supra*, *Strydom* v *Strydom* 2003 (1) ZLR 379(H).

In terms of section 2, *supra*, a Consumer Contract means a contract for sale or supply of goods or services or both in which the seller or supplier is dealing in the course of business. There is little doubt that the defendant is in the business of provision of transport services. This fact is, in any event, admitted in the defendant's plea. It is not disputed that when the defendant so ferried their goods they were doing so in the course of such business. In the

premises the contract between the parties is a consumer contract as defined in section 2, *supra.* Further, to the extent that the defendant's Tariff Book makes provision for insurance of goods transported in the event of loss or damage, the contract also qualifies to be treated as a contract of insurance. Such a contract has been held to be a consumer contract by this court in *Radar Holdings Ltd & Anor* v *Eagle Insurance Ltd* 1998 (1) ZLR 479 (H) at 492E-F.

Section 5(1) gives a court discretion to find a consumer contract to be unfair if it excludes or limits the liabilities of a party to an extent that it is not reasonably necessary to protect its interest, it is contrary to commonly accepted standards of fair dealing or if it is expressed in a language not readily understood by the other party.

The current contract is unreasonably oppressive in that it contains a provision that seeks to deny plaintiffs adequate compensation for their goods. The Tariff Book arbitrarily, unreasonably and without just cause seeks to quantify the value or quantum of compensation to be paid in respect of all goods lost or damaged by means of mass or weight. This method is unreasonably oppressive if one has regard to the fact that weight alone is not a suitable standard used in evaluating assets. Further, the contract limits the defendant's liability more than is reasonably necessary. It results in owners of goods being transported not getting real compensation in the event of loss or damage. In any event, the terms of the agreement as contained in the Tariff Book are conveyed to the other party in a bad, vague and less informative fashion as alluded to above. This is not readily understood by the other party – *Cotton Marketing Board of Zimbabwe* v *NRZ* and *Lewis* v *R R, supra*. As the contract is unfair in terms of the Act, the plaintiffs are entitled to relief as defined in section 4.

Accordingly, it is ordered that:

(a) The defendant delivers to the plaintiffs a 3 piece teak room divider;
(b) Alternatively the defendant pays the plaintiff the current market value of the 3 piece teak room divider.
(c) The defendants shall pay costs of suit on the ordinary scale.

Marondedze, Mukuku & Ndove, plaintiffs' legal practitioners
James, Moyo-Majwabu & Nyoni, defendant's legal practitioners