JIAWU MANUFACTURERS
versus
MITCHELL COTTS FREIGHT ZIMBABWE (PVT) LIMITED

HIGH COURT OF ZIMBABWE
NDOU J,
HARARE, 20 May, 6, 11 and 17 June, 2002 and 29 October, 2003

Mr *J R Tsivama* for plaintiff
Mr *R Ranchod* for defendant

NDOU J: The plaintiff claimed payment of the sum of $816 000,00 in respect of the replacement cost of 102 television sets missing from the defendant's premises while they were in storage. Defendant has denied liability for the amount claimed.

Alex Lou, the Managing Director of the plaintiff, testified. He testified that in 1999 the plaintiff entered into an agreement with the defendant whereby the latter was to store the farmer's black and white television sets for reward. He testified that in 1999 the plaintiff entered into an agreement with the defendant whereby the latter was to store the farmer's black and white television sets for reward. He produced defendant's "Goods Received Note". 5825 issued and signed by the latter's representative on 5 November 1999 under file Ref WH 157/99. In December, 1999 the defendant charged the plaintiff bonded ware house storage fees to the tune of $27 370,75. The invoice was produced. It is beyond dispute that the plaintiff paid this amount.

Thereafter, the plaintiff withdrew the television sets in lots. The total number of lots was thirty-four, and for each he produced a "Delivery Note Book" invoice issued by the defendant. A reconciliation of the total number of television sets deposited by the plaintiff and those withdrawn establishes that a total of one hundred and two were not accounted for. All this factual situation is established by documents from the defendant. In the circumstances there is no doubt that the 102 television sets went missing from the custody in its bonded storage ware house.

The fact that those 102 television sets went missing from the defendant's bonded storage warehouse does not necessarily mean that the latter is liable to pay replacement costs. The plaintiff must still establish that the defendant is, in law, liable. Once this is established then the plaintiff must establish the quantum of such liability.

I am satisfied that with the quality of the testimony of Mr Lou on how the television sets went missing and the total number missing. In order to avoid paying

for the missing television sets the defendant placed substantial reliance on the so-called "The Shipping and Forwarding Agents" Association o Zimbabwe's Standard Trading Conditions".

Although this was the second time that the plaintiff was using the defendant's bonded storage warehouse. Mr Lou testified that he was made aware of the existence of these conditions and, in any event, he did not see the document containing the same at the time of the agreement. He testified that he went to the defendant to obtain a copy of these "conditions" on several occasions and he was informed that the copy was kept at their Head Office. And he was informed that the document could only be made available to him by the defendant's Managing Director. Up to the time that these proceedings were launched the defendant had not made the document available to him. He said that the document was eventually made available a few days before the commencement of this trial to his legal practitioner. I believe his testimony in this regard. In any event the defendant did not lead evidence to contradict this part of his testimony.

He said he amended his claim to $816 000,00 i.e. $1 800,00 per set because he was claiming the replacement cost, so he took into account the impact of inflation on his original claim. To arrive at that figure he also consulted another company which imported and assembled similar black and white television sets i.e. Sino Electrical.

Under cross-examination he conceded that the small print in the defendant's invoices and letterheads made reference to trading conditions. He, however, was adamant that he did not see a copy of these conditions. For the record such reference is phrased as follows:

> "All goods are handled subject to the trading conditions of the Zimbabwe Shipping and Forwarding Agent's Association, a copy of which is available for inspection at the Registered Head Office of the Company".

At the bottom of the "Bonded Warehouse Tariff" which the witness conceded that he had in his possession the following words appear -

> "(b) All handling, storage and transport of goods at owner's risk…."

I should highlight that the initial document issued by the defendant when the television sets were deposited on 5 November, 1999 makes no reference to the trading conditions or owner's risk. When the television sets were deposited a "Goods Received Note" was issued by the defendant. This document makes no reference whatsoever to the trading conditions or owner's conditions and these only commenced appearing in defendant's invoices over a month and a half later. All subsequent

documents bore the reference to the trading conditions.

The plaintiff also called Stanley Gutsa, Sales Manager at Sino Electrical (Pvt) Ltd. His testimony was to deal with the aspect of the value of the television sets. His evidence did not take the case any further as he was not familiar with prices of the type of television set the subject matter of these proceedings.

The defendant called one witness, Brian Likhuma, the Executive Manager. He explained the defendant's previous dealings with the plaintiff. He conceded that the defendant had no explanation for the missing television sets except that there was a problem at their bonded storage warehouse. He said Mr Lou's position after the discovery of the missing television sets was that he wanted the sets replaced. He stated that in terms of Clause 19 of the trading conditions, as the value claimed exceeded $300 000 the liability of the defendant should be calculated in terms of the "value declared for customs" i.e. $440 per television set.

Under cross-examination he conceded that the television sets could have been stolen by defendant's employees. He said Police were called but their investigations came to naught. He said that he did not personally bring the contents of trading conditions to Mr Lou's attention. He only assumed one Mr McKenzie did so, but later accepted that there is no evidence showing that any representative of the defendant did in fact bring it to Mr Lou's attention. He also confirmed that the conditions were not kept at bonded storage warehouse where this transaction took place but at the registered office of the defendant. He said that he had no alternative value to give to the court to show that the value given by Mr Lou was inflated. In support of its case defendant relies on trading conditions, in particular Clauses 18, 19 and 25. It is necessary to state what these clauses provide -

"18. The Company shall not in any circumstances be liable for consequential loss however, caused.

19. In no case shall the liability of the Company exceed the value of the goods or the value declared by the Customer for insurance, customs or carriage purposes or the following respective amounts, whichever figure is the least:

a) Inward and outward consignments received or to be forwarded by airfreight - Z$50 per consignment;

b) Inward and outward consignments received as to be forwarded by sea freight or other surface carriage, excluding parcel post - Z$25 per consignment.

If it is desirable that the liability of the Company should not be governed by these limits, written notice thereof must be given to the Company before any goods or documents are entrusted to the Company, together with a statement of the value of the goods. Upon receipt of such notice, the Company may agree to its liability being increased to a maximum amount equivalent to the amount stated in the notice, in which case it shall be entitled to affect 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. The Company shall not be responsible for loss of profits in any circumstances…..

…25. Pending, forwarding and delivery, goods may be warehoused or otherwise held at any place or places at the sole discretion of the Company at the Customer's risk and expense".

It is common cause that these television sets were not cleared with Customs by the defendant but by a company known as Pollo Freight Services. All that the defendant did was to store television sets in its warehouse after such clearance by Customs. Would the trading conditions apply in such circumstances? I think so on account of Clause 1 which provides -

> "1. The following conditions apply to all business undertaken by all clearing and forwarding agents….." (emphasis added).

My understanding is that the standard conditions amount to nothing more than the so-called exemption and limitation clauses in a contract. In *Bristow* v *Lycett* 1971 (2) RLR 206 (A) at 221 G-H, 1971 (4) SA 223 (RA) at 236 BEADLE CJ said -

> "The exemption clause is, after all, nothing more than a clause in a contract. There is no special magic to an exemption clause in this case. Its meaning must be ascertained in the same way as any other clause in a contract, by ascertaining what the parties must have intended to cover and bearing in mind the rules applicable to implied or tacit contracts".

In *Swart & Anor* v *Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202 (Translation(RUMPFF CJ said -

> "What must naturally be accepted is that, when the meaning of words in a contract have to be determined, they cannot possibly be cut out and posted on a clean sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evidence that a person must look at the words used having regard to the nature and purpose of the contract and also at the context of the words in the contract as a whole".

In *Transport and Crane Hire (Pvt) Ltd* v *Hubert Davies & Co (Pvt) Ltd* 1991(1) ZLR 190 (SC) at 195 C, KORSAH JA said -

> "All common law, the right of a contracting party to claim damage for a breach of contract may be excluded by the express terms of the contract, provided that the language employed to do so is plain. Even liability for negligence may be excluded if words are used which sufficiently indicate that the parties intended, in the context of the agreement, that such should be the case".

In other words if the words of an exclusionary clause are sufficiently clear then effect must be given to them by a court of law. In the same case McNALLY JA discussed the court's reaction to such clauses. At 203 B-G the learned judge of appeal said -

> "The courts, primarily in England but followed in South Africa and Zimbabwe, were hostile to these exemption clauses. Their attitude is expressed, as only he can do it, by LORD DENNING in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] QB 284 at 296-7; [1983]1 All ER 198 (CA) at 113-4. The decision was approved on appeal in [1982]2 AC 803; [1983]1 All ER 737 (HL) and LORD DENNING's reasoning was specifically approved in the speech of LORD DIPLOCK. This is what LORD DENNING said -
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>> 'None of you nowadays will remember the trouble we had, … with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which the use of the printing press….It was a bleak winter for our law of contract…Faced with this abuse of power, the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it. They still had before them the idol, 'freedom of contract'. They still knelt down and worshipped it, but they conceded under their cloaks a secret weapon. They used it to stab the idol in the back. The weapon was called 'the true construction of the contract'. They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause….But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld it, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount'".

At 204 F-G to 205 A the learned Judge of Appeal further said -

> "I do not think we should pretend, that the court's approach to the interpretation of exemption clauses is based on a search for the 'true meaning'. I think we must accept that we are dealing with what I would call 'policy-based interpretation.
> The cases in England and South Africa and Zimbabwe show, to my mind, quite clearly, that the court's interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the court's claiming that they do not make law but only interpret it. That is not so. See *Blower* v *Van Noorden* 1909, TS 890 at 905, *Liverpool City Council* v *Irwin* [1976] QB 319 at 332; [1975]3 All ER 658 (CA) at 666; *Zimnat Insurance Co Ltd* v *Chawanda* 1990(2) ZLR 143(SC) 1991(2) SA 825 (CS) *in fine*. I say this because later in this judgment I will refer to case whose approach to the interpretation of exemption clauses cannot, to my mind, be defended on the grounds of grammar or logic. They are 'policy-based interpretations;. They are well-established in the law. I agree with them. But I do not defend them on the basis that they interpret language truly and naturally. They can only be defended on the ground that they are accepted and well-established policy-based interpretations".

(The cases alluded to by McNALLY JA (*supra*) are, *inter alia*, *Kroonstad Westelike Boere Ko-Operateve Vereeniging Bpk* v *Botha and Anor* 1964(3) SA 561 (A) at 571 H; *Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd* 1977(3) SA 670 (A); *Gannet Manufacturing Co (Pty) Ltd* v *Postaflex (Pty) Ltd* 1981(3) SA 216 (C); *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd and Anor* [1983] 1 All ER 101 (HL) at 105 h to 106 a; *Alderslade* v *Hendon Laundry Ltd* [1945] KB 189; [1945]1 All ER 244 (CA) at 245; *Cotton Marketing Board of Zimbabwe* v *National Railways of Zimbabwe* 1988(1) ZLR 304 (SC) at 319-320; 1990(1) SA 582 (ZS) at 594; *Canada Steamship Liner Ltd* v *Regem* [1952]1 All ER 305 (PC); *SA Railways and Harbours* v *Lyle Shipping Co Ltd* 1958(3) SA 416(A) at 419C-E and *Minister of Education* v *Stuttaford and Co (Rhodesia) (Pvt) Ltd* 1980(4) SA 517(Z).

The position was aptly articulated by GUBBAY CJ in *Tubb (Pvt) Ltd* v *Mwamuka* 1996(2) ZLR 27(S) at 31E-F to 32A-G as follows -

"At common law the right to a party to sue for loss or damage to a property many be excluded by the express terms of the contract entered into. But any claim to such exemption of liability should be examined in accordance with the following well-established principles:

'(1) The words of the exclusionary clause must be read as part of the contract as a whole. They must be sufficiently clear and comprehensive, so as to require a court to give effect to them…

2) Any ambiguity as to the meaning or scope of the excluding or limiting term must be resolved against the party who inserted it - the *proferens*. It is for the latter to prove that the words used clearly and aptly embrace the contingency that has arisen. See *Shubara Ranch (Pvt) Ltd* v *Shield of Zimbabwe Insurance Co Ltd* 1988(2) ZLR 306(S) at 309H-310A.

3) If there is no express inference to negligence in the exemption clause, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the *proferens* and/or his servants; and if they are, whether 'the head of damage may be based on some ground other than negligence'…

4) Where the existence of an 'owner's risk' clause excluding liability for negligence is not in dispute, the burden of establishing any other possible ground of liability, such as gross negligence or *dolus* rests upon the claimant. See *King's Car Hire (Pvt) Ltd* v *Wakeling* 1970(4) SA 640 (N) at 643B. *Stocks & Stocks (Pty) Ltd* v *T J Daly & Son (Pty) Ltd* 1979(3) SA 754(A) at 760 E-F.

5) 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. See *Micor Shipping (Pty) Ltd* v *Tredger Golf and Sports (Pvt) Ltd & Anor* 1977(2) SA 709 (W) at 713H-714A. Where 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.

6) The time when the excluding or limiting term is alleged to have been given is of great importance. Such a term will not avail the *proferens* unless the other party was aware of it before the contract was entered into. A belated notice is valueless. To give effect to it would be to alter unilaterally the terms of the contract. See *Olley* v *Marlborough Court Ltd* [1979]1 All ER 127 (CA) at 134 C-D; *Peard* v *Rennie and Sons* (1895)16 NLR 175 at 183;

7) A court may, however, presume notice of the exempting terms from previous dealings between the parties. See *J Spurling Ltd* v *Bradshaw* [1956]2 All ER 121 (CA) at 125 H-I;

8) A party cannot exempt himself from liability for the willful misconduct or criminal or dishonest activity, of himself, his servants or agents, or perhaps, even from the loss or damage to the *merx* resulting from gross negligence on his part or their part. See *Christie : The Law of Contracts in South Africa* 2 ed at 213-214".

I proceed to apply these legal principles to the facts *in casu*. Here the *proferens* inserted the exempting and limiting terms in a document kept at the Registered Office of the Company and not at the operational centres, such as the bonded warehouse where contracts are entered into. In some, and not all, documents and letterheads used at the operational centres there is reference to the existence of such exempting or limiting conditions at the Registered office of the defendant company. From the evidence, the initial document signed at the time of the entering of contract did not contain such reference to the existence of the trading conditions. There is no evidence that these limiting or exempting clauses were specifically brought to the attention of witness Lou at the time of entering the storage agreement. Although later invoices and correspondence had such small print pointing to the existence of the trading conditions this would, in my view, amount to not more than a valueless belated notice - *Olley* v *Marlborough Court Ltd* (*supra*) and *Peard* v *Rennie & Sons* (*supra*). In this matter the parties, however, had two previous dealings. The defendant previously stored glass for the plaintiff with no problems. Secondly, the plaintiff unsuccessfully tried to source import finance from the defendant. In the circumstances, the plaintiff had access to the defendant's documentation bearing the reference to the trading and as such the fact that the first document did not make

reference to the storage conditions would not make a difference. I will presume that the plaintiff had access to documents making reference to the existence of the standard conditions from the parties' previous dealing - *J Spurling Limited* v *Bradshaw* (*supra*).

Credible evidence of Mr Lou establishes that the exempting or limiting clauses were not specifically brought to his attention or otherwise within his knowledge at the time the plaintiff entered into the agreement with the defendant. After the agreement was sealed there was a stage where he became aware of their existence and enquired. The bonded warehouse did not have copies of the trading conditions. Instead he was referred to the defendant's registered office. At the latter he was informed that such trading conditions were kept by the Managing Director of the defendant. The latter was not present. He made subsequent attempts to get a copy but in vain. As alluded to above, he only saw a copy well after the commencement of these proceedings. In the circumstances, the excluding or limiting term was not brought to the attention of the plaintiff - *Micro Shipping (Pty0 Ltd* v *Tredger Gold and Sports (Pty) Ltd & Anor* (*supra*). In this case the exclusionary clauses 18, 19 and 15 are sufficiently clear and comprehensive so as to require that I give effect to them provided that they meet the other requirements set out by GUBBAY CJ in *Tubb (Pvt) Ltd* v *Mwanoka* (*supra*). The clauses have details on the question of liability in different scenarios.
The p*roferens* has also proved that the words used in the standard trading conditions clearly and aptly embrace the contingency that has arisen in this case. The television sets went missing from the bonded warehouse where they were being stored for reward. There is express reference to negligence in the exemption clauses. The provisions cover negligence on the part of the *proferens* and its servants.
The problem here is that the excluding or limiting terms were not brought to the attention of the plaintiff timeously. As highlighted above, a belated notice is valueless. As stated above, the *proferens* believed that the television sets went missing as a result of theft. From the size of the sets and the quantum involved that is the most probable or plausible explanation. As highlighted above, the defendant cannot exempt itself from liability for theft by its employees. Applying the policy interpretation to these aspects find that the disappearance of the television sets is not an act covered by the exemption clauses. The breach of contract is, in any event, fundamental and as such the exemption clauses cannot exempt the defendant from liability for such fundamental breach.
On the value of the missing television sets it is trite that the fact that a breach of contract has occurred is not, in itself, sufficient to merit an award of damages. It must be shown in addition, that loss has been suffered. The plaintiff must prove its damages, they will not be presumed. If the plaintiff proves no damages none will be awarded - see *Rhodesia Cold Storage and Trading Co Ltd* v *Liquidator Beira Cold Storage Ltd* 19905 (2) BAC 253, "The Law of Contract in South Africa" R H Christie *supra*, at 524; *Swart* v *Van der Vyver* 1970(1) SA 633 (A) at 643 C; *Sommer* v *Wilding* 1984(3) SA 647 A at 656 I, 664 D-665 H; *Scott and Anor* v *Poupard and Anor* 1971(2) SA 373 A and "The Principle of the Law Contract" 4 ed AJ Kerr at page 573-4. The onus is on the plaintiff to adduce evidence to prove the damages which it

claims to have suffered but the court is nevertheless obliged to assess the damages as best as it can - *S M Goldstein & Co (Pty) Ltd* v *Gerber*, 1979(4) SA 930(A) at 937G; *Wilding* (*supra*) at 664D-665H and *Probart* v *South African Railways and Harbours* 1926 EDLD 205 at 224-5. In contract the plaintiff has other remedies at his disposal besides damages. Unlike damages for delict, damages for breach of contract are not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed - *Victoria Falls and Tvl Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* 1951 AD 1. In this case at p 22 INNES CJ said -

> "So that we must apply the general principles which govern the investigations of the most difficult question of fact - the assessment of compensation for breach of contract. The sufferer by such breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party".

This is the primary residual rule. Both the detrimental and the beneficial results of the breach of contract must be taken into account. The aggrieved party is not entitled to be put into a better position than he would have been in had the contract been performed - *Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd* (*supra*) at 687 C; *Katzenellenbogen Ltd* v *Mullin* 1977(4) SA 855 (A) at 875 C and *Bonne Fortune Belleggings Bpk* v *Kalahari Salt Works (Pty) Ltd and Ors* 1973(3) SA 739 (NC) at 744 A.

To be recoverable the loss must be of a kind and extent which might have been contemplated or foreseen by the parties when they entered into the contract - *Dennill* v *Atkins* 1905 TS 282 at 288-9; *Shatz Investments (Pty) Ltd* v *Kalovyrmas* 1976(2) SA 545(A) at 550; *Victoria Falls TVL Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* (*supra*) at 22 and *Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd* (*supra*) at 687 D-H.

The next issue in this matter is the date with reference to which loss is to be determined. In *Voest Alpine Intertrading Gosselleschaft MBH* v *Burwill & Co (SA) (Pty) Ltd* 1986 (4) SA 671 (C) at 672 J; *Elgin Brown and Hamaer (Pty) Ltd* v *Dampskibsselekabet Tom Ltd* 1988(4) SA 671 (N) at 674 G and *Munhuwa* v *Mhukahuru Bus Services* 1994 (2) ZLR 382 (H) at 388E it was stated that damages are to be assessed or calculated as at the date of breach. I agree with the learned author A H Kerr (*supra*) at page 641 that these statements seem obscure. What seems to be intended in these cases is that damages are assessed or calculated by means of a formula in which the date of breach or termination of the contract, depending on the circumstances is important. The date of breach is important but the extent of loss, the amount to be awarded, the amount assessed or calculated, can only be determined at a

later date. From the evidence before me, the television sets were selling at $2 000,00 at the time that it was discovered that they were missing. The amended value was $8 000,00 each. This is far less compared to the testimony of Mr Lou and Mr Gutsa who gave the value at the time of the trail at $14 000,00 and $18 000,00 respectively. Given the state of our economy it is very difficult for parties to give the replacement costs with some measure of precision. I am, however, satisfied that the plaintiff adduced sufficient evidence to show that it suffered damages as a result of the missing 102 television sets imported for resale. I am therefore, obliged in this case to assess the damages as best as I can. I should strive to place the plaintiff in the position it would have occupied had its television sets stored with the defendant been returned to it. I have to avoid placing undue hardship to the defendant. I have to strike a balance. 102 television sets. With this in mind, and the date of the breach, and all other surrounding factors highlighted in my judgment I find that the value of $8 000,00 will place the plaintiff in a position it would have been had the 102 television sets not gone missing in the defendant's custody. This type of loss was reasonably foreseen by the parties.

From my judgment it is now clear why I dismissed the application for absolution from the instance at the close of the plaintiff's case. At that juncture I formed an opinion that there was sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff - *Supreme Service Station* (1969) 1971(1) RLR 1 A at page 5 and *Munhuwo* v *Mhukahuru Bus Services* (*supra*) at 313G-384 A.

From the foregoing I am satisfied that the plaintiff proved its case on a balance of probability and I order as follows -

1. That judgment be and is hereby granted in favour of the plaintiff against the defendant for the payment of the sum of $816 000,00 with interest thereon calculated at the fixed rate from date of the service of summons to date of payment in full.

2. Costs of suit.

Sawyer & Mkushi, plaintiff's legal practitioners
Hussein, Ranchod & Co, defendant's legal practitioners