CABRI (PRIVATE) LIMITED
versus
TERRIER SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 16 September 2002 and 3 March 2004

Civil Trial

Mr *A.P. de Bourbon SC,* for the plaintiff
Mr *P. Nherere,* for the defendant

GOWORA J: The defendant offers services as a crane hirer and mover of heavy equipment and machinery. In August 2000, the plaintiff entered into a contract with the defendant for the movement of heavy equipment and machinery within its premises and to an adjacent building. In the process of moving a lathe, the sling with which it was attached to the crane broke, causing it to fall on a wire cut EDM machine. Both were damaged extensively and are beyond repair. The cost of replacing them is US$109 600,00. The plaintiff claims that amount as damages arising out of an alleged breach of the terms of the contract between the parties, on the grounds that the defendant in effecting the lifting and moving of the lathe, used slings that were worn and unserviceable and further, that the defendant's employees failed to attach the slings to the appropriate attachment points on the lathe. The defendant denies liability on the basis that the contract between the parties was one for the hire of its crane and other equipment and operators. The contract was not one for the provision of services.

The issues which fall for determination are as follows:

1) Whether the contract between the parties was one of service or hire;
2) Whether the terms of Exhibit 4, the document attached to the defendant's further particulars filed on 31 July 2001, formed part of the contract between the parties.
3. Whether -
   3.1 the contract qualifies as a consumer contract, as defined in the Consumer Contracts Act [*Chapter 8:*03] ("Chapter 8:03"); and
   3.2 whether in the circumstances of this matter and out of fairness to the plaintiff, this Court ought to exercise its discretion in terms of subsection 4(1) of Chapter 8:03 and delete clause 22

of the contract which excludes responsibility for the quality of the slings and riggings supplied.

4. Whether the defendant's employees who were operating the crane were negligent.

5. The quantum of the plaintiff's damages.

In seeking to prove the terms of and conditions of the contract between the parties the plaintiff called two witnesses, John Andre Pitout and Allan Robert Henry Crundall.

Pitout was the production manager of the plaintiff and, prior to being employed by the plaintiff, had worked for Air King Zimbabwe. It was when he worked with Air King Zimbabwe that he had used the defendant's services in moving equipment on two occasions. He testified as follows. In August 2000, the plaintiff acquired equipment and heavy machinery from an enterprise owned by Mashonaland Holdings. It was necessary to separate the equipment, relocate some within the factory environment and move some to an adjacent building. Because of past dealings he had had with the defendant, he contacted Mr Emerick an employee of the defendant, and requested him to visit the premises of the plaintiff. Emerick came to the premises and he pointed out to him the equipment which required moving and where each piece was to be placed. There were a lot of pieces to be moved. About six compression moulding machines were to be moved from the main factory into the warehouse of Mashonaland Holdings. Three extruder machines had to be moved from the factory to the storage area within the factory. An injection moulder which was in a precarious position had to be moved into the factory environment. About six machines had to be moved to the adjacent building.

The machines were to be jacked up and rollers placed beneath them so that they could be moved along the floor. They would be taken out through the door and thereafter lifted by crane and moved to the adjacent building where they would be lowered to the ground. They would again be rigged and moved to their new positions. All the equipment for moving the machines was supplied by the defendant. The truck that was used for the crane belonged to the defendant and the equipment was operated by the defendant's employees.

Pitout said that, within a few weeks of his talking to Emerick, the defendant's crew was on the scene. There was no formal written agreement entered into between the parties but, on a daily basis, he would be handed a job card which he would sign. The card was prepared by the defendant's foreman. He would keep a copy, and the second copy would be handed to one of the defendant's crew. He was shown a waybill card which he identified as the job card. It shows the date, the work done and the number of hours worked by the defendant's employees and the name of the driver of the truck. He said that the defendant provided slings to lift the equipment. They were made of nylon and were similar to seat belts, but a lot larger. By the time of the accident the defendant's employees had been on the premises for at least three or four weeks. Although he did not witness the accident, which had occurred at the end of August 2000, he had been given details thereof. The wiro roller, the wire cut EDM, had been lifted off the truck and placed on the ground in the adjacent building. The lathe was on the same truck. It was then lifted, so that it could be moved over the wall of the adjacent building, as had been done to the wiro roller. Whilst the lathe was still aloft, the two slings holding it broke, and it fell and hit the roller, resulting in both items being damaged beyond repair. Both items were imported.

Pitout said that the plaintiff's staff were not involved in lifting the equipment over the wall. No one in the plaintiff's employ had any expertise in the use of heavy lifting equipment and they all relied on the defendant. The defendant had sent an invoice after the job, but he is not sure that the defendant was paid. The day following the accident a loss assessor came to assess the damage. During his dealing with Emerick, nothing was ever said to him to the effect that the defendant was limiting its liability. When he left the employ of the plaintiff neither of the machines had been replaced.

Pitout said under cross-examination that he had left the plaintiff's employ in August 2002. He confirmed that, in addition to his dealings with the defendant when he was with Air King Zimbabwe, the plaintiff had itself, prior to his being employed there, had dealings with the defendant. He confirmed that he and Emerick had met at the plaintiff's premises, where he had pointed out to the latter the equipment which needed to be moved. Emerick quoted the defendant's hourly rates. Quotes were given for crane hire and rigging at hourly rates. He thought that Emerick might have

mentioned a truck to him but he could not be sure. It would have been impossible for Emerick to give him a global quote due to the various types of equipment that had to be moved. He could not dispute that the lathe had a manual which would have shown how it should be lifted.

Pitout denied that he was shown the printed terms on which the defendant did business. He was not aware if anyone at the plaintiff's offices ever saw them before August 2000. When the defendant's crew moved on site Emerick was present, and thereafter he would visit the site at least once a day to co-ordinate with his team, although he could not say for certain that he was there everyday. He said initially the plaintiff's driver had been requested to assist with the crane. At that time the defendant's employees were moving a compression moulder without slings under the supervision of the defendant's foreman. He had stopped the plaintiff's driver from being involved. At the time of the accident, none of the plaintiff's staff was involved in moving the equipment, as it was not the responsibility of the plaintiff. The defendant was more knowledgeable in lifting and moving, which is the reason the plaintiff hired the defendant. The plaintiff is a processor of plastic and is not in the business of moving equipment.

Asked to describe the lathe, Pitout said that it was a machine governed by its holding capacity and by its length between the centre sections. He said the one that was damaged was 2½ metres between the centre sections. Its function was to cut steel in a cylindrical form, and it was also capable of screw cutting. It was long and had a bed where the actual functions were done. It was not very tall. When he got to the machine after the accident, he found the slings lying on the ground next to the machine. He assumed that the defendant's employees had slung the slings around the machine. He confirmed that the lathe had round holes or pipes through which the slings could be put in order to raise the machine.

Pitout said that there were thousands of lathes around the country and it was not the plaintiff's responsibility to ensure that the machine was lifted properly. It was put to him that Emerick had quoted him separately for hire and for supervision but he denied that he was quoted separately for supervision. He further denied that he had been given an option between a higher rate and lower rate and that he had chosen the lower rate. He said that he had signed at the bottom of the waybill consignment note at the end of each day, but he had never checked the writing at the bottom which

made reference to written terms, as his concern was specifically with the hours quoted thereon to see if they coincided with the time spent on site. He confirmed that the waybill consignment had an item on rigging and that when Emerick quoted for hire, it related to the crane, and that rigging related to rigging. He said that when Emerick quoted for the hire of the crane, he understood it to include the truck, but he was not certain any more if that had been the case.

Pitout said that the responsibility for supervising the defendant's employees was that of the defendant's foreman and that no one else, including himself, was in a position to give instructions to the said employees. He had never been given the option of two rates.

Crundall was a director of the plaintiff. He testified as follows. He had been in business for twenty years and had used the defendant's services on many occasions. At no time had he ever been aware of the terms under which the defendant undertook work. Pitout had informed him of the basis of the contract. He had not witnessed the accident but had seen the slings afterwards. Although he was not an expert, his view was that the slings had been under stress and had broken as a result. The day after the accident a certain Geoff Cooper had come to the premises. He told him he was the insurance assessor. Both the plaintiff and the defendant were using the same broker, but he was not sure if Cooper had come at the instance of the insurance company or the broker.

He and Cooper had gone around the scene together. Cooper took photographs of both the wiro roller and the lathe, and also of the slings, and also inspected the machinery and assessed the damage. He asked the witness a number of questions and then left, taking the slings with him. The witness has never heard from him again nor has he seen the photos which he took of the damaged machines or the slings since their removal. When Cooper was examining the equipment, the witness had occasion to notice that the slings had a badge which indicated the maximum load they could carry, and the witness stated that every machine had a badge which gave its weight. Crundall said that a replacement could be obtained for the lathe but not for the wiro roller as there were only three in the country. The roller is a specialised machine. He had asked the supplier to give him a quotation for a new machine and also for a good used one. A new one was more expensive. It was possible to obtain a used one from South Africa. However,

the plaintiff has not been able to obtain the necessary foreign currency to import the machines.

The plaintiff does not have the expertise in moving equipment which is why it approached the defendant. In the past, the defendant had successfully completed the work that the plaintiff had contracted it to perform. He believed that the defendant was a professional mover. The plaintiff had no clue in the moving of equipment and, other than on the first day when the plaintiff's driver used the forklift, all the work had been done by the defendant's employees. Pitout had intervened when the plaintiff's driver had been used and he remembered him being very upset about that. None of the plaintiff's employees had any experience in moving equipment. The only experience any of the plaintiff's employees had in moving equipment was that they had observed the defendant's employees moving equipment. On previous occasions, the defendant had moved several lathe machines and, on those occasions, the plaintiff had not supervised the moving, it only indicated where machines were to be moved to.

Crundall stated that although the lathe could have had a manual, at the time concerned, the manual would not have been available as the company had just been taken over and about half of the manuals were missing. More importantly, no one was requested to produce the manual. He agreed that a manual would show how the lathe should be lifted but denied that, if the defendant did not have a manual, it was incumbent upon the plaintiff to show the defendant how the equipment was to be lifted. He did not know how the slings had been attached to the machine. He said that the plaintiff and the defendant had had dealings from as far back as 1986 or 1987. He had never signed a consignment waybill, although it was possible that some of his managers might have. The earlier jobs had involved moving one or two machines. He had left the terms of moving the equipment to Pitout. He was not aware that the defendant had two rates, hourly and global, but he was not in a position to dispute that.

I found that the two witnesses gave their evidence in a straightforward and candid manner. Their version of the events were given in a simple manner and there was no attempt to exaggerate or tailor the facts. I have no reason to disbelieve them and I accept their evidence as the truth .

The witnesses called for the defence were Joseph Martin Emerick and

Charles Griffith. Their evidence was to the following effect.

Emerick was employed by the defendant as a crane manager. He testified as follows. Part of his duties involved receiving calls from clients and advising them on their requirements for carriage and transport or rigging. When he was requested to, he would go on site to assess what equipment had to be used for the job and, if required, he would provide quotations for various jobs. He had received a telephone call from Pitout requesting him to go and look at machines which had to be moved and relocated. He went to the plaintiff's premises, where Pitout took him round to the various departments and showed him the equipment that had to be moved. He told Pitout they would need the crane, riggers and transport to move the machinery. He then returned to the defendant's premises and later Pitout called him and requested that he should move the equipment. He had given Pitout the hourly rates for the crane, the vehicle needed for moving the machinery and the riggers. There was a separate rate in respect of each item. There was no agreement for the defendant to do anything for the plaintiff, merely to provide equipment and operators. The defendant would sometimes give an overall quotation, which included everything, and at other times it would give just an hourly charge. The overall quotation would include the crane hire, the transport and the riggers.

He had instructed the crane driver, the truck driver and the riggers to proceed to Mashonaland Holdings. He had gone there at the outset to point out the machines which were to be moved and had left his staff to carry on with the moving of the equipment. He subsequently visited the premises two or three times a week to see how they were progressing with moving the equipment. He was unable to say with certainty who was responsible for the supervision, but he assumed that the plaintiff would have had someone to supervise the defendant's employees as to which machine to move or lift. He was not on site when the machines were damaged. He only got to hear about it later. He had received a call on his mobile phone from Pitout informing him about the accident and asking that he should go and see him.

Emerick said that the agreement between the parties was verbal, including the quotation. He confirmed that as the work progressed Pitout would sign a consignment waybill produced by the defendant. When the defendant was engaged by a client, if there was a written contract, it would

spell out the terms and conditions. If it was a verbal contract, the conditions would vary from situation to situation. If a client requested a quotation and a verbal agreement followed, the waybill note would have the name of the customer and the job to be done. It would also note the fact that the defendant was not a normal carrier and that if the client wanted to know more about the conditions for hire, the client should contact the defendant's office.

Although the witness had been with the defendant for four years at the time the contract was entered into, he had been in the business for 20 to 25 years. The defendant had at the time fourteen cranes with capacities, of 5 tonnes, 18 tonnes, 40 tonnes, 45 tonnes and 55 tonnes in lifting capacity. The cranes are self-propelled. He would decide which crane to use for a particular job depending on the information from the client on the weight of the article to be lifted.

Initially, for this contract in question, the large crane was used, because of the heavy machinery to be moved, and thereafter the small truck with the crane attached was used. About four or five people were used in the rigging, depending on the job to be done. As crane manager, his job was to put the team together as and when it was needed. He went to the site two or three times a week to monitor progress. He could not remember who was in overall charge. His foreman was responsible for getting the plaintiff to sign the waybill and he was the man on site. There was a separate waybill for crane hire, for transport and for rigging. The foreman would be responsible for writing out each of them. The customer would sign them.

He got to the site after the call from Pitout. He saw the slings lying on the ground broken. They were torn or broken lower down from the hooks, but he did not know how they had come off the hooks. The slings had a rating of 2 to 3 tonnes, but he could not be sure of the exact relief. He thought the slings had been in use for 6, 7 or 8 months. He was aware that Cooper attended at the site and took photographs but he had never seen the photographs.

He was aware that the lathe had been damaged beyond repair. In the four years he had been with the defendant, he had done work for the plaintiff, although he could not remember having moved a lathe machine. He had, however, organised teams to move lathes for other clients, but they

had not dropped any. He was unable to say why the plaintiff's lathe had dropped. As regards the job done just prior to plaintiff's, they had moved equipment of between 18-20 tonnes with a different sling. He denied that the defendant had to accept responsibility and said that the plaintiff should have had someone to supervise the defendant's staff.

He denied that he was an expert at moving equipment, saying that he had no training. He could not say whether or not the company had expertise as he could not speak for the company. He could, though, give advice. He accepted that the defendant employed skilled riggers, crane-operators and drivers, but said that Pitout could not have regarded him as skilled. He accepted that people went to the defendant because the defendant had expertise, but denied that the defendant was out to deceive people. He said he had been in the crane business for 16 years and confirmed that there was no one in the plaintiff's employ who had been in the crane business longer than he had. He agreed that the day-to-day work of the people employed by the defendant was to go out and lift and move heavy equipment, and that the defendant charged rates for the equipment used for that work. He also agreed that the defendant charged different rates for crane-operators, riggers and drivers. He could not say if the defendant had been paid for the work done for the plaintiff. He said he did not know all the people employed by the plaintiff and did not know anything about their knowledge of cranes. He is not an expert on lathe machines.

Griffith was the owner and Chief Executive Officer of the defendant. He testified as follows. The business of the company is transport, crane hire and rigging specialising in abnormal loads. The company had been incorporated in 1980, but he had been in the business for 40 years, having started at the age of seventeen. The plaintiff and the defendant had been doing business together for sixteen or seventeen years and the plaintiff had had several owners.

When the contract with the plaintiff was negotiated he was away from the office. He had designed the consignment waybill twenty years ago and he was familiar with it. He said that before August 2000, he had done work for the plaintiff in 1997, 1998, 1999 and twice in 2000. On all the contracts, they had waybills signed by the plaintiff's representatives. Regarding Exhibit 3, the waybill, he said that the defendant is not a common carrier, as it specialises in lifting and carrying abnormal loads. It uses cranes and

rigging. There are written terms and conditions in the office of the defendant for anyone to see. The company has printed copies available for clients to take away upon request. He produced in evidence a copy of the terms and conditions.

The defendant offers three types of service – abnormal load road transportation, crane hire and rigging. Each of them had its own manager specialist. Mr Watson was in charge of rigging, Mr Emerick was in charge of crane hire and a director, Mr Lobb, was in charge of abnormal load road transportation. Mr Lobb was in overall charge. He had thirty-four years experience in abnormal load road transportation, crane hire and rigging. There was also himself. The company had started out as a small crane-hire company and had moved into abnormal loads and then into rigging, which complements abnormal load transportation and crane hire. It is structured in such a way that clients could ask for, and be supplied with, an overall job, supervised by whoever was in charge of the service required. He said that for that service, the defendant would quote a set price, which he referred to as an "in and out". Should a client however require to hire just one or two of the services, the company charges an hourly rate, and it would not supply expert supervision, the reason being that many clients felt that by supervising the work themselves, they could get the job done quicker and cheaper.

He was aware that the plaintiff was being charged at hourly rates and that there are different rates in respect of the crane hire, rigging and transportation and that each service had its own waybill consignment, as they might have different finishing times. Griffith said that it would appear that no one was supervising the moving of the equipment. If the plaintiff had asked to be provided with an "in and out" service, the defendant would have done that. He said the defendant's foreman was not in charge of the operation and, so far as he knew, the three teams knew what they were required to move. When the two machines were damaged he did not visit the site, but he was aware that a few weeks after the accident, an assessor appointed by the insurance company had come on site and taken photographs of both machines and of the slings. The slings had been taken away. However the defendant was not liable for the damage to the machines. The slings were put on the lathe machine in the wrong way, which was the responsibility of the person in charge of overseeing the

operation, and not that of the defendant, which had quoted hourly rates. Griffith admitted that when the defendant offered its services, it professed expertise at handling all types of machines, including lathes. In his view, the defendant was entitled to deny liability because it had not been contracted to supervise the moving of the machines. Clause 22 of Exhibit 4, the Standard Terms and Conditions of Contract; excluded the defendant from responsibility in circumstances where the defendant is contracted on an hourly basis. In some instances a company had its own slings, as some specialised machines come from the factory together with their own slings and with manuals containing slinging diagrams. He said that he had copied clause 22 from another document and that it referred to slinging and rigging. He further said that the defendant would sometimes go onto a site and sling machinery with the equipment of the client, in which event the rigging would not be the responsibility of the defendant.

Griffith was unable to say why, in its plea, the defendant had denied supplying the slings. He was not involved in the negotiations and was therefore unable to state that there was an agreement for the plaintiff to supply its own slings. He was unable to say when the plaintiff selected the sling to be used in moving the lathe machine. He did say, though, that the plaintiff had given the defendant instructions on methods for rigging and slinging when the defendant got on site. The exemption clause might have been given to the plaintiff on site, but it was possible that when the defendant got on site, they were told “to get on with it”. He was not able to say whether or not the plaintiff had given instructions, regarding how to move the machines. He also could not say how the hirer used the slings. He denied that Emerick had been supervising the crews sent by the defendant. The purpose of the waybill was to record the details relating to the hire and it is subsequently used to raise an invoice. It is also a reference point for the client.

Griffith said he was not in the business of common carriage, as a carrier takes goods from one place to the next. When he was asked to point to any document which stated that in the event of the defendant moving items, it would not be responsible if its employees dropped equipment, he referred to the waybill. He said that the plaintiff had signed lots of waybills in 1998 and 1999 and for two jobs in 2000. The plaintiff’s representatives should have read the bottom of the waybill. It was suggested to him that

what the plaintiff's employees were signing for was to confirm the number of hours worked but he maintained that they should have paid attention to the bottom of the page. He said the cost of the contract was $400 000,00 and, although an invoice had been sent to the plaintiff, there had been no payment. The defendant was insured with Diamond Insurance Company but no claim had been lodged.

Griffith said the slings had snapped because they had been put around the machine. The machine had two holes through which steel bars should have been inserted for the lifting of the lathe. The slings, having been placed around the machine, were cut by the sharp edges on the bottom of the lathe on the second lift causing the lathe to fall to the ground. The slings had been put on the machine by the defendant's employees without supervision.

Griffith said that the defendant has moved equipment from Cape Town to Nairobi and that the waybill is a standard document. It had not been designed specifically for the plaintiff. A lot of companies had copied the same document. He said that the responsibility for the machine having been slung in the wrong manner lay with whoever had been placed in charge of the operation by the plaintiff, and it was not Emerick. Emerick, as crane manager, was responsible for all the cranes and he could not have therefore spent his time supervising this job. Had the plaintiff opted for an "in and out" job, the rigging manager Mr Lobb or the witness himself would have undertaken to supervise the job.

I find that Emerick was a truthful witness who gave evidence in a simple and straightforward manner. He did not seek to embellish his evidence in any way and I find his testimony to be credible. I was however not impressed by the demeanour of Griffith as a witness. He was clearly intent on tailoring his evidence in order to justify the stance taken by the defendant to deny liability for the plaintiff's claim. He was not willing to accept that the defendant's crew, despite clear evidence pointing to the same was being supervised by Emerick even if Emerick was only coming on site every two or three days. He was also intent on insisting that the contract was a written contract when the evidence of Emerick was to the contrary. I am unable to accept his evidence as he was an unreliable witness in every respect.

I turn now to the issues for determination in this matter.

Was the contract between the parties one of service or hire

It is common cause that the contract concluded by the parties was oral. The contract was concluded at the plaintiff's premises after the defendant's representative Emerick had been shown the equipment that the plaintiff wanted to be moved within the premises and to the adjoining premises. The defendant was to provide the cranes for the various sizes of equipment to be moved, as well as the operators of those cranes. The defendant also provided a truck when it was necessary to provide one. The plaintiff was quoted an hourly charge by the defendant for the equipment that was used.

Mr *de Bourbon* contended that the agreement between the parties constituted an hourly contract to move the equipment from one point to the next and that what was actually hired was the defendant's services to move the equipment. I find that his submission has merit. Firstly from the evidence of Emerick it does not appear as if the "in and out " option was ever discussed between himself and Pitout even though from the evidence of both witnesses for the defence such an option was available. In addition by providing operators for the various pieces of equipment used on the job, which operators he would frequently visit to oversee and supervise to check on the progress, Emerick gave out to the plaintiff that he was supervising the defendant's operators. The doctrine of quasi mutual assent would therefore operate against the defendant. Lastly the employees of the defendant themselves never approached the plaintiff for directions or instructions on how to move any of the equipment and this very salient fact has not been disputed by the defendant's witnesses.

Mr *Nherere, per contra,* argued that the plaintiff contracted with the defendant for the hire of equipment, the crane namely the rigging equipment and the truck. Had the plaintiff wanted to hire the services of the defendant in moving the equipment, then the defendant would have given the plaintiff a global quotation for the whole job, referred to as an "in and out" by Griffith. This latter quotation would include charges for supervision. Pitout's evidence was clear that he was only quoted the charges for the hire of the crane and the rigging. He had no recollection of a separate quotation for a truck. He did not recall having been quoted for supervision. His impression was that the quotation for crane hire included

the truck, although he could no longer be certain. The evidence of Emerick, on the other hand, was that he had given Pitout an hourly rate for the crane, the vehicle needed for moving the machines and the riggers. For each of the items there was a separate charge. They never discussed an overall rate. At times the defendant would give an overall quotation which would include everything, namely the crane, transport and riggers but his evidence was that this was not the case here as there was no discussion between him and Pitout on an overall charge. As regards supervision, his view was that it was difficult to ascertain who was responsible. His assumption was that the plaintiff would have someone to show the defendant's employees which machine to move or lift.

In the absence of a written agreement between the parties as to whether the contract was one for hire or for service it is necessary to look at the conduct of the parties in relation to the contract.

The defendant accepted a mandate to move the plaintiff's machines and gave a quotation for the work required to be done. There was no requirement from the defendant that the plaintiff should furnish information to the defendant on the manner of moving the equipment and securing it when lifting it by crane. The defendant's crane manager would visit the site two or three times a week to see how things were going on which occasions he would have realised that the defendant's employees who were on site were not receiving instructions, supervision or assistance from the plaintiff. The crane, the truck and the riggers were all operated by the defendant's employees without any input by the plaintiff. The slings belonged to the defendant. The defendant's employees decided which particular slings to be used for lifting the lathe and the wiro cutter. The manner of attaching the slings to the machines was decided by the defendant's employees. In my view the defendant assumed and took upon itself the responsibility for supervising the movement and slinging of machines.

The view I take is that the manner of quoting for the service that the defendant was providing for the plaintiff did not, in this instance, determine whether this was a contract for the hire of equipment or of services. Emerick had been with the defendant for a period in of 4 years. If it was the custom of the defendant to quote a global amount when the defendant was to be responsible for the movement and the supervision, he would have mentioned it to Pitout. I am satisfied that, in so far as both parties were

concerned, the plaintiff needed machines to be moved and the defendant had the expertise and the equipment to do the moving. After the plaintiff accepted the defendant's quote, the defendant got on with the job. The contract between the parties was one of service and not of mere hire of equipment.

Did Exhibit 4 form part of the contract

Mr *de Bourbon* contended that the signing of Exhibit 3, the waybill, could not make Exhibit 4 which constituted the defendant's written terms and conditions for undertaking work, part of the contract between the parties. He submitted further that the impression created was that the terms arose out of previous dealings between the parties.

Per contra, Mr *Nherere* submitted that the terms and conditions of Exhibit 4 became part of the contract by virtue of the fact that Exhibit 3, the consignment note, was signed every day by an employee of the plaintiff. At the bottom of the consignment note it is stated that:

> "All goods are handled and carried subject to our conditions covering the acceptance, consequence, delivery and warehousing of goods, a copy of which can be seen at the Company's registered office".

It was the further submission of Mr *Nherere* that the case of *Tubb (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) *w*hich Mr *de Bourbon* sought to rely on was distinguishable on the basis that in that case the condition sought to be relied on was an unsigned notice appearing on the wall. *In casu,* Exhibit 3 was signed by the plaintiff's employee and it clearly referred to another set of documents. He submitted that the consistent course of conduct had not been challenged. The *caveat subscriptor* principle applied and, by virtue of the plaintiff's signature on the bottom of Exhibit 3, the plaintiff was taken to have accepted that the goods were handled subject to the terms and conditions which were available should the plaintiff choose to avail himself of them. He added that, in view of the consistent course of dealing between the parties prior to the conclusion of the agreement in *casu*, Exhibit 4 could not be taken as a post contractual document.

> "The law relating to this issue is reasonably well settled. If a person receiving a document knows that there is a writing on it and that it contains conditions relative to the contract, he is bound whether he reads them or not; if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party has done what is reasonably necessary to bring

> the conditions to his notice." See *Central South African Railways v Mclaren* 1903 TS 727, *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C); *Hughes, N.O. v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) at pp 803-804; *King's Car Hire (Pty) Ltd v Wakeling,* 1970 (4) SA 640 (N) at pp 642-644, *Kemsley v Car Spray Centre (Pty) Ltd,* 1976 (1) SA 121 (SE) at pp 123-124. See also Mackeurtan *Sale of Goods in South Africa,* 4 ed, pp 36-37.

A distinction must, however, be drawn between documents which a person ought reasonably to suppose to contain conditions, and documents which he cannot reasonably be held to suppose to contain conditions. See *Central South African Railway v Maclaren (supra*) [at 734], where the Court drew a distinction between documents such as a bill of lading or even certain railway tickets, on the one hand, and a cloakroom ticket on the other. Similarly, in *Frocks Ltd v Dent and Goodwin (Pty) Ltd, supra* [at 725], it was held that the exclusion clause was printed on a warehouse invoice "on which no reasonable person would expect to find conditions limiting the liability of the bailee." [See *Micor Shipping v Trevor Golf and Sports* 1977 (2) SA 709 at pp 713-714C per FRANKLIN J.]

Later at 714E quoting from the judgment of HARCOURT J in *King's Car Hire (Pty) Ltd v Wakeling (supra).*

> "In judging of what is reasonably sufficient, the party bearing the onus of establishing the incorporation of the condition in question should bear in mind the degree or magnitude of risk that the steps he has taken may not prove sufficient to convey the necessary notice to persons acting reasonably. He must (as in cases of negligence) bear in mind the extent of the risk of non-observance by the other party in relation to the steps which he has taken and the degree of probability that such steps will bring to the notice of such other party, if acting reasonably, the existence of the condition sought to be implied in the contract."

The case for the defendant is that Exhibit 4 formed part of the contract between the parties and that, as a result, clause 22 thereof applied to exclude liability on the part of the defendant for all claims for loss or damage arising out of the use of slings belonging to the defendant. Clause 22 provides:

> "There shall be no obligation upon the owner to supply slings or crane assistants but in the event that the owner agrees to supply his/her standard selection of slings, he/it gives no warranties that the said slings will be suitable for the Hirer's purposes or for any lift to be performed by the Crane described overleaf and the Hirer's instance and all directions and or instructions for rigging and methods of slinging shall be the sole and absolute responsibility of the Hirer who indemnifies and holds harmless the owner against all claims for loss

or damage of any nature whatsoever arising out of the use of the said slings by the Hirer, the rigging and methods of slinging."

At common law the right of a party to sue for loss or damage to property may 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 propositions:

(1) The words of the exclusionary clause must be read as part of the contract as a whole. See *Bristow v Lycett* 1971 (2) RLR 206 (A) at 221G-H; *Transport & Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 (S) at 195F-G. They must be sufficiently clear and comprehensive so as to require a court to give effect to them. See the *Transport & Crane Hire* case *supra* at 196A-B.

(2) Any ambiguity as to the meaning or scope of the excluding or limiting term must be resolved against the party two 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 *Shumba Ranch (Pvt) Ltd v Shield of Zimbabwe Insurance Co Ltd* 1988 (2) ZLR 206 (S) at 309H-310A.

(3) If there is no express reference 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", *per* LORD MORTON OF HENRYTON in *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C, quoted with approval in the *Transport & Crane Hire* case *supra* at 198B-D..

(4) Where the existence of an "owners 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 (Pty) Ltd v Wakeling supra,* at 643B; *Stocks & Stocks (Pty) Ltd v T J Dally & Son (Pty) Ltd* 1979 (3) SA 754 (A) at 760E-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 supra,* 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* [1949] 1 All ER 127 (CA) at 134C-D; *Peard v Rennie & Sons* (1895) 16 NLR 175 at 183.a

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

(8) A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity, of himself, his servants or agents; or perhaps, even from the loss of or damage to the *merx* resulting from gross negligence on his or their part. See Christie *The Law of Contract in South Africa* 2 ed at 213-214.[1]

The witnesses for the plaintiff were adamant that they had never seen Exhibit 4, which contains the clause which the defendant would seek to invoke to evade liability. I have no reason not to believe them. Indeed, it is the evidence of the defendant's Chief Executive Officer that Exhibit 4, which sets out the standard terms and conditions of contract, would have been available at the defendant's offices for anyone with an interest to pick up and read. The contention by the defendant is that reference to Exhibit 4 was made in Exhibit 3 thereby incorporating Exhibit 4 into the contract.

It is common cause that Exhibit 3 was signed at the end of the day, after each of the teams had completed its task. There is no suggestion by the defendant that Exhibit 3 formed part of the contract when the agreement was entered into. The contract was verbal and I accept the testimony of Pitout that the purpose of Exhibit 3 was to establish a record between the parties of the work done, the time taken and the details of the defendant's employees engaged in the task. Emerick accepted that the contract between the parties was verbal and in the circumstances it begs the question as to when Exihibit 4 became part of the contract.

The parties had had previous dealings for a considerable time dating back some years. They had recent dealings in 1997, 1998 and 1999. The scope of the work involved in those days, however, was much less as the plaintiff, on those previous occasions, had requested the movement of only a few machines. The plaintiff had not, on those occasions, been required to sign a waybill. If the plaintiff's employees had been required to do so, it had not been brought to the attention of the plaintiff's managing director.

1 See: *Tubb (Pvt) Ltd v Mwamuka (supra*) at 31E-32G

Certainly he was unaware of the existence of any document resembling Exhibit 4 until after the occurrence of the mishap when the two machines were damaged and I have no reason to doubt his evidence on this aspect. Pitout, who concluded the agreement on behalf of the plaintiff was not shown the printed standard terms and conditions of the contract (Exhibit 4), and significantly, the writing on the bottom of the waybill (Exhibit 3) was not brought to his attention and he did not focus on it. He was more concerned with the number of hours recorded as having been worked by the defendant's employees. He was not aware that any of the plaintiff's employees had, prior to August 2000, been shown the printed standard terms and conditions under which the defendant conducted business.

Emerick, according to his evidence, only went to the site two or three times a week. There is no suggestion that at any stage he brought the conditions appearing at the bottom of the waybill to the attention of Pitout with whom he was dealing. Prior to the conclusion of the contract, the provisions of clause 22 of the standard terms and conditions were not conveyed to the plaintiff's employees. Nor were they brought to the plaintiff's attention subsequent to the conclusion of the contract. The evidence of previous dealings does not suggest that the plaintiff had ever been given notice of the standard terms and conditions on which the defendant did business, let alone the exemption clause.

In casu, I am not convinced that the standard terms and conditions (Exhibit 4) formed part of the contract between the parties. As a consequence the defendant is not entitled to rely on the provisions of clause 22 thereof, to evade liability.

Even if I am wrong in this conclusion, and Exhibit 4 did form part of the contract, was the defendant entitled in the circumstances to rely on the exemption clause therein.

I turn now to consider whether the defendant was entitled to rely on the exclusion clause and deny liability in accordance with the provisions of clause 22 of Ex 4. In *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 at 195 McNALLY JA stated:

> "At common law, the right of a contracting party to claim for damages 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 considering the exemption clause regard must be had to the entire contract.

It was Mr *de Bourbon's* contention that the loss did not fall within the terms of the exemption clause. He suggested that the exemption clause was not normal. In his view, exemption clauses are interpreted very restrictively. In the *Transport Crane Hire* case *(supra)* MacNALLY JA, at 204-205, referred to the interpretation of exemption clauses as being policy based. Further on, when describing the approach of courts to exemption clauses, he stated thus at 207D:

> "The first case on which I rely is *Alderslade v Hendon Laundry Ltd* [1945] KB 189; [1945] 1 All ER 244 (CA) at 245 in which Lord Greene MR said this:
>
> > "…. where the head of damage … is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and 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"."

The learned Judge of Appeal at 207 also quoted with approval the following passage from a judgment by Lord MORTON in *Canada Steamship Lines Ltd v Regem* [1952] AC 192: [1952] 1 All ER 305 at 310:

> "(i) if the clause contains language which expressly exempts the person in whose favour it is made (hereinafter called the *proferens*) from the consequences of negligence of his own servants, effect must be given to that provision ….
>
> (ii) if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point it must be resolved against the *proferens* …..
>
> (iii) if the words used are wide enough for the above purpose, the court must then consider whether the … 'head or damage may be based on some often ground other than that of negligence' to quote again Lord Greene MR in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the

> *proferens* cannot be supposed to have desired protection against it, but subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants."

The next authority he examined was the decision of STEYN CJ in *SA Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) from which he quoted with approval the following passage which is found at 419C-E of the judgment:

> "The rule to be applied in construing an exemption of this nature appears from *Essa v Divaris* 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect: but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded on negligence."

Finally in *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (S) at 325C DUMBUTSHENA CJ stated thus:

> "In my opinion, for this exemption clause to exclude liability arising from negligence, there must be express reference to negligence. I do not believe that the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servant of the respondent. And if the words are wide enough to cover negligence, I believe the head of damage may be based on some ground other than that of negligence."

In casu, clause 22 is to the following effect:

> There shall be no obligation upon the Owner to supply slings on crane assistants but in the event that the Owner agrees to supply his/its standard selection of slings, he/it gives no warranties that the said slings will be suitable for the Hirer's purposes or for any lift to be performed by the Crane described overleaf and the Hirer's instance and all directions and or instructions for rigging and methods of rigging shall be the sole and absolute responsibility of the Hirer who indemnifies and holds harmless the Owner against all claims for loss or damage of any nature whatsoever arising out of the said slings by the Hirer, the rigging and methods of slinging."

The defendant did not specifically exclude liability where there was negligence on the part of its employee. The evidence is clear that slings which were used belonged to the defendant and it was the defendant's employees who attached the same to the lathe machine in an effort to lift

the same. The manner in which the slings were attached caused them to snap, resulting in the machine falling.

In my view the employees of the defendant were negligent, which negligence I intend to deal with later on in the judgment. The negligence of the defendant's employees I find, went to the very root of the contract in that having been contracted, as experts in the moving of heavy equipment and machinery, which function included the slinging and lifting of the machinery they were negligent in the manner in which they attached the slings for lifting the machinery.

In the absence of express reference to the exclusion of liability on the basis of negligence, I must consider whether the words used in the exemption clause are wide enough to their ordinary meaning to cover the negligence on the part of the defendant's employees.

In *Transport Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd (supra)* at 209C-210B MCNALLY JA stated thus:

> "Clearly the exemption clause does not expressly refer negligence. That answers the first point clearly the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. In this connection I adopt and accept the reasoning of SQUARES J in *Minister of Education v Stuttaford & Co (Rhodesia) (Pvt) Ltd, supra,* at 523E-H, that "any loss" must include loss arising from negligence. See also the speech of Lord Frazer of Tulley–belton in the *Ailsa Craig* case, *supra* 15107g.
>
> But that is not the end of the matter. We have to answer the third question, which introduces the "policy-based interpretation". I repeat that question:
>
> > "If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than negligence."
>
> In my view there is clearly at least one other ground, which is neither fanciful nor remote. It is the ground of strict liability of the merchant seller, which arises regardless of negligence. Late delivery might be another ground. Accordingly I would interpret the exemption clause as applying to those grounds, and not that of negligence. It follows that the respondent has not discharged the onus of satisfying the court that his negligence is covered by the exemption clause (see Chitty on *Contracts Generals Principles* 26 ed, para 956).
>
> It seems to me, in conclusion, that if a party to a contract wishes to exempt himself from liability for his own negligence, he should say so in many words, unless the context indicates that the exemption clause relates only to negligence. Ideally, he should add words to the effect that the other party should take out insurance to cover any possible risk of loss from the negligence of the *proferens.* This is

> what happened in the case of Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794. In that case the court was satisfied that the exemption clause did not exclude the liability of the *proferens* for its own negligence. A major, if not the major factor in that decision was that it was convenient for both parties, and expressly agreed, that the defendant (who was in the position of the respondent in this case) would insure the goods at an agreed rate. The agreement to insure was a satisfactory *quid pro quo* for the exemption."

The clause in this matter specifically seeks to contract out of liability for consequential damage caused by defects or the unsuitability of the slings used in lifting the equipment.

In his work, the *Law of Contract in South Africa* 3 ed, page 209 RH Christie states:

> "The second method by which the courts endeavour to confine exemption clauses within reasonable bounds is by interpreting them narrowly. The method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting the such clauses the court must first examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause (for instance strict liability, negligence, gross negligence), and the clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable which involves the least degree of blame worthiness.

In *SAR & H v Lyle Shipping Co. Ltd* 1958 (3) SA 418, in examining an exemption clause STEYN JA had this to say at 419B-D.

> "The question raised on appeal is whether or not the clause quoted above exempts the appellant from liability for negligence. It does not do so either explicitly or in general terms so all embracing as clearly to draw such liability into the scope of the exemption. It refers in comprehensive language to possible events as a result of which damage may be sustained, but not to the possible legal grounds of responsibility for such damages on the occurrences of any such event, with the result that, having regard only to the wording of the clause, it is open to the interpretation that it bars actions arising from causes of one or more classes leaving unaffected those founded on causes of one or more other classes. The rule to be applied in construing an exemption of this nature, appears from *Essa v Divaries,* 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for the damages which the clause purposes to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect; but where in law such liability could be based on some other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded on negligence."

The view I take in the light of the authorities adverted to above is that the failure by the defendant to specifically exclude liability for negligence in its exemption clause is fatal to its cause. The defendant's liability for damages occasioned to the plaintiff could have been based on other ground other than negligence. It should have sought to explicitly exclude liability for negligence. I find that therefore the exemption clause is inoperative against the plaintiff's claim.

Were the defendant's employees operating the crane negligent?

It is common cause between the parties that the slings for lifting the equipment were attached to the lathe incorrectly. Instead of iron bars being placed in the appropriate holes in the lathe and the slings being attached to the iron bars, the slings were passed through the holes and under the lathe. When the lathe was lifted, the sharp edges where the slings passed under the lather cut into the slings and caused them to break. That was the probable cause of the accident. It might have been, however, that the lathe was too heavy and the slings could not support the weight. Whichever was the cause, however, it was the defendant's employee who was operating the crane, who had decided which slings to use and who had decided what method of slinging should be used. Clearly the slings or the method used was not satisfactory. That was the fault of the operator.

It was submitted by Mr *de Bourbon* that the proven facts give rise to the application of the doctrine of *res ipsa loquitur.* He contended that after the slings were put around the lathe for a second time, the slings snapped causing the lathe to drop downward onto the wiro cutter. He referred to *Boka Enterprises (Pvt) Ltd v Pine* 1991 (2) ZLR 308. At 313 KORSAH JA stated –

> "Before the invocation of the doctrine it must be established that whatever caused the accident was in the exclusive control of the defendant. In the two cases cited by the learned trial judge *viz Arthur Bezuidenhout and Meiny* 1962 (2) SA 566 (A); and *Naude N.O. v Transvaal Boot and Shoe Manufacturing Company* 1938 AD 379, to illustrate the application of the doctrine, the motor vehicle in each case was under the exclusive control of the defendant."

In the instant case the defendant's employee was operating the crane, the slings were attached by the defendant's employee and the lathe machine was lifted by the defendant's employee. The decision as to which

slings to attach to the lathe was made by the defendant's employees, as was the manner of attachment of the slings to the machinery being lifted and moved. The slings themselves belonged to the defendant. The decision as to which crane to use was that of the defendant's servants and the machinery was moved from point to point by the defendant's employees. The supervision of the defendant's employees was done by Emerick twice or three times a week for the duration of the period that the defendant was on site. It is therefore not in dispute that the defendant's employees had exclusive control over not only their equipment but also the plaintiff's equipment. Further the defendant had exclusive control in the manner of effecting the proper performance of the contract. In my view, it is a proper scenario to invoke the doctrine. There was in this case a lack of reasonable care and skill in the manner in which the defendant performed the contract. Therefore it follows that the defendant's employees who were operating the crane were negligent.

The loss suffered by the plaintiff was caused by the negligence of the defendant's employees.

Was the contract a consumer contract in terms of Chapter 8:03?

Assuming that I am wrong in finding that the contract is a service contract, when in fact it is a contract for the hire of equipment, I have been urged by Mr *de Bourbon*, to find that the contract, which is a consumer contract, contained an unfair term. He contended that the *onus* to show that the contract did not contain on unfair terms was upon the defendant.

Mr *Nherere* argued that the contract is not a consumer contract as the defendant was supplying neither goods nor services. The contract was also not one for the sale of goods, rather the defendant was hiring out equipment. He further submitted that the defendant was acting in the course of business whilst the plaintiff was not. He contended that clauses 10 and 22 of the standard terms and conditions were not unfair as contemplated by Chapter 8:03. He submitted that Griffith explained why it was important for the hirer to supervise the moving as he would know how the machine operated. Further, it was the hirer who obtained insurance for the movement of the equipment. (See clause 2 to Schedule). He further submitted that the defendant's employees were under the supervision and

control of the plaintiff whilst they were operating the crane and the negligence of the plaintiff cannot be attributed to the defendant. Both counsel referred me to the case of *Radar Holding Ltd & Anor v Eagle Insurance Co Ltd* 1999 (2) ZLR 246.

In section 2 of *Chapter 8:03* the term "consumer contract" is defined as follows:

> "consumer contract" means a contract for the sale or supply of goods or services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not but does not include –
>
> a) a contract for the sale, letting or hire of immovable property; or
>
> b) a contract of employment."

In the context of this case the dispute between the parties would be whether the defendant was supplying or selling services. In the *Radar Holdings* case *(supra)* in defining services GUBBAY CJ at 248F – 249C stated:

> "I respectfully agree that "services" is a word capable of an expansive meaning. *Webster's International Dictionary* defines it as "acts or instances of helping or benefiting; conduct contributing to another's advantage or welfare or benefit". The *Oxford English Dictionary* is to much the same effect. It provides the meaning (*inter alia*) of "the action of serving, helping or benefiting; conduct tending to the advantage of another … supply of the needs of persons".
>
> What scant judicial authority there is has considered the use of the word "services" in the context of income tax legislation. Nonetheless, a meaning broader than work and labour alone is given. In *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 at 230, it was held that an agreement to assist a company financially was an agreement to render services. In *Commissioner for Inland Revenue v Transvaal Bookmakers' Association (Co-operative) Ltd* (1953) 19 SATC 14 (T) at 19, PRICE J was satisfied that the entitlement of members of the respondent association to borrow from it specified sums of money on easy terms of payment constituted a service rendered by the association. And in this jurisdiction, in the case of *H v Commissioner of Taxes* 1957 R & N 688 (SR) at 693A, HATHORN J found it to have been correctly conceded that by the grant of credit facilities and a guarantee for certain indebtedness of a company, the taxpayer rendered a service to his co-shareholders and to the company, and in doing so he also benefited himself.
>
> Citing the exclusion of contracts of lease of immovable property (*locatio conductio rei*) and of employment (*locatio conductio operarum*) in the definition of a consumer contract, Mr *de Bourbon,* for the respondent, submitted that by a contract for the sale or supply of services the lawmaker must have meant a contract of *locatio conductio opera,* one party using their labour to bring about a result, like a mechanic repairing the engine of a motor vehicle or a plumber

unblocking a sink."

The plaintiff required the movement of equipment from one building to an adjacent one as well the movement of certain equipment within the factory environment. To give effect to the contract the defendant brought on site the necessary equipment as well as the requisite operators for each of the tasks to be performed. The supervision of the defendant's employees was done by Emerick the crane manager of the defendant. Emerick would attend at the plaintiff's premises twice or three times a week and there is no suggestion that the defendant ever referred technical issues to the plaintiff for clarity on how to move and lift the equipment. By the time that the machines fell resulting in their being damaged, the defendant had been on the premises for about three weeks and yet had not required any input or assistance from the plaintiff: meaning that the defendant was completely in charge and in control of the whole process. In my view what distinguishes hire from the provision of services is the amount of control being exercised not only over the equipment being used but also who specifically has control over the operators of the equipment, as that is the person in charge of the process. In my view the facts disclose that control was being exercised by the defendant, and as a consequence what the defendant was offering was a service and not a hire of equipment.

I am persuaded therefore that the contract between the parties was a consumer contract.

Section 4 of Chapter 8:03 provides:

"(1) Subject to subsection (3), if a court is satisfied -

a) in accordance with section *five,* that any consumer contract is unfair; or
b) in accordance with section *six,* that any actual or reasonably anticipated exercise or non-exercise of a power, right or discretion under a consumer contract is or would be unfair; or
c) that any consumer contract contains a scheduled provision;

the court may make an order granting any one or more of the following forms of relief –
....."

If Mr *de Bourbon's* argument is to be accepted clauses 10 and 22 of the standard terms and conditions are scheduled provisions. Mr *Nherere* on the other hand contends that the clauses are not unfair as contemplated by Chapter 8:03. Apparently he accepted that the Schedule to Chapter 8:03 is

the operative provision. The Schedule to Chapter 8:03 describes what are defined as scheduled provisions. Paragraph 2 thereof reads as follows:-:

> "2. Any provision whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his negligence."

The exclusion clauses of the standard, terms and conditions are clauses 11 and 22 which read as follows:-

> "11. Notwithstanding anything herein contained to the contrary while the crane is on the site, the Owner shall not be responsible or liable to the Hirer or any other person for any acts or omissions on the part of the Owner's operator while such operator is carrying out the instructions of the Hirer or any acts or omissions on the part of the Hirer or the Hirer's operator or for any loss or damage whatsoever occasioned to the Hirer or any other person, property or thing and the Hirer indemnifies and holds harmless the Owner against all claims of any nature whatsoever for any loss or damage aforesaid, including all costs relating to such claims, but this indemnity shall not extend to include an act solely attributable to the Owner's operator.
>
> 22. There shall be no obligation upon the Owner to supply slings or crane assistants but in the event that the Owner agrees to supply his/its standard selection of slings, he/it gives no warranties that the said slings will be suitable for the Hirer's purpose or for any lift to be performed by the Crane described overleaf and the Hirer's instance and all directions and or instructions for rigging and methods of rigging shall be the sole and absolute responsibility of the Hirer who indemnifies and holds harmless the Owner against all claims for loss or damage of any nature whatsoever arising out of the use of the said slings by the Hirer, the rigging and the methods of slinging."

Whilst the earlier clause seems to accept responsibility for loss or damage arising out of acts attributable solely to the defendant's operator, it does not provide for responsibility where the loss or damage is attributable to omissions on his part. The last clause excludes liability for loss or damages howsoever caused or incurred. In my view this clause falls squarely within the provisions of paragraph 2 of the Schedule to Chapter 8:03 and is therefore a scheduled provision.

Mr *Nherere* invited me, in the event of finding that the contract contains a scheduled provision, to vary the contract. Although the Act empowers me to cancel the contract, such a course would not be practical as the major part of the contract had been performed. The parties are not

seeking performance in terms of the contract, but the dispute is centred upon whether or not the plaintiff can be awarded damages as a result of the defendant's inability to perform the contact properly.

In terms of s 4(1) of Chapter 8:03, if the court is satisfied that a consumer contract contains a scheduled provision it may make an order granting a form of relief specified in that subsection. One of the forms of relief is to cancel any part of the consumer contract. I consider that it would be fair to cancel clause 22 of the standard terms and conditions.

Quantum of plaintiff's damages

The plaintiff produced quotations which establish that the cost of replacing the wire cut EDM and the lathe would amount to US$109 600,00. That evidence was not disputed by the defendant.

Mr *de Bourbon* has applied for an amendment to the prayer relating to the damages. He seeks that the order reflects that the amount be paid in Zimbabwe dollars at an exchange rate of $55 to the American dollar. Mr *Nherere* indicated that there had been no evidence adduced as to the rate of exchange in respect of the currencies. I agree with the submissions of Mr *Nherere* that in the absence of evidence on the conversion rate of the Zimbabwe dollar to the American dollar it would be impossible to fix a rate for purposes of the judgment. The rate of conversion will be the prevailing official rate at the time the payment is effected.

It is ordered that the defendant pay the plaintiff –

1. US$109 600,00 or the equivalent in Zimbabwe dollars converted at the official rate as at the time of payment with interest thereon at the rate of interest paid by a commercial bank in Zimbabwe on a foreign currency account denominated in US dollars from 2 August 2000 to date of payment.

2. Costs of suit.

Wintertons, plaintiff's legal practitioners.
Mucharehwa & Partners, respondent's legal practitioners.