# DISPUTE RESOLUTION
## ALERT

1 FEBRUARY 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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### Exemption clauses and liability for damages

Pens are mightier than swords! None more so than the one used to draft exemption clauses, aka "*disclaimer clauses*". An exemption clause is a contractual modification to the common law rule as to risk; a "*shield*" if you will, absolving one party, either wholly or partially from an obligation or liability which would or could arise at common law under a contract. Our courts have also demonstrated a willingness to give effect to exemption clauses.

### Get out of my house! The commencement of prescription

Special pleas are often seen as the "*easy*" way out as they have the effect of disposing of the matter before the court even delves into the merits of a claim. A special plea is an effective manoeuvre when used properly but must disclose a defence in law substantiated by facts. Failure to do so may render one defenceless.

# Exemption clauses and liability for damages

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This is precisely what happened in *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd* (508/2020) [2022] ZASCA 7. In that matter, the parties, Schenker South Africa (Pty) Ltd (Schenker) and Fujitsu Services Core (Pty) Ltd (Fujitsu), concluded a written agreement, the material terms of which were that Fujitsu, an electronic company, would make use of Schenker's logistic and warehousing services, which they did, without any recorded incidents – until one weekend in June 2012.

On 23 June 2012, an employee of Schenker arrived at the SAA Cargo warehouse, provided the necessary documents, collected a consignment for Fujitsu and proceeded to steal it. Fujitsu instituted a delictual action for damages against Schenker. Schenker defended the claim on the basis that its delictual liability for theft was excluded in terms of the contract between the parties. Fujitsu's counter argument was that, on a proper construction, the agreement did not exclude liability for theft of goods. And so, like many of the commercial matters that appear before the courts, the resolution of the dispute depended on an interpretation of the applicable provisions of the agreement. In its interpretation, the High Court found that the thief was not acting in terms of the contract when he attended to SAA Cargo on Saturday, 23 June 2012 to steal Fujitsu's goods and that the theft was an act performed outside of the agreement. Thus, the High Court found in favour of Fujitsu and ordered Schenker to pay Fujitsu US$ 516,877 as damages for theft of goods.

The matter was then brought on appeal to the Supreme Court of Appeal. The issue to be decided on appeal was whether – on a proper construction of the applicable provisions – a delictual claim based on theft was excluded from the contract. In its interpretation, the Supreme Court of Appeal stood by things already decided and followed established legal precedent citing to Endumeni and Durban's Water Wonderland as its guiding stars. Those judgment's place importance on the language used in the provision. In Durban's Water Wonderland, the court held that:

> *"If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens."*

The first issue that the Supreme Court of Appeal dealt with was whether the thief was executing the agreement when he uplifted the goods from SAA Cargo. Fujitsu argued that the employee was not executing the agreement when he collected the consignment since it is a bit far-fetched that the goods were being 'handled' or 'dealt with'

# Exemption clauses and liability for damages

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as specified in the definition of 'goods' in the contract, thus the act of theft was not committed during his course of employment. Giving expression to the ordinary meaning conveyed by the verbs "*handled*" and "*dealt with*" as they appeared in the definition of the word "*goods*", the Supreme Court of Appeal held that he was executing the agreement.

Having determined that the thief was executing the agreement, the Supreme Court of Appeal proceeded to determine whether liability was excluded in terms of clause 17 read with clause 40.1 of the agreement. In relevant part, those clauses recorded the following:

"17. GOODS REQUIRING SPECIAL ARRANGMENTS

*Except under special arrangements previously made in writing [Schenker] will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should [Fujitsu] nevertheless deliver such goods to [Schenker] or cause [Schenker] to handle or deal with any such goods otherwise than under special arrangements previously made in writing [Schenker] shall incur no liability whatsoever in respect of such goods, and in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods. A claim, if any, against [Schenker] in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 40 and 41.*"

And

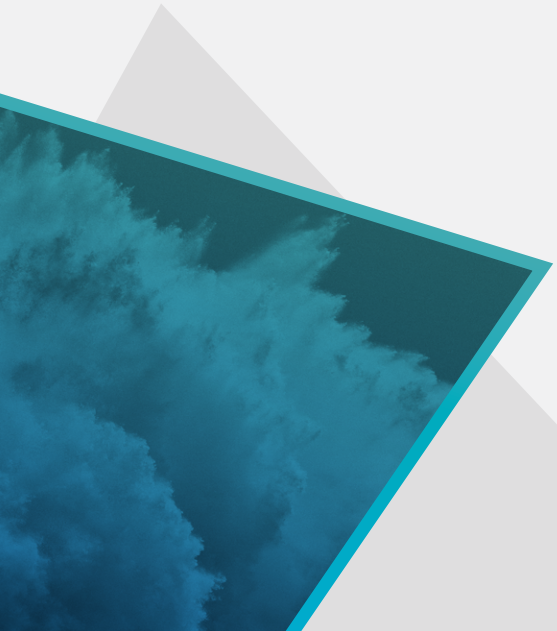
"40.LIMITATION OF [SCHENKER'S] LIABILITY

40.1 *Subject to the provisions of clause 40.2 and clause 41, [Schenker] shall not be liable for any claim of whatsoever nature (whether in contract or in delict) and whether for damages or otherwise, howsoever arising including but without limiting the generality of the aforesaid -*

40.1.1 *any negligent act or omission or statement by [Schenker] or its servants, agents and nominees; and/or...*

40.2 *Notwithstanding anything to the contrary contained in these trading terms and conditions, [Schenker] shall not be liable for any indirect and consequential loss arising from any act or omission or statement by [Schenker], its agents, servants or nominees, whether negligent or otherwise.*'"

Regarding the above clauses, Fujitsu submitted that the language used in clause 17 cannot be construed so as to include, within its ambit, intentional acts by employees of Schenker. The Supreme Court of Appeal rejected Fujitsu's argument, finding instead that having regard to the agreement as a whole, the phrases 'of whatsoever nature' and 'howsoever arising' in clause 40.1 should be given



# Exemption clauses and liability for damages

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their ordinary literal meaning and are sufficiently wide in their ordinary import to draw into the protective scope of the exemption the deliberate and intentional acts of the employees of Schenker.

Regarding clause 17 specifically, the Supreme Court of Appeal held that if the goods were *"valuable"*, Fujitsu had to make prior special arrangements with Schenker. The commercial rationale behind this was that it would enable Schenker to take steps to mitigate against the risk of theft for instance. It was not disputed that the goods were 'valuable' nor was it disputed that Fujitsu did not make any special arrangements. Fujitsu's failure meant that Schenker had successfully established that its liability was excluded in terms of the agreement which absolved it from liability for the loss suffered by Fujitsu. It followed that Fujitsu's cause of action was one which fell within the ambit of the disclaimer and ought to have been dismissed. Therefore, the appeal was upheld with costs and the High Court's order was set aside.

This judgment represents yet another example of the power of the proverbial pens. When the ink dries and agreements are concluded, the words that were written by the drafter's pens matter. In a dispute, parties must live and die by the words that they chose to record the relationship between themselves. Thus, as a takeaway, parties should ensure that they pay careful attention to the language they use in their agreements.

IMRAAN ABDULLAH,
MUKELWE MTHEMBU AND
YUSUF OMAR

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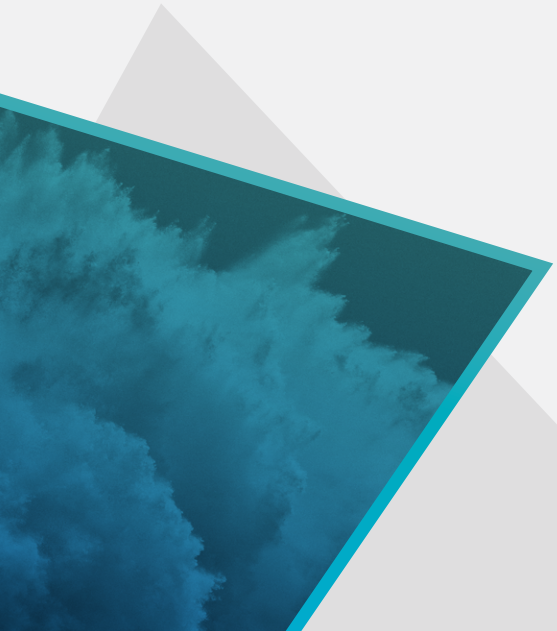
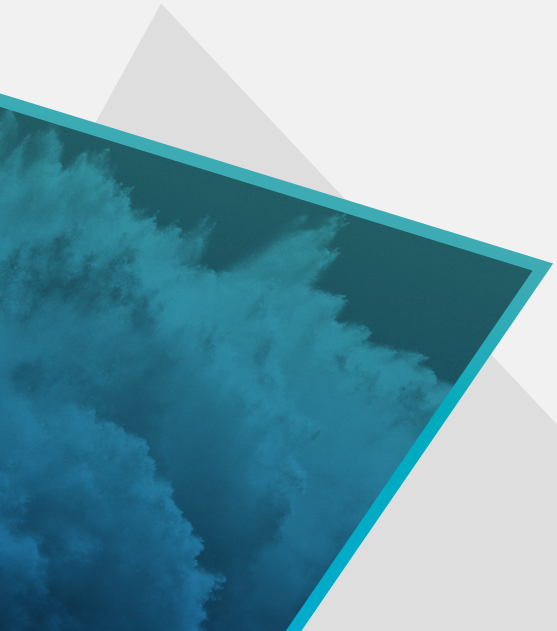


# Get out of my house! The commencement of prescription

Special pleas are often seen as the "*easy*" way out as they have the effect of disposing of the matter before the court even delves into the merits of a claim. A special plea is an effective manoeuvre when used properly but must disclose a defence in law substantiated by facts. Failure to do so may render one defenceless.



According to the Prescription Act 68 of 1969 (Prescription Act) section 11(d) a debt prescribes after three years from the date on which it becomes due. It is settled law that the definition of "*debt*" for purposes of the Prescription Act is broad enough to encompass any obligation to make restitution, such as a one arising from a contract cancelled by repudiation, noted in *Cook v Morrison and another* 2019 (5) SA 51 (SCA) (at para 15). However, what remained unclear, until *Pretorius v Bedwell* [2022] ZASCA 4, was when prescription actually begins to run in a damages claim based on repudiation.

The Supreme Court of Appeal (SCA) in *Pretorius v Bedwell* (paragraph 10) reiterated that:

> *"...repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract. 1 Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise. Accordingly, prescription commences to run from that date."*

At the back of this notion the SCA sets out what facts must be pleaded in a special plea of prescription in a claim for damages based on repudiation to successfully disclose a defence in law.

In summary, the matter pertained to a dispute which arose in 2007 in terms of which Kenneth Bedwell (Bedwell) seeking financial relief, turned to his brother-in-law Dave Pretorius (Pretorius). It was agreed that Pretorius would purchase a property, by way of mortgage loan and when Bedwell qualified for a mortgage loan of his own he would purchase the property back.

In 2008 the relationship had broken down, and on 8 April 2008 Pretorius instructed Bedwell to leave the property. On the same day Bedwell invited Pretorius to negotiations on a way forward, which was in vain and Bedwell left the property the following day.

In 2010 Bedwell learned that Pretorius sold the property to a third party. On 11 October 2011. Bedwell issued action proceedings (summons) against Pretorius claiming damages resulting from the repudiation of the agreement, to which summons Pretorius raised a special plea of prescription arguing *inter alia* that Pretorius repudiated the agreement on 8 April 2008, and since the summons was issued on 11 October 2011, the claim had prescribed under section 11 of the Prescription Act.

# Get out of my house! The commencement of prescription

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The SCA stated that prescription begins to run, not when the reneging party repudiates the contract, but rather when the innocent party communicates its acceptance of such repudiation to the repudiating party and elects to cancel the agreement.

Upon communication of the acceptance of the repudiation the innocent party's claim for damages arises and prescription may begin to run. In this case, the SCA found that Pretorius failed to plead that on 8 April 2008 he repudiated the contract and Bedwell accepted such repudiation. The SCA ruled that the onus was on Pretorius to prove that the claim had prescribed and, the special plea did not set out the relevant facts, that is, that the agreement was repudiated on 8 April 2008 and the repudiation was accepted and acceptance thereof was communicated on that same date (or at a later date but before 10 October 2008). Therefore, the special plea did not disclose a defence in law and failed on the facts. For that reason, the SCA found that the full bench of the High Court had correctly dismissed the special plea and accordingly the SCA dismissed the appeal.

The cause of action for damages emanating from repudiation only comes alive when the innocent party communicates the acceptance of the repudiation. Thus, when replying on prescription, it will not suffice to merely reiterate the provisions of the Prescription Act or to simply state that the claim has prescribed. One must set out, firstly when the repudiation occurred and more importantly when the innocent party communicated the acceptance of the repudiation.

CORNÉ LEWIS AND
OLWETHU MOSES

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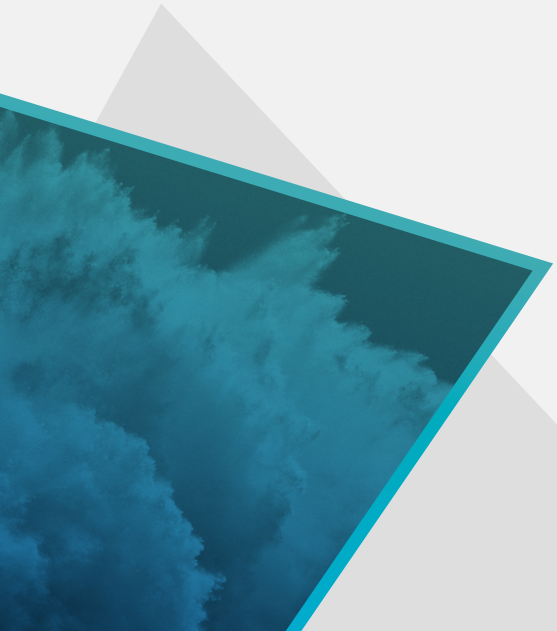

# OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:


**Tim Fletcher**
Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**
Chairperson
Joint Sector Head
Government & State-Owned Entities
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

**Eugene Bester**
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

**Jackwell Feris**
Sector Head
Industrials, Manufacturing & Trade
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

**Tobie Jordaan**
Sector Head
Business Rescue, Restructuring & Insolvency
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

**Corné Lewis**
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

**Richard Marcus**
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

**Burton Meyer**
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

**Rishaban Moodley**
Sector Head
Gambling & Regulatory Compliance
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

**Mongezi Mpahlwa**
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

**Desmond Odhiambo**
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

**Lucinde Rhoodie**
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

**Clive Rumsey**
Sector Head
Construction & Engineering
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

**Belinda Scriba**
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

**Tim Smit**
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

**Joe Whittle**
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

**Roy Barendse**
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

**Jonathan Witts-Hewinson**
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com


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**JOHANNESBURG**
1 Protea Place, Sandton, Johannesburg, 2196.
Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111
E jhb@cdhlegal.com

**CAPE TOWN**
11 Buitengracht Street, Cape Town, 8001.
PO Box 695, Cape Town, 8000, South Africa.
Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388
E ctn@cdhlegal.com

**NAIROBI**
Merchant Square, 3rd floor, Block D,
Riverside Drive, Nairobi, Kenya.
P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.comm

**STELLENBOSCH**
14 Louw Street, Stellenbosch Central,
Stellenbosch, 7600.
T +27 (0)21 481 6400
E cdhstellenbosch@cdhlegal.com


CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**