A.M.I ZAMBIA LIMITED AND PEGGY CHIBUYE

SUPREME COURT
NGULUBE, C.J., CHAILA AND MUZYAMBA, JJ.S.
ON 4TH NOVEMBER, 1998 AND 13TH APRIL, 1999.
(S.C.Z JUDGMENT NO. 8 OF 1999)

Flynote

Contract - Storage of goods - Exemption clause

Headnote

The appellants carried on the business of, among other things, storage of goods for customers. The respondent's goods were stored with the appellant and it was subsequently discovered that there had been pilferage and that goods worth K5,562.63 had been stolen. The appellant sought to rely on an exemption clause which said that goods would be stored "at owner's risk".

Held:

(i) There was no suggestion that the clause "at owner's risk" had been given a definition in the contract so that it would have been necessary to ascertain it's meaning, like any other clause in the contract, having regard to the nature and purpose of the contract, and the context within which the words were used.

(ii) At "owner's risk" in the circumstaces would have to exclude wrong-doing and misconduct of the party seeking exemption and that of his staff.

For the Appellant: Mr. N.K. Mubonda, of D.H. Kemp and Co.
For the Respondent: Mr. C.M. Ngenda, of Christopher Russell and Co.

Judgment

NGULUBE, C.J.: delivered the judgment of the Court.

This case concerned custody of goods for reward. The appellants carried on the business of, among other things, storage of goods for customers. The respondent's goods were stored with the appellant and it was subsequently discovered that there had been pilferage and that goods worth 5,562-63 had been stolen. The appellant sought to rely on an exemption clause which said that goods would be stored ''at owner's risk''. The learned trial judge heard the evidence and found that the exemption clause had not been brought to the respondent's attention. On this point, the learned judge said he was resolving an issue of credibility between two sets of witnesses and accepted the evidence of the respondent and her witness. One ground of appeal argued by counsel challenged this finding of fact, with counsel submitting that there was sufficient evidence to show that the exemption clause was brought to the attention of the respondent.

The Supreme Court has evolved and constantly affirmed some definite principles when it comes to reversing a trial court's findings of fact, especially those based on credibility. Not having had the advantage of seeing and hearing the witnesses at first hand which the trial court has, we do not lightly interfere unless it unmistakably appears that the trial court fell into error and could not have taken proper advantage of seeing and hearing the witnesses at first hand. The first hurdle confronting the appellants was the finding on an issue of credibility that the exemption clause was not brought to the attention of the respondent at the time of entering into the contract. We have not been given any justifiable excuse for reversing the learned trial judge and this alone resolves the appeal.

If the case had been that the exclusion clause was brought to the respondent's attention at inception, then, of course, it would have been necessary to dwell at some length on the second ground of appeal which was argued before us. It is no longer encouraged to talk about a so-called doctrine of fundamental breach so that whether an exception clause in contract is to be deprived of effect or not should not be on account of the breach being a fundamental one. Where the parties' bargaining strengths are evenly matched, it is a question of construction whether the exclusion clause is sufficiently wide to give exemption or to limit liability from the consequences of the breach in question. Indeed, the cases of ***Securicor Zambia Limited v William Jacks And Co. Zambia Ltd.*** **S.C.Z. Appeal No. 24 of 1990** (liability limited in

amount); ***Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. And Another*** **(1983)1 ALL E.R. 101** (liability limited in amount); ***George Mitchell (Chesterilall) Ltd. v Finney Lock Seeds Ltd.*** **(1983) 2 ALL E.R.** (liability limited in extent and amount) and the case of ***Photo Production Ltd. v Securior Transport Ltd.*** **(1980) 1 ALL E.R. 556** (exclusion and limitation of liability) which Mr. Mubonda cited are all in point so far as they support the legal proposition under discussion. In the case at hand, there was no suggestion that the clause ''at owner's risk'' had been given a definition in the contract so that it would have been necessary to ascertain its meaning, like any other clause in a contract, having regard to the nature and purpose of the contract, and the context within which the words were used. On the facts, we do not see how the appellants could have exemption from their own wrongdoing by the misconduct of their staff. "At owner's risk" in the circumstances would have to exclude wrongdoing and misconduct of the party seeking exemption and that of his staff.

In truth, there are no grounds for interfering with the judgment below. The appeal is dismissed, with costs to be taxed if not agreed.
