

## Courts' approach to exemption clauses and the potential impact of the Consumer Protection Act thereon

### Introduction:

1. Exemption clauses are provisions in a contract in terms of which a party is protected from certain claims in respect of damages, loss, negligence, non-performance etc. An example of an exemption clause is the following:

*"The buyer shall not have or acquire any claim against the seller, nor shall the seller be liable in contract or delict for any general, special or consequential damages sustained by the buyer or any third party flowing directly or indirectly from this contract whether due to acts, omissions or otherwise of the seller or its employees or agents or any other person for whom the seller may be held liable, and the buyer hereby indemnifies the seller and holds it harmless against any such claim as aforesaid."*

2. Such clauses can obviously have onerous implications for the non-benefitting party as they have the effect of excluding or limiting liability on the part of one of the contracting parties. Our Courts have, on a number of occasions, been tasked with assessing whether or not such clauses can be enforced. Recent cases in this regard will be discussed below, in order that our Courts' historic approach to exemption clauses may be illustrated.

3. Since these decisions were handed down, the Consumer Protection Act, Act 68 of 2008, (hereinafter referred to as "*the Act*") has come into force. This Act deals extensively with exemption clauses and the relevant provisions thereof will also be discussed below as this will have an impact on how our Courts approach such exemption clauses in future.

Case law dealing with enforcement of exemption clauses prior to the Act coming into force:

4. The matter of *Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)* may be considered as one of the most well-known and controversial decisions dealing with the enforcement of exemption clauses. The facts of the matter are briefly as follows:
  - 4.1 The respondent was admitted for an operation and post-operative medical treatment at the appellant's hospital facilities.
  - 4.2 After the respondent had undergone the operation, a nurse in the employ of the appellant negligently caused him injury by applying a bandage too tightly, cutting off the blood supply to a part of his body.
  - 4.3 The respondent then instituted a claim against the appellant, who denied liability based on an exemption clause contained in the

admission agreement. The court *a quo* held that the exemption clause could not be enforced and the matter was taken on appeal.

- 4.4 The exemption clause which the appellant sought to have enforced read as follows:

*"I absolve the hospital and / or its employees and / or agents from all responsibility and indemnify them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient, whatever the causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents."*

- 4.5 The respondent argued that he should not be bound by the exemption clause as the same was against public policy for the following reasons:

4.5.1 There was an unequal position between the parties concluding the agreement, with the hospital being in a stronger bargaining position;

4.5.2 The exemption clause had the effect of exempting the hospital and its employees from properly carrying out their duties;

- 4.5.3 The clause exempted hospital personnel from gross negligence; and
- 4.5.4 The exemption clause conflicted with the constitutional right of access to healthcare.
- 4.6 In the alternative to his argument that the exemption clause was contrary to public policy, the respondent argued that the clause was unenforceable for being unreasonable, unfair and contrary to the principles of good faith which underlie our law of contract.
- 4.7 In the further alternative, the respondent argued that his attention should have been drawn to the clause and the appellant's failure to do so constituted a breach of a legal duty owed to the respondent.
- 4.8 In its consideration of the matter, the Supreme Court of Appeal expressed the view that an exemption clause excluding the appellant from gross negligence would indeed be contrary to public policy. In this case, however, the Court found that gross negligence had not been alleged by the respondent and, as such, this consideration did not find application in the matter.
- 4.9 The Court held that:

- 4.9.1 Clauses of this nature are the norm not the exception, are sound business practice and not contrary to public policy.
- 4.9.2 There was no evidence that the respondent was in a weaker bargaining position than the appellant.
- 4.9.3 There are sufficient sanctions by professional bodies and legislation to ensure that medical professionals perform their duties properly in compliance with their professional rules.
- 4.9.4 The clause does not conflict with the Constitution as contractual freedom is also a constitutionally enshrined right.
- 4.9.5 While the principle of good faith is one of the foundations of our law of contract, it is not a rule of law based on which the exemption clause can be set aside.
- 4.9.6 There was no duty on the appellant's clerk to explain the clause to the respondent nor could the respondent allege that he did not expect such a clause bearing in mind that such clauses have become the norm instead of the exception.
- 4.10 The exemption clause was, accordingly, upheld by the Supreme Court of Appeal.

5. In the matter of *Mercurius Motors v Lopez 2008 (3) SA 572 (SCA)* the Court dealt with exemption clauses that undermine the very essence of a contract. The facts of the matter are briefly as follows:

5.1 The respondent delivered a vehicle that he was leasing to the appellant for a service and certain minor repairs. The vehicle was stolen while on the premises.

5.2 The respondent instituted action based on his contract of deposit with the appellant. The appellant denied that the loss of the vehicle was due to any negligence on its part and relied on exemption clauses in the contract of deposit, one of which appeared on the reverse side of the repair order form (under a carbon copy which had to be detached to reveal the terms and conditions) and read as follows:

*"I/we acknowledge that Mercurius shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and / or burglary and / or unlawful acts (including gross negligence) of their representatives, agents or employees."*

5.3 The court *a quo* held that the exemption clauses were printed in such a manner so as not to draw the reader's attention thereto and, as such, the respondent had been misled and the clauses could not be upheld. The Court *a quo* further found that the appellant had not taken reasonable steps to secure the vehicle as

there were *inter alia* not adequate processes in place to ensure that the keys were not left in the vehicle overnight.

- 5.4 The respondent's claim was awarded with costs.
  - 5.5 On appeal, the Supreme Court of Appeal held that a person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depositary would take reasonable care in relation to the safekeeping of the vehicle entrusted to him or her. An exemption clause such as the one relied upon by the appellant, that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of the customer who signed a standard-form contract, not by way of an inconspicuous and barely legible clause that referred to the conditions on the reverse side of the page in question. The exemption clause was thus not upheld.
  - 5.6 The Supreme Court of Appeal further held that, by not safeguarding the keys to the vehicle, the employees of the appellant did not act as a reasonable person in their circumstances would have acted.
  - 5.7 The appeal was thus dismissed with costs.
6. In the more recent matter of *Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)*, the Court held a different view on the enforcement of an exemption clause. The facts of the matter are briefly as follows:

- 6.1 The plaintiff was a guest at the Birchwood Hotel (hereinafter referred to as "*the hotel*") and wanted to exit the hotel premises.
- 6.2 He found that the gate to one of the entrances of the hotel was closed and waited for a security guard to open the gate. When realising that the gate was still not opening, the plaintiff alighted from his vehicle and walked towards the gate himself.
- 6.3 The gate had jammed and the wheels had come off the rails. The gate fell on the plaintiff as he approached and caused serious bodily injuries.
- 6.4 The plaintiff sought to recover damages from the hotel based on his assertions that the hotel had been negligent and could have prevented the harm from occurring had it:
  - 6.4.1 Properly maintained the gate;
  - 6.4.2 Ensured that the gate was safe for public usage; and
  - 6.4.3 Warned the public of the potential danger created by the state of disrepair of the gate.



- 6.5 The hotel denied negligence and relied on an exemption clause on the back of the hotel registration card, which stated that:

*"The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his / their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft, or any cause and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel."*

- 6.6 Guests were directed to the exemption clause by an instruction on the registration card which read *"Please read terms and conditions on reverse!"*

- 6.7 The Court found that the security guard had failed to take reasonable steps to prevent the accident by warning the plaintiff to keep at a distance. The Court further found that reasonable steps on the part of the hotel would entail regular checks to ensure that every gate was well maintained and functioning properly at all times. If a gate was not functioning well, the hotel should have warned the public of the potential danger posed by the gate.

- 6.8 Turning to deal with whether or not the exemption clause was binding on the plaintiff and if it was not against public policy the

Court applied the test formulated in *Barkhuizen v Napier 2007 (5) SA 323 (CC)* in which it was stated that, when challenging a contractual term, the question of public policy inevitably arises. But that this was no longer difficult to determine because:

*"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain, our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, is a cornerstone of that democracy, it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.*

*... Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

- 6.9 The Court stated that, according to the two-stage enquiry espoused in the *Barkhuizen* case, it may first examine whether a term in a contract is objectively reasonable. If it finds that it is, the

next enquiry is whether it should be enforced in the particular circumstances. The Court expressed the view that exemption clauses that exclude liability for bodily harm in hotels and other public places have the effect, generally, of denying a claimant judicial redress.

6.10 The Court thus held that a guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness.

6.11 The plaintiff's claim thus succeeded.

#### The provisions of the Act which may impact the enforcement of exemption clauses

7. The above decisions are somewhat divergent when it comes to upholding exemption clauses.
8. The position has, however, been clarified to a certain extent by the Act, which came into effect on 01 April 2011 and which sets the promotion and advancement of the economic welfare of consumers in South Africa as its primary purpose. The Act seeks to protect vulnerable consumers and, at present, the Act applies to consumers with an annual turnover not exceeding R2 000 000.00 (two million rand), subject to further

exemptions / exclusions which may apply (as set out in section 5 of the Act).

9. The Act prescribes certain fundamental "*consumer rights*" of which the right to "*fair, just and reasonable contract terms*" may significantly impact the validity and enforceability of exemption clauses as terms that do not comply with the requirements of the Act may be declared unlawful and set aside by the Court.
10. Section 48 of the Act contains a general prohibition on unfair, unreasonable and unjust contract terms and also prohibits any agreement that requires a consumer to waive any rights, assume any obligations or waive any liability of a supplier on terms that are unfair, unreasonable or unjust or if such terms are imposed as a condition of entering into an agreement. The section also lists criteria in order to determine whether a condition of a contract is unfair, unreasonable or unjust terms, which include the following:
  - 10.1 Terms that are "*excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied*".
  - 10.2 Terms which are "*so adverse to the consumer as to be inequitable*".
  - 10.3 If the consumer relied upon a false, misleading or deceptive representation or statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.

11. Section 48(2) of the Act also requires that, if the agreement is subject to a term, condition or notice that may be unfair, unreasonable, unjust or unconscionable in terms of the criteria listed above, the fact, nature and effect of that term, condition or notice must specifically be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements set out by the Act. If this provision is not complied with the Court may set aside the specific terms and conditions that were not drawn to the attention of the consumer.
12. Section 49(1) of the Act states that provisions in consumer agreements must be drawn to the consumers' attention if such provisions:
  - 12.1 In any way limit the risk or liability of the supplier or any other person.
  - 12.2 Constitute an assumption of risk or liability by the consumer.
  - 12.3 Impose an obligation on the consumer to indemnify the supplier or any other person for any cause.
  - 12.4 Are an acknowledgement of any fact by the consumer.
13. In addition to the above, section 49(2) states that, if a provision or notice concerns any activity or facility which is subject to risks, the supplier must specifically draw the fact, nature and potential effect of those risks to the consumer's attention. The consumer must agree thereto by signing or

initialling or otherwise indicating acknowledgment thereof. This is required for any risks:

- 13.1 That are of an unusual character or nature.
  - 13.2 The presence of which the consumer could not reasonably be expected to be aware of or notice, which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances.
  - 13.3 That could result in serious injury or death.
14. Section 49(3) and 49(4), read together with section 22, states that any such provisions, conditions or notices must be written in plain language and must be drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer having regard to the circumstances. Furthermore, this must be done before the consumer:
- 14.1 Enters into the agreement,
  - 14.2 Begins to engage in the activity;
  - 14.3 Enters or gains access to the facility; or
  - 14.4 Is required or expected to pay for the transaction.

15. In terms of section 49(5), the consumer must be given adequate opportunity in the circumstances to receive and comprehend the provision or notice.

16. Section 51 of the Act further contains certain outright prohibitions on the terms that can appear in contracts and states *inter alia* the following:

*"A supplier must not make a transaction or agreement subject to any term or condition if –*

*...*

*(b) it directly or indirectly purports to –*

*(i) waive or deprive a consumer of a right in terms of this Act;*

*(ii) avoid a supplier's obligation or duty in terms of this Act;*

*(iii) set aside or override the effect of any provision of this Act; or*

*(iv) authorise the supplier to –*

*(aa) do anything that is unlawful in terms of this Act; or*

*(bb) fail to do anything that is required in terms of this Act ..."*

17. Section 51(1)(c)(i) of the Act further specifically prohibits terms that purport to *"limit or exempt a supplier of goods or services from any liability for a loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier ..."*.

18. Section 51(1)(c)(i) accords with the Court's decision in the *Afrox* case in which it was held that the exclusion of gross negligence in an exemption clause is contrary to public policy.
19. In terms of section 52 of the Act, if the Court determines that provision was (in whole or in part) unconscionable, unjust, unreasonable or unfair, the Court may make a declaration to that effect and make any order that it deems just and reasonable in the circumstances. This includes an order to compensate the consumer for losses and expenses.

### Conclusion

20. It is clear that the Act does not preclude a party from including an exemption clause in an agreement. The Act does, however, offer a more clear recourse to a non-benefitting party who seeks to impugn the enforceability of such a clause.
21. There seems to be an argument to be made that, had the Act been in force when the *Afrox* matter was decided, the outcome may have been different, specifically with regard to the obligation to draw the patient's attention to the exemption clause. The decisions in the *Mercurius Motors* and *Naidoo* matters seems to be more in line with the provisions of the Act.
22. The Act does, however, not have retrospective effect and the provisions can only be relied on in respect of agreements entered into after 01 April



2011. The manner in which our Courts will approach the provisions of the Act remains to be seen as there has not been reported case law on the subject as yet.

23. It will be of particular interest how the Court will approach the question whether or not an exemption clause is so adverse as to be inequitable. It may well be that the test laid down in the Naidoo matter may find application, i.e. that a clause will be found to be inequitable if it has the effect of denying judicial redress to such an extent that it offends against notions of justice and fairness.
24. For a further discussion on the effect of the Act on product liability claims, please refer to an article by the same author titled *"Our Courts' approach to product liability claims and the impact of the Consumer Protection Act thereon, with specific reference to manufacturers' and suppliers' liability"*.

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## **Bibliography:**

### Case law:

- *Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)*

- *Mercurius Motors v Lopez 2008 (3) SA 572 (SCA)*
- *Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)*

Legislation:

- The Consumer Protection Act, Act 68 of 2008