

REVISITING THE INTERPRETATION OF EXEMPTION CLAUSES

**Drifters Adventure Tours CC v Hircock
2007 2 SA 83 (SCA)**

1 Introduction

The influence of the Constitution on the enforceability of exemption clauses contained in contracts has received some attention in the recent jurisprudence and literature on the subject. (Tladi "One Step Forward Two Steps Back for Constitutionalising the Common Law: *Afrox Healthcare v Strydom*" 2002 2 *SA Public Law* 473-478; Young "Indemnification Clauses in Multiple Contract Transactions" March 2002 *IBL* 115-118. Van der Heever "Exclusion of Liability in Private Hospitals" April 2003 *De Rebus* 47-48; Richardson "Managing HIV/AIDS Impact No Easy Task; Interpreting an Indemnity Clause: Insurance" Jun-Jul 2005 *Executive Business Brief* 28-29; Hopkins "Exemption Clauses in Contract" June 2007 *De Rebus* 22-25; and Visser "*Drifters Adventures Tours CC v Hircock* [2006] SCA 130 (RSA)" 2007 1 *De Jure* 188-193.) In particular, decisions of the Supreme Court of Appeal, the traditional upper custodian of the common law, have drawn much interest and criticism for their apparent failure to approach contractual issues from a constitutional perspective. The recent case of *Drifters Adventures Tours CC v Hircock* (2007 2 SA 83) provides a further opportunity to obtain some insight into that court's approach in interpreting exemption clauses in contracts. This note endeavours to analyse the court's approach and decision in the *Drifter's* case against the background of the well-established traditional approach to contractual interpretation as well as recent cases which have raised the role of the Constitution with respect to exemption clauses. A further objective of this paper is to consider the impact of the court's decisions on the wording which drafters of such clauses choose to use when seeking to protect their clients or themselves.

2 Facts

The appellant was a tour operator who operated across borders from South Africa. It was common cause that the respondent was injured as a result of an accident which resulted from the negligent driving of an employee of the appellant while travelling in Namibia on a bus operated by the appellant. The appellant denied vicarious liability for damages caused by its employee on the basis of an exemption clause which read as follows:

"I have read and fully understand and accept the conditions and general information as set out by Drifters in their brochure and on the reverse side of

this booking form. I acknowledge that it is entirely my responsibility to ensure that I am adequately insured for the above venture. I further absolve Drifters, their staff and management and affiliates of any liability whatsoever, and realise that I undertake the above venture entirely at my own risk" (86E-F).

The conditions found on the reverse side of the booking form under the heading "Booking Conditions and General Information" read as follows:

"Due to the nature of hiking, camping, touring, driving and the general third-world conditions on our tour/ventures, Drifters, their employees, guides and affiliates, do not accept responsibility for any client or dependant thereof in respect of any loss, injury, illness, damage, accident, fatality, delay or inconvenience experienced from time of departure to time of return, or subsequent to date of return, such loss, injury, etc arising out of any such tour/venture organised by Drifters" (86E-F).

The sole question before the court was whether the exemption clause protected the appellant from liability for the damages sustained by the respondent from the negligent driving of one of the appellant's employees on a public road (88F-G).

3 Judgment

After stating the general rule relating to the validity and interpretation of indemnity clauses, and especially the fact that in the case of ambiguity such clauses should be interpreted *contra proferens*, the court found that the exemption clause (as quoted above) should not be read in isolation but with reference to the whole contract. The court stated:

"Despite the fact that the latter part of the indemnity clause, read on its own, is wide enough to exclude liability for negligence ('any liability whatsoever') one is nevertheless driven to refer to the reverse side of the document and particularly to the conditions appearing there" (88B).

The court then turned its attention to the conditions found on the reverse side of the booking form. It found that the reference to "driving" in the above context was, at best for the appellant, ambiguous, and had to be interpreted with a bias against the *proferens* (88G-H). In essence the court then held that, "the appellant's refusal to take responsibility for 'driving' is predicated upon the 'nature' of the driving in respect of 'adventure' activities" (88H-I). According to the court, the reason for the ambiguity is the fact that the reference to "driving" in the conditions (quoted above) does not refer to negligent driving anywhere in the country and on any terrain, but to driving in "general third-world conditions" as described in the quotation above.

In the light of the above, the exemption clause was, according to the court, capable of bearing more than one meaning and had to be interpreted in a manner least favourable to the *proferens*. Ultimately, the finding of the court was that the exemption clause did not intend to exclude liability for negligent driving on public roads in spite of the wording "any liability whatsoever" in the clause and that the appellant accordingly did not contract out of its liability for damages caused by the negligent driving of its employee in the case at hand. In support of this restricted interpretation of "driving", the

court also cited the argument that the appellant was obliged in terms of the Cross-Border Road Transportation Act (4 of 1998) to have a permit which required it to hold minimum passenger liability insurance (89E-F). The court held that for the appellant to contract out of this liability altogether would be “so perverse that we cannot accept that the appellant would have done so” (89G). The appeal was accordingly dismissed.

4 Analysis

The general rule regarding the validity of exemption clauses seems to be trite: the onus to establish the validity of an exemption clause is on the party wishing to rely on it (see, eg, *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA); and *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA)). An exemption clause will be enforceable if it is clear, unambiguous and not against public policy (see *Afrox Healthcare Bpk v Strydom supra*). In the words of Scott JA in *Durban’s Water Wonderland (Pty) Ltd v Botha* (1999 1 SA 982 (SCA) 989G-J):

“If the language of the disclaimer or exemption clause is clear 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*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A) 804C.) But the alternative meaning on which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be ‘fanciful’ or ‘remote’.”

Courts are often called upon to properly interpret a contract in order to resolve a dispute. One part of this process of interpretation involves ascertaining the meaning of the particular words used, the grammatical construction of the sentences, and the facts or external objects to which the words of the document relate in order to arrive at a “sense of the whole document” (*Rand Rietfontein Estates Ltd v Cohn* 1937 AD 324-325).

There have been a number of reported cases illustrating a range of different wordings which drafters have endeavoured to utilise in order to attempt to obtain maximum protection for their interests. The courts have already given detailed consideration to the proper meaning of words and phrases such as “any”, “any damage”, “any loss”, “however caused”, “from whatever cause arising” and “for whatever reason”. It is true that such words and phrases cannot be read in isolation and must be interpreted specifically within the context in which they operate. Nevertheless, it is useful to consider the court’s ordinary understanding of some of the above-mentioned words and phrases. This may serve to emphasise the importance of context in the *Drifter’s* case where the words exempting liability appeared within a specific framework which is central to an understanding of the judgment.

In *Hayne & Co v Kaffrarian Steam Mill Co Ltd* (1914 AD 363 371), Innes CJ stated that “in its natural and ordinary sense ‘any’ – unless restricted by context – is an indefinite term which includes all the things to which it relates”. “Any damage” has been held to mean, ordinarily, damage of

whatever kind (*Herman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D & CLD) 395B-C). In *Herman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* (*supra*), the clause in dispute made reference to the words "from whatever cause arising" and these words were held to be extremely wide in scope (see also *Stott v Johannesburg Country Club* 2003 4 SA 559 (T) 564G-H). Much was made of the fact that the clause in question not only drew attention to the kinds of damage (namely, "any damage") to be covered, but also to the origin of the damage, however caused, that it intended to eliminate (*Herman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* *supra* 395B-D). The court held that the ordinary meaning of the words, as they were used, made the clause wide enough to exclude the lessor's liability for damages arising out of a failure to maintain the exterior of leased premises (*Herman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* *supra* 391D-E).

In *Chubb Fire Security (Pty) Ltd v Greaves* (1993 4 SA 358 (W)), the respondent had sold his business to the applicant and had been employed by the applicant immediately thereafter. The contract of employment contained a restraint of trade clause and, when the applicant unlawfully dismissed the respondent, the question arose as to whether the applicant was entitled to enforce the restraint despite having repudiated the contract of employment. Although it was common cause that the agreement was terminated as a result of the applicant's repudiation thereof, the applicant claimed that it was entitled to rely on the restraint clause because it provided that the restraint would apply "for a period of two years as from the date of termination of (respondent's) employment for whatever reason" (*Chubb Fire Security (Pty) Ltd v Greaves* *supra* 360H).

One of the contentions of the respondent was that the words "for whatever reason" had to be interpreted to refer only to the grounds for termination of the contract enumerated in the agreement itself. The court held that the words "for whatever reason" in the restraint clause had a very wide meaning as there was no indication that the parties intended to in any way restrict the plain meaning of the words so as to apply only to termination of employment on the grounds enumerated in the agreement (*Chubb Fire Security (Pty) Ltd v Greaves* *supra* 361H-I).

Similarly, in *Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd* (1980 4 SA 517 (Z)), Squires J had to consider a clause referring to "any loss" and held that it ordinarily meant loss of whatever kind (523H; and regarding a similar approach to the words "any legal action", see *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A)). The learned Judge went on to add that there was nothing which could limit the ambit of the losses which had been contemplated in that case in such a way as to exclude a loss caused by negligence. Regarding clauses which added additional words such as "of whatever kind", or "howsoever caused", or the like, Squires J was of the opinion that they were added *ex abundanti cautela* (*Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd* *supra* 523I). He concluded that "any loss" must mean any kind of loss however it was caused, thereby including loss caused by negligence (523I).

In *Stott v Johannesburg Country Club* (*supra* 565), it was held that the words “however caused”, although being a phrase indicating a disclaimer in the widest possible terms, did not necessarily indicate that the rule included the instance of harm suffered by a member not on the club premises for loss of support of another member suffering personal injury on the club’s premises (565E-F). Applying the golden rule in this case, the Court held that the provision in question related only to injuries or harm suffered by a member when that member is physically upon the club premises and/or grounds (565E-F). The Court conceded, however, that the view professed by the golf club was possible, although less probable. Relying upon the case of *Durban’s Water Wonderland (Pty) Ltd v Botha* (*supra*), the Court found that the language used had to be construed against the *proferens*. This decision was confirmed on appeal in *Johannesburg Country Club v Stott* (*supra*).

In the *Durban’s Water Wonderland* case, the appellant’s liability had to be considered in the light of notices which provided that:

“The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided” (988D-E).

The Court held that it was apparent from the language employed in the disclaimer that any liability founded upon negligence in the design or construction of the amusement amenities would fall squarely within its ambit (990I-911A). The Court went as far as to conclude that the language used was capable of only one meaning, namely that the appellant would not be liable for injury or damage suffered by anyone using the amenities, whether such injury or damage arose from negligence or otherwise (992C-D).

As quoted above, in the *Drifters* case the appellant’s indemnity form contained a sentence (in bold capitals) absolving Drifters, their staff, management and affiliates of “any liability whatsoever”. The reverse side of the form included a condition stating that the appellant did not accept responsibility in respect of “any loss, injury, damage, accident, fatality, delay or inconvenience experienced from the time of departure to time of return ... such loss, injury etc arising out of any such tour/venture organised by Drifters”.

Relying upon the decisions in *Hayne* and *Herman’s Supermarket*, and reading the words “any liability whatsoever” in isolation, it is feasible to conclude that the appellant should have escaped liability by virtue of the exemption clause contained on the front of the indemnity form. Indeed, even when one considers the wording contained on the reverse side of the form in isolation, it is arguable that the view in *Stuttaford* regarding the interpretation of “any loss” could be followed in a manner to exclude liability.

This argument may find further support with some in the decision of the SCA in *First National Bank of SA Ltd v Rosenblum* (*supra*). In this case, the

respondents sued the appellant bank for damages arising out of the theft of the contents of a safe deposit box. The appellant avoided liability on the basis of the following term in the contract for the provision of the box which expressly excluded liability (194C-D):

“The bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage and whether the loss or damage is due to the bank’s negligence or not” (194C-D).

It was uncontested that some of the bank’s employees had been involved in the theft of the contents of the box, either acting negligently or in a grossly negligent fashion (195C). The respondents relied upon the *eiusdem generis* rule to contend that the clause only dealt with causes of loss beyond the control of the bank. The SCA concluded, however, that the breadth of the phrase “or as a result of any cause whatsoever” could not be narrowed so as to exclude liability for causes beyond the control of the bank only (197H).

Such approaches, when applied to the *Drifter’s* case, would effectively question whether the wording of the exemption clause in the *Drifters* case was ambiguous. The argument could be that it would be difficult to get a more lucid statement than the following: “I further absolve Drifters, their staff, and management and affiliates of any liability whatsoever, and realise that I undertake the above venture entirely at my own risk” (our emphasis). Following the *First National Bank* case, it might be argued that this wording cannot be narrowed in such a way as to allow the appellant to be liable for the respondent’s injuries.

That there was, somewhere else in the document, a statement that the appellant or its affiliates did not accept any responsibility for misfortunes which arose out of the “nature of hiking, camping touring, driving and the general third world conditions” (*Drifters Adventure Tours CC v Hircock supra* 86F-G) would not, according to this view, have any bearing on the clear language of the indemnity clause. In addition, it could be argued that the fact that the sentences preceding the indemnity clause referred to the undertaking that the tourist had read and understood the whole agreement also does not detract from the clarity of the indemnity clause. Moreover, the first few words of the indemnity clause, “I further absolve ...” would clearly express the fact that, over and above whatever else is agreed to in the document, the contracting party absolved the appellant from “any liability whatsoever”.

This reasoning would culminate in the conclusion that the court erred in interpreting the indemnity clause as it did by using one section of the contract to limit the ordinary meaning of the indemnity clause in a way which could not have been intended by the parties. This approach would consider the court’s interpretation in *Drifters* to fall into the very trap warned against in *Durban’s Water Wonderland (Pty) Ltd v Botha (supra)* quoted above:

“But the alternative meaning on which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be ‘fanciful’ or ‘remote’.”

It must be remembered, however, that to determine the meaning of the words used by the parties, the contract is interpreted as a whole (Sharrock “Contract” in Joubert *The Law of South Africa* (2004) 270; and *South African Warehousing Services (Pty) Ltd v South British Insurance Co Ltd* 1971 3 SA 10 (A)). In order to achieve this, every clause of the contract should be read together with the other clauses contained in the contract as well as with the apparent purpose and scope of the contract (Sharrock 270; and *South African Warehousing Services (Pty) Ltd v South British Insurance Co Ltd supra*). As the Appellate Division (as it then was) held in *Swart v Cape Fabrix (Pty) Ltd* (1979 1 SA 195 (A)), when the meaning of words in a contract has to be determined, “they cannot possibly be cut out and pasted on a sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evident that a person must look at the words used having regard to the nature and purpose of the contract, and also at the context of the words in the contract as a whole” (202B-D).

In the constitutional era, this has been restated so that the answer is to found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law with due regard to any constitutional implication (*First National Bank of SA Ltd v Rosenblum supra* 196A-C).

It is also correct that if a later clause qualifies an earlier one, effect is given to the later clause and that if the language used, read in its context, is vague or ambiguous, evidence of the surrounding circumstances is admissible in order to ascertain the true intention of the parties. (Sharrock 270. In the *Drifter’s* case, the appellant’s founder, Mr Dott, testified as to the origin of the contractual indemnities in the contract which the parties had signed. As the court noted, “significantly absent from Mr Dott’s recital of the risks the appellant wishes to exclude are those inherent in ordinary road transportation”.) If, after such consideration, the court is still unsure, it may rely on one or more of the canons of construction to decide the meaning the parties intended (Sharrock 271). These include the *contra proferentem* rule and the *eiusdem generis* rule (Sharrock 271).

Given the above, it is submitted that a proper linguistic construction and interpretation of the contractual indemnities in the *Drifter’s* case result in the conclusion which the court arrived at. As the court in *First National Bank of SA Ltd v Rosenbaum (supra)* concluded, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfill a contractual obligation (such as “any liability whatsoever”), it would not be regarded as doing so if there was “another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application” (*First National Bank of SA Ltd v Rosenbaum supra* 195G-196C). This is particularly true in the *Drifter’s* case because, to use the words of the court, a reader is driven to the reverse side of the document and especially the conditions appearing

there, in order to interpret the indemnity clause (*Drifters Adventure Tours CC v Hircock supra* 88B-C).

Such an analysis raises the importance of the words drafters of contracts choose to use when seeking to protect their clients or themselves from liability as well as the way in which the words chosen are arranged. This analysis necessitates some further consideration.

5 Choosing the proper words in exemption clauses and the role of public policy

“Liability for negligence can be excluded or limited, if the proper words are chosen for the contract” (Squires J in *Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd supra* 523C-D).

It is possible to use the *ratio decidendi* of some of the above-mentioned cases, together with the seminal judgment of the Constitutional Court in *Barkhuizen v Napier* (2007 5 SA 323 (CC)), in order to arrive at principles which should aid the effective drafting of exemption clauses in future taking into consideration the proper role of public policy.

5.1 Exemption clauses may enjoy wide scope

In the *Chubb* case, for example, the court held that the words “for whatever reason” in the restraint clause had a very wide meaning because there was no indication that the parties intended to in any way restrict the plain meaning of such words (*Chubb Fire Security (Pty) Ltd v Greaves supra* 361H-I). In the *Drifters* case, although the drafters used the words “I further absolve Drifters ... of any liability whatsoever”, the drafters opened the door to the interpretation favoured by the court by indicating that these words were to be read in conjunction with the conditions on the reverse side of the brochure. As explained above, the conditions on the reverse side placed the exclusion of liability within the specific context of adventure activities and served as a contraction of the very wide indemnity which would have been enjoyed had the appellant not included the conditions explaining the reason for the exclusion clause.

5.2 The clause should be clear and unambiguous

It is submitted that the ideal situation for drafters of exclusion clauses would be to ensure that the court considers the language they have used to be capable of only one “fairly susceptible” meaning, in order to ensure that the *contra proferentem* rule will not apply to their disadvantage. Applying this to the *Drifters* case, and relying upon the *Durban’s Water Wonderland* case, it is suggested that despite Mr Dott’s testimony, the appellant probably intended to absolve itself from any liability for any injury or damage suffered by anyone subjecting themselves to a Drifter’s tour or venture – whether such injury or damage arose from negligence or otherwise (*Durban Water Wonderland (Pty) Ltd v Botha supra* 992A; and see *Municipality of Kwekwe*

v Imprecon (Pty) Ltd 1984 1 SA 38 (ZS) to the effect that a court should interpret a contract having regard not only to the particular clause under consideration but also to the overriding purpose which the contract was intended to achieve). Indeed, had the indemnity form not contained reference to an acknowledgment that the conditions on the reverse side of the form had been read, the legal position may have been quite different. The exemption clause would have been clear and unambiguous when reading the contract as a whole and the court would have been forced to give effect to it unless it considered the exemption of liability to be contrary to public policy. Because of the provisions of the Cross-Border Road Transportation Act (4 of 1998) which obligated the appellant to carry minimum passenger liability insurance, it appears that the court in the *Drifter's* case might have considered an exclusion of liability in the circumstances of a bus accident to be contrary to a statutory provision and against public policy even if the wording of the indemnity form had been different (*Drifters Adventures Tours CC v Hircock supra* 89D-F). Although the court used the Cross-Border Road Transportation Act in support of its interpretation of the expression "driving" its expressed sentiments may be indicative of its opinion regarding the public policy issue. In particular, the court noted that, "contracting out of this liability altogether would be so perverse that we cannot accept that the appellant would have done so" (*supra* 89F-G). As discussed below, the Constitutional Court judgment in *Barkhuizen* impacts upon our understanding of the relationship between public policy and the Constitution and the role of public policy as part of the law of contract.

5.3 *The risk of contravening public policy*

The court in *Barkhuizen* noted that constitutional challenges to contractual terms ordinarily resulted in the question of whether the disputed provision was contrary to public policy (333B-C). The court confirmed that public policy was now deeply rooted in the Constitution, represented the legal convictions of the community and embodied those values held closely by society (333C-D).

A pertinent question in *Barkhuizen* was whether public policy tolerated a time limitation clause in a short-term insurance contract between private parties – a clause which did not *deny* the applicant the right to seek judicial redress (although the right was certainly limited) (337E-G). Similarly, it may be argued that one of the fundamental questions in cases involving exclusion clauses is whether public policy sanctions the clause in issue.

One possible reason for the drafter's having included the conditions explaining the exclusion from liability sought (as opposed to a bare disclaimer in the widest possible sense) may have been to ensure that a challenge against the enforceability of the contract on grounds of public policy would not succeed.

As Innes CJ noted:

“Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognise any arrangement which is contrary to public policy” (*Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 779).

Given the traditional approach of the court in this regard, however, there is a strong argument to encourage drafters in general to endeavour to absolve their client's of liability as widely (but as clearly and unambiguously) as possible instead of concerning themselves with issues of public policy at the drafting stage. This would result in the court being forced to consider the exemption clause under consideration to be clear, unambiguous and, for example, to exclude liability even for grossly negligent behaviour (see *First National Bank of SA Ltd v Rosenblum supra* 201G relying upon *Fibre Spinners and Weavers* (1977 2 SA 324 D) which held that there was no reason, founded on public policy, why a clause exempting a person from liability for gross negligence should not be enforceable). To read such a clause against the drafter would then necessitate a finding that the clause was contrary to public policy – a conclusion which South African courts have traditionally been reluctant to reach. Further support for this submission is to be found in *Afrox Healthcare Bpk v Strydom (supra* 35 par 13). In this case, Brand JA held that even when a party specifically alleges that a clause is too wide in scope, for example, because it includes exemption for gross negligence, the clause must still be interpreted with reference to the facts before the court. In other words, where the facts indicate ordinary negligence and not gross negligence, the breadth of the exemption clause will be read down in such a way that it is interpreted with specific reference to the facts. The argument in this regard is simply that there is very little risk in drafters drawing their exclusion clauses in a wide manner considering that the court will in any event interpret the clause with reference to what has actually transpired. Considering the judgments of the Supreme Court of Appeal (and its predecessor, the Appellate Division) results in the contention that clauses will not be struck down as contravening public policy merely because they have been drafted in an all encompassing way. Only if the facts indicate, for example, gross negligence, will the court consider whether it is contrary to public policy for a party to have sought to exclude liability for gross negligence. If the facts indicate ordinary negligence, despite the clause referring to excluding liability for “negligence and gross negligence”, the court will consider public policy purely with reference to the negligent conduct. It would, therefore, be arguable that there is minimal hazard in drafters adopting this tactic. If an event occurs which the court considers would be against public policy to exclude a party from liability, it will make such a finding irrespective of the wording chosen. But to draft an exclusion clause in a restricted mode, for example, by including conditions, examples of cases where liability will not be accepted or an explanation of the reasons for excluding liability (as in the *Drifter's* case) results in greater opportunity for an unsatisfactory conclusion as far as that party is concerned.

The conventional reason for the court's apparent reluctance to consider such clauses to be in contravention of public policy is that two very important principles of freedom of contract and legal certainty dictate against such a finding. This is succinctly stated in the often-quoted *dictum* by Smalberger JA in *Sasfin (Pty) Ltd v Beukes* (1989 1 SA 1 (A) 9B-F):

"The power to declare contracts against public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12: ...

'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ...'

In grappling with the often difficult problem it must be born in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."

The upholding of the indemnity clause in *Afrox Healthcare Bpk v Strydom* (*supra* 34E-F) is a striking example of a clause that, on the face of it, can be said to "offend one's individual sense of propriety and fairness" and yet was still upheld by the SCA. The clause read as follows:

"Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende 'n afhanklike van die pasiënt) weens skade of verlies van watter aard ookal (insluitende gevolgsnade of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die pasiënt of enige siekte (insluitende terminale siekte) opgedoen deur die pasiënt wat ook al die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuim deur die hospitaal, werknemers of agente." (*Afrox Healthcare supra* 32 G-I. One of the reasons for the court's decision in *Afrox* was its finding that exemption clauses in standard contracts are the rule rather than the exception.)

In *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* (2004 5 SA 248 (SCA)), the court held that contractual provisions will generally only be regarded as contrary to public policy when that is their clear effect. The court went on to note that this would be the case only if there was a probability that unconscionable, immoral or illegal conduct would result from the implementation of the provisions according to their tenor (258D-G; and this judgment was applied in *SA Bank of Athens Ltd v Van Zyl* 2005 5 SA 93 (SCA)). In *Sasfin's* case a deed of cession by a doctor who placed a finance company in immediate and effective control of all the doctor's earnings, including the recovery of the doctor's book debts was considered to be unconscionable and incompatible with public policy and thus contrary to public policy (*supra*). Similarly, it may be arguable that an exclusion clause which seeks to exclude any and every possible occurrence which might result in liability should be considered to be contrary to public policy. Although the SCA's approach, particularly in *Afrox* where the exclusion clause was drafted extremely broadly, would suggest that even

this is unlikely, the judgment of the Constitutional Court in *Barkhuizen* may have important ramifications in this regard.

There are some important similarities between exclusion clauses and time-limitation clauses which necessitate a detailed consideration of the Constitutional Court's verdict in *Barkhuizen*. For example, both types of clauses may be characterised as being a common feature in South African contracts. The court in *Barkhuizen* was able to justify the upholding of such clauses by emphasising the importance of limiting the time period within which litigation ought to be launched. Similarly, it is arguable that the court would justify exclusion clauses as being important for limiting the liability of a party to a contract, possibly thereby facilitating greater economic activity by permitting a contracting party to shift liability in certain instances. One could extend this line of reasoning, following the approach in *Barkhuizen* and because of the principle of *pacta sunt servanda*, in order to conclude that there is no reason in principle why public policy would not tolerate exclusion clauses in contracts subject to the considerations of reasonableness and fairness (338G and 344D-E).

6 Conclusion: is the enforcement of exemption clauses unconstitutional?

It is now clear that the law of contract, like all law in South Africa, is subject to the Constitution (*Barkhuizen v Napier supra* 333C-E). According to the majority judgment of Ngcobo J, a term opposed to the values enshrined in the Constitution would be against public policy and, therefore, unenforceable (*Barkhuizen v Napier supra* 333E-F). Testing clauses in this manner,

“leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them” (*Barkhuizen v Napier supra* 334A-B).

Hopkins has recently pondered whether exemption clauses are constitutionally compliant or whether they should be regarded as being unenforceable on account of the fact that they are inconsistent with the spirit, purport and object of the Bill of Rights (Hopkins June 2007 *De Rebus* 22). In particular, he submits that the constitutional provision which should be targeted as the violated provision should be section 34 of the Constitution which provides for the right of access to court. (S 34 of the Constitution reads as follows: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”) This, so the argument goes, would place the debate at the level of whether the limitation of section 34 should nevertheless be allowed to stand on the basis of the section 36 limitations clause (Hopkins June 2007 *De Rebus* 25).

In dealing with this argument it is important to note that the court in *Barkhuizen* confirmed that section 34 reflects the values that underlie the constitutional order in South Africa and also constitutes public policy (334G).

According to this judgment, the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy (339F). As a result, it may be argued that the proper approach to matters pertaining to exclusion clauses may also be to determine whether the clause in question is inimical to the values underscoring our society, as given expression to in section 34, and thus contrary to public policy (335F).

But do exemption clauses in contracts always amount to a limitation of the constitutional right contained in section 34 as Hopkins suggests? Put differently, do exclusion clauses in all cases contravene public policy by negating an applicant's constitutional right to enjoy judicial redress of legal disputes? Specifically with reference to cases like *Drifters*, it does not appear that an argument could be sustained to the effect that an exemption clause detracts from a person's right to have a dispute resolved by the application of law in a court or similar tribunal and should only be permitted in justifiable cases (in terms of s 36). There appears to be a difference between such scenarios and the *Barkhuizen* case. The latter case dealt specifically with a time-bar clause which is always likely to result in a special plea which, if successful, indeed does have the effect of preventing the merits of the matter being argued in court. A party aggrieved by the enforcement of an exemption clause would always have access to court to argue, for example, about the interpretation of the clause, that it should be construed *contra proferentem* or that it contravened public policy. Such opportunities may indeed be considered to afford a claimant an "adequate and fair opportunity to seek judicial redress" (see *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC); 1996 12 BCLR 1559 (CC)). Considering whether a time-limitation clause affords a contracting party an inadequate opportunity to have disputes arising from the contract resolved by a court may always involve balancing the principle of *pacta sunt servanda* with everyone's right to seek judicial redress in terms of section 34. It is questionable, however, whether section 34 of the Constitution should always be relied upon as the basis for an argument that a particular exclusion clause contravenes public policy.

There may be a further important consideration which addresses this issue. The court in *Barkhuizen*, relying on *Afrox* and because of the unequal nature of South African society, emphasised that the relative situation of contracting parties was a relevant consideration in determining whether a contractual term was contrary to public policy (341G-I). In other words, in addition to objectively determining the reasonableness of a particular contractual provision, a further enquiry involves an investigation into the circumstances of the case – which includes consideration of the relative situation of the contracting parties and an acknowledgment that the unequal bargaining power of parties to a contract is an applicable factor in the consideration of public policy (341). While public policy generally favours the utmost freedom of contract, also as part of an individual's dignity and autonomy in regulating their own life (*Napier v Barkhuizen* 2006 4 SA 1 (SCA) 8D-G; and see Hopkins June 2007 *De Rebus* 25), it nevertheless takes into account the necessity for doing simple justice between the parties to the contract (*Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 3 SA 773

(A)). Proper consideration of the circumstances of the parties to a contract which incorporates an exclusion clause may open the door to a particular exclusion clause being held to contravene public policy without section 34 being relied upon. The question is whether concepts such as “reasonableness” and “fairness”, while undoubtedly based upon the values underlying the Constitution, would always require a specific constitutional right as being the pivot around which a challenge based on public policy was founded. Public policy should only be relied on as a cause of action or defence where the content of the contract itself, or the effect thereof, is harmful to the public interest (see *Barnard v Barnard* 2000 3 SA 741 (C)). Contravening a statutory proviso or a provision of the Bill of Rights clearly and directly should, in our view, normally be tantamount to contravening public policy. The court’s power to declare a contract contrary to public policy should be exercised where impropriety and the element of public harm are manifest (*Barnard v Barnard supra*). Agreements or clauses clearly inimical to the interests of the community, whether contrary to law or morality or social or economic expedience will be unenforceable on grounds of public policy, and courts should not avoid declaring them to be unenforceable (*Sasfin (Pty) Ltd v Beukes supra*). In the context of exclusion clauses specifically, whether such a finding always requires a link to a constitutional right, rather than a broader consideration of the relative circumstances of the contracting parties, constitutional values, reasonableness and fairness remains to be seen.

Frans Marx and Avinash Govindjee
Nelson Mandela Metropolitan University, Port Elizabeth