Exemption Clauses: an assessment of the burden of proof

By Ivor Heyman

Much has changed in the legal landscape surrounding exemption clauses from when the landmark case of **Durban's Water Wonderland (Pty) Ltd v Botha** 1999 1 SA 982 (SCA) was decided. In that case, the court had to decide on the enforceability of a disclaimer notice when the plaintiff and her daughter were flung from a jet ride in an amusement park. The SCA held that, since the defendant had done whatever was necessary to bring the notice to the attention of the plaintiff, the notice could be incorporated into the contract between the plaintiff and defendant, and the disclaimer notice was upheld.

Over time, the strict interpretation of contract followed by the court in **Durban's Water Wonderland** has been tempered by various decisions of our courts. As can be seen from the decisions below, courts have become unwilling slavishly to enforce exemption clauses, preferring instead to examine whether the terms of the contract operate unfairly and unreasonably on the plaintiff.

In the case of Johannesburg **Country Club v Stott** 2004 (5) SA 511 (SCA), the court stated in an obiter dictum that exclusion of liability for damages for negligently causing the death of another was "radical" and that it was arguable that to permit such exclusion would be against public policy because it runs counter to the high value which previously the common law, and now the Constitution, places on the sanctity of life.

In the case of **Barkhuizen v Napier** 2007 (5) SA 323 (CC), the Constitutional Court held that, while it was necessary to recognise the doctrine of pacta sunt servanda, courts could decline the enforcement of a contractual clause if implementation would result in (i) unfairness or (ii) would be unreasonable for being contrary to public policy. According to the court, a term in a contract that seeks to deprive a party of judicial redress is prima facie contrary to public policy, and is inimical to the values enshrined in our Constitution, even if freely and voluntarily entered into by consenting parties.

In **Naidoo v Birchwood** 2012 (6) SA 170 (GSJ), the court held that an exemption clause which enabled a hotel to escape liability for injury to its customers while on hotel premises could not be enforced. The court stated that the question is whether in the circumstances of a particular case (e.g. where the plaintiff is staying at a hotel or visiting a public place), the enforcement of a contractual term would result in an injustice. If the exemption clause prevented the contracting parties from having access to the courts, it would be unfair and unjust.

The most far-reaching incursion into the sanctity of exclusion clauses can be found in the **Consumer Protection Act**, No 68 of 2009. Regulation 44(3)(a)2 of the Act provides that a term of a consumer agreement is "presumed" to be unfair if it has the purpose or effect of "excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier..." This regulation creates a presumption that the defendant bears the onus to dislodge, and which the plaintiff may then rebut.

It is submitted that exclusion clauses have gone from being prima facie enforceable to prima facie unenforceable. The reason is that such clauses deny access to the courts, a situation that our courts are no longer prepared to countenance for the reasons stated above. The result is the plaintiff no longer bears the onus to show that the clause limiting liability for injury or death is unfair and unreasonable. The defendant now bears the onus of showing that the clause is fair and reasonable.

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