Contractual Exemption Clauses under the South African Constitution: An Examination of the Potential Impact of Public Policy and Ubuntu on such Provisions

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Declaration of Candidate

I, Sheethal Sewsunker, hereby declare that the content submitted in this dissertation represents my own work unless otherwise indicated to the contrary in the text. Furthermore, the dissertation has not previously been submitted towards any other academic qualification.

Abstract

This dissertation will examine the current state of our common law in relation to its treatment of exemption clauses in contracts, and will focus on recent developments which may augur greater scope and a new approach to be taken in future for South African courts to ensure fairness and the promotion of substantive justice for contracting parties faced with such provisions. Whilst it is acknowledged that exemption clauses are considered to be an integral part of most contracts and are used to facilitate the efficient running of businesses, their continued use in standard form contracts have been viewed with judicial suspicion and scrutiny as the inherent nature of these clauses have the potential to operate unfairly against a contracting party by excluding their rights of recourse which they would have otherwise had at common law. Public policy has always been a benchmark against which potentially unfair contracts terms have been measured however, the advent of the Constitution has brought about a new meaning to be prescribed to public policy as the Constitutional Court has declared that it is now deeply rooted and informed by constitutional values of dignity, equality, freedom and more recently ubuntu which is to infuse the common law principles of contract. Despite these developments, the new meaning of public policy and the apparent elevation of the spirit of ubuntu as an overarching and founding constitutional value has not been fully utilised by courts in a manner which can effectively address these potentially unfair, one-sided and abusive exemption clauses by declaring them to be contrary to public policy. Notwithstanding legislative acknowledgement and the subsequent enactment of the Consumer Protection Act 2008 which has brought about greater regulation of unfair and unconscionable contract terms, it is argued that the testing of potentially unfair and abusive exemption clauses against the dictates of public policy and ubuntu in a constitutional context may provide the South African courts with a new approach to pursue greater substantive justice in respect of these notoriously problematic clauses.

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Section: 1

Introduction and Methodology

This dissertation will examine the current state of our common law in respect of its treatment of exemption clauses in contracts, and will focus on recent developments which may augur greater scope in future for South African courts to ensure fairness and the promotion of substantive justice for contracting parties faced with such provisions. Before one can examine these issues, however, this introductory section will provide some background to the analysis by briefly introducing some important concepts which are inextricably linked to our courts' approaches to and attitudes towards exemption clauses. These concepts include the fundamental underlying principles of our law of contract, namely freedom and sanctity of contract. They also include discussion of a common setting for such clauses, namely standard form contracts. Also, in order to examine the law's treatment of such provisions, we must briefly consider the concepts of public policy and transformative constitutionalism under the South African constitutional dispensation.

In the section that follows I will briefly introduce these concepts by way of providing a social and legal context for the analysis. After briefly addressing the methodology to be followed in this dissertation, Section 2 will examine exemption clauses more closely. In the latter sections of the dissertation I will then address the courts' treatment of such provisions as well as the most recent developments in our law of contract which may serve to facilitate a different approach by our courts to exemption clauses in future. First, though, one must consider the background to the issues which will be dealt with in more detail in those sections.

1.1 The social and legal context:

Traditionally the common law of contract was firmly based on the fundamental principle of *pacta sunt servanda*[1] and has been characterised by the ideals of freedom and sanctity of

[1] Meaning an agreement must be honoured.

contract.[2] What these ideals translated into is that all individuals who possessed contractual capacity were free to make a decision on whether to conclude a contract, with whom they wish to contract and to determine the terms that will regulate the contract.[3] Such contractual autonomy reflects the legal concept of consensus which is the basis of South African contract law and is important in proving the existence of a contract.[4] Sanctity of contract on the other hand dictates that contractual obligations which have been freely and seriously concluded must be honoured and that a court of law, if called upon, will be required to enforce such an agreement.[5]

The legal concepts of freedom and sanctity of contract are deeply rooted and form the basis of what is known as the "eighteenth and nineteenth century's classical liberal theory of contract".[6] The non- interference of the courts and the promotion of contractual autonomy and freedom led to the development of a rigid set of rules being applied by the courts.[7] It was considered to be inappropriate for judges to review and police contracts validly entered into for compliance with considerations of substantive fairness.[8] It is said that such an approach provided predictability and legal and commercial certainty[9] as courts first and foremost concerned themselves with formal validity of a contract rather than its substance.[10] It is evident that such a dogmatic approach could not last in the face of other competing social considerations. Hutchinson[11] states "while parties might enjoy considerable freedom in determining the contents of their contracts, they cannot legitimately expect the courts to

[2] D Hutchison et al *The Law of Contract in South Africa*, (2009) 21.

[3] Ibid Hutchinson et al; D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 867. The authors state "freedom of contract epitomizes a non-interventionist, individualist approach and that parties are free to decide whether, with whom and on what terms to contract".

[4] Ibid Hutchinson et al 20; Bhana & Pieterse (2005) 122 *SALJ* 867.

[5] Ibid Hutchinson et al 21.

[6] Bhana & Pieterse (2005) 122 *SALJ* 866.

[7] Ibid Bhana & Pieterse (2005) 122 *SALJ* 867. The author states that "judicial interference was viewed with scepticism and that this led to rules being applied almost mechanically with a minimal level of intervention".

[8] Cockrell 'Substance and form in the South African law of contract' 1991 *SALJ* 59.

[9] Hutchison et al 23.

[10] Bhana & Pieterse (2005) 122 *SALJ* 867.

[11] Hutchinson et al 23.

enforce provisions that are offensive to law, morals, public policy or to broad community notions of what is fair and reasonable".

A further ideal which underpins the law of contract is that of good faith.[12] It is an assumption of contract law that all contracts entered into are concluded in good faith,[13] requiring contracting parties to conduct themselves in an honest and fair manner and to honour their obligations.[14] According to Bhana & Pieterse[15] "good faith is reconciled with the value of *pacta sunt servanda*".

Recent case law now also suggests that ubuntu may have a new role to play in contract law. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*,[16] the Constitutional Court shed some light on the interaction and applicability of good faith and ubuntu to the law of contract.[17] Both the majority and minority judges agreed that good faith and the values which inform ubuntu are applicable to contractual relations and that ubuntu is a relevant consideration to be taken into account as it informs the spirit, purport and objects of the Constitution.[18] It was further confirmed that the "law of contract must lend itself to such values as it cannot be confined to common law legal tradition alone".[19] This judgment will be examined in more depth below.

The importation of open ended values and ideals such as good faith, public policy, morality, ubuntu and reasonableness aids judges with flexibility[20] to use individual discretion when determining the enforceability or validity of a contract and its terms. A consideration of such normative values ensures that the rigid common law principles do not operate in isolation and the interests of the society which the law regulates are also valued to prevent or redress any

[12] Hutchinson et al 23.

[13] Bhana & Pieterse (2005) 122 *SALJ* 867.

[14] Hutchinson et al 21.

[15] Bhana & Pieterse (2005) 122 *SALJ* 867.

[16] 2012 (1) SA 256 (CC).

[17] Ibid.

[18] Ibid. See the minority judgment of Yacoob J at paras 23-24.

[19] Ibid.

[20] Hutchinson et al 23; Bhana & Pieterse (2005) 122 *SALJ*. The authors state that "courts take on a pragmatic role... to engage in purposive adjudication that takes cognisance of all relevant facts and policies on a casuistic basis".

harm or unfairness experienced by a contracting party or the public at large.[21] Strict application of the classical liberal theory meant that once it was established that the contracting parties freely and voluntarily entered into a contract and that the terms did not offend against public policy, the contract would be enforced.[22] The commonly quoted judgment of Innes CJ in *Wells v South African Alumenite Company*[23] illustrates this with apparent approval:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice"

It has increasingly been observed, however, that the classical liberal theory of contract however, is out of tune with modern commercial reality as it appears to be based on an incorrect assumption that contracting parties always possess real freedom to choose with whom and on what terms to contract.[24] Further, it assumes that contracting parties have almost equal bargaining power and are able to engage in negotiations regarding the terms of the contract.[25]

The veracity of these assumptions may be significantly out of step with our current reality. Although South Africa is 18 years into a free and democratic society, many of the past inequalities created by the Apartheid system are still present. The majority of South Africans are either burdened by poverty or else they are illiterate.[26] These two factors cause consumers to be placed in a vulnerable position and as a result are susceptible to being abused by contracting parties such as corporations, which may be in a much stronger and superior bargaining position.[27] This is mostly evident in the use of the standard form contract (also

[21] Bhana & Pieterse (2005) 122 *SALJ* 868.

[22] Hutchinson et al 24.

[23] 1927 AD 69 at para 73.

[24] Bhana & Pieterse (2005) 122 *SALJ* 883.

[25] Hutchinson et al 25.

[26] K Hopkins 'Standard form contracts and the evolving idea of Private law Justice: a case of Democratic Capitalist Justice v Natural Justice' *TSAR* (2003) 150, 155.

[27] Hutchinson et al 25.

known as a contract of adhesion).[28] A strict adherence to the common law principle of sanctity of contract may lead to harsh and often oppressive standard form contracts being upheld and facilitates the abuse of unequal bargaining power.[29] The focuses of this paper, contractual exemption clauses, are particularly relevant and prevalent in the context of standard form contracts. Accordingly, I will include some brief discussion of this much-maligned form of modern-day contract.

Standard form contracts were defined by Sachs J in *Barkhuizen v Napier*[30] as "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm's length negotiations."[31] The terms are often imposed and drafted in obscure legalese to suit the best interests of the stronger contracting party and, as a result, consumers are mostly unaware of these terms.[32] The contracting party in a weaker bargaining position is often rendered powerless having to surrender to the terms which have been pre-determined by the stronger party without any option of negotiation.[33] Doubt has been expressed over whether standard form contracts should even be considered contracts at all since they go against the very foundation of the formation of a contract (that being negotiation and consensus of contractual terms).[34] It is said that these contracts often constitute an "imposition of will rather than mutual consent."[35]

In the context of the utilities sector, consumers often do not have a choice of a supplier or service provider at all due to the development of monopolies over services such as water, electricity and telecommunications.[36] Consumers become bound by the standard terms and

[28] Hopkins *TSAR* (2003) 150,153. The author states that: "these contracts were described by the French as *contracts d' adhesion* and the French term was passed on to English law". See Friedman *Law in a Changing Society* (1972) 404.

[29] Ibid Hopkins *TSAR* (2003) 150,152.

[30] 2007 5 SA 323 (CC) 135.

[31] Ibid at para 135.

[32] Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) - Part 2' (2009) *Stell Law Review* 61. See also Sachs J's minority judgment in *Barkhuizen v Napier* supra.

[33] Hopkins *TSAR* (2003) 150,153; T D Rakoff '*Contracts of adhesion: An essay in Reconstruction'* 1983 *Harvard Law Review* 1173.

[34] Sachs J's minority judgment in *Barkhuizen v Napier* supra at para 138.

[35] Ibid at para 138.

[36] D McQuoid –Mason et al *Consumer law in South Africa* (1997) 27.

conditions upon which these services are provided and the only real choice the consumer has is to decide whether or not to use these services at all.[37]

Standardised contracts may contain unfair contractual terms such as one-sided exemption clauses which can be used throughout specific industries and potentially affect the interests of numerous people, but the individual injustice sustained is often considered so small that it is futile to seek redress by court action.[38] These unfair clauses usually harm people who "are too poor to pay for the expenses of litigation but are too 'rich' to qualify for legal aid..."[39] Furthermore, Kotz explains that the resources of a stronger contracting party who imposed the unfair clause are usually much more substantial than those of the other contracting party, that this results in a situation where the stronger party may simply buy off the other side to keep the matter out of court.[40] This may have significant implications for access to justice and the rule of law.

On a more positive note, the use of standardised contracts no doubt has brought with it convenience, in that transactions can now be concluded more speedily and without the need for time consuming individual negotiations.[41] In reality most consumers are pre-occupied with their daily activities and it is usually considered impractical for consumers to go shopping around for the best contractual terms.[42] Most consumers usually expect speedy and convenient service and simply do not have the time or money to engage the services of attorneys to review their contract before signing it.[43] The use of these contracts has also been described as a 'cost-saving tool' precisely because they contain standard terms, thereby eliminating the need to engage lawyers for legal drafting of a new contract with individual terms for each new contract concluded.[44]

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[37] McQuoid –Mason et al (1997) 27.

[38] Comments made by Prof Hein Kotz in the South African Law Commission Project 47 Discussion Paper 65 'Unreasonable Stipulations of Contracts and the Rectification of Contracts' (1998) at 19.

[39] Ibid at 19.

[40] Ibid at 19.

[41] Hutchinson et al 25.

[42] Sutherland (2009) *Stell Law Review* 53.

[43] Ibid 53.

[44] Hopkins *TSAR* (2003) 150, 153.

Further benefits of the use of standard form contracts include large corporations being able to draft wide terms which take into account all possible scenarios, thereby minimizing risk.[45] Although standardised contracts possess these (and other) benefits, they are still subject to being abused by stronger parties in the contractual relationship.[46] A party in a superior bargaining position may use such standardised contracts to exploit consumers by imposing unfair terms.[47] "At the stroke of a pen or a painting of a sign on a wall",[48] consumers enter into contracts with terms which they may hardly understand or have reconciled their minds to. Most of the time they are unaware that they have become bound by a contract and have waived their common law rights which would normally have been afforded to them.[49]

Consumers become bound as a result of the *caveat subscriptor* principle, which means "let the signatory beware".[50] This principle postulates that a party who signs a document becomes bound to all terms contained in it as a result of their signature even if they are unaware of such terms.[51] In the case of contract terms which do not require a signature for assent, the courts have also formulated special rules relating to tickets and notices, which closely approximate the *caveat* rule. However, there are instances were one may escape from the *caveat subscriptor* rule.[52] These exceptions include *iustus error*, fraud, undue influence and duress and require the signatory to be able to show that s/he created no reasonable impression that s/he intended to be bound.[53] The *caveat subscriptor* rule is premised on the reliance theory, which is often still explained with reference to Blackburn J's well-known dictum from the English case of *Smith v Hughes*[54]:

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[45] Ibid Hopkins *TSAR* (2003) 150, 154.

[46] Hutchinson et al 26.

[47] CC Turpin 'Contract and Imposed terms' (1956) *SALJ* 144,146.

[48] Hutchinson et al 26.

[49] Ibid.

[50] R H Christie *The Law of Contract in South Africa* 5th ed. (2006) 174-176.

[51] Should someone fail to make themselves aware and read what is in the contract then in terms of *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) as per Fagan CJ at paras 472 -473 he is "taking the risk of being bound by it and he cannot then be heard to say that his ignorance of what was in it was a *justus* error"; *Burger v Central South African Railways* 1903 TS 571, 578; Turpin (1956) *SALJ* 144, 149.

[52] T A Woker 'Caveat Subscriptor: How careful are we expected to be'? (2003) 15 SA *Merc LJ* 110.

[53] Ibid Woker.

[54] 1871 LR 6 QB 597, 607.

> 'If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if had intended to agree to the other party's terms'.

When one considers the continued aptness in a modern setting of the above-mentioned assumptions which underlie the classical liberal theory of contract, as well as the potential for substantial injustice to result from archaic notions of the sanctity of contracts, one may also be confronted with what may be termed a 'perfect storm' or confluence of contractual mechanisms with a high probability of harming the interests of the unsuspecting consumer or other contracting party. Standard form contracts often contain exemption clauses which seek to "exclude, alter or limit the liability that normally flows from contractual relations".[55] For this reason, exemption clauses have been viewed with judicial hostility, suspicion and criticism.[56] These clauses have the potential to be exploitative and to operate unfairly against contracting parties in a weaker bargaining position.[57] Exemption clauses are nevertheless, generally, perfectly valid and enforceable and parties who have voluntarily entered into a contract which contains an exemption will be held bound to it unless the clause is deemed to be contrary to public policy.[58]

The courts' treatment of public policy over the years has recognised that it is not a static concept. In South Africa today all law, including the common law of contract, is now subject to the Constitution.[59] In *Barkhuizen v Napier*,[60] Ngcobo J (in delivering the majority judgment held that "public policy represents the legal convictions of the community; it represents those values that are held most dear by the society".[61] Further, "public policy must

[55] P N Stoop "The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Contract Law" (2008) 20 *SA Merc LJ* 496; S Cohen 'Exemption Clauses' 2007 *The Professional Accountant* 4.

[56] See McNally JA's view in *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pty) Ltd* 1991 4 SA 150 (ZS) quoting Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296-7; Stoop (2008) 20 *SA Merc LJ* 496, Cohen (2007) *The Professional Accountant* 4; S Van der Merwe et al *Contract: General Principles* 3rd ed. (2007) 297. See also H R Hahlo 'Unfair Contract Terms in Civil-Law Systems' (1981) vol 98 *SALJ* 70.

[57] Van der Merwe et al (2007) 297.

[58] R Sharrock *Business Transactions Law* (2011) 8th ed 235.

[59] The Constitution of the Republic of South Africa, (1996) hereinafter referred to as the "Constitution".

[60] 2007 (5) SA 323 (CC)

[61] Ibid at para 28.

now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. 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".[62] In *Brisley v Drotsky*,[63] Cameron JA held that "public policy is now rooted in our Constitution and the fundamental values it enshrines. They include human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism".[64]

The new meaning attributed to public policy has come about as a result of transformative constitutionalism and its role in changing legal culture.[65] At the dawn of our new democracy the late Etienne Mureinik observed that a true shift from apartheid to a post-apartheid society requires a move from a "culture of authority" to a "culture of justification".[66] The latter was described as "a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion".[67]

The Constitution has brought about a change not only in society but a change in the judicial community, including judicial attitudes towards traditionally-accepted principles of law. Judges are no longer required to make decisions only based on empowering authority. Doctrines of public policy and conceptions of fairness, good faith and ubuntu enter the spectrum of decision making. This implies the move away from formalism in contracts to the promotion of a culture of substantive fairness and equity. It is inevitable that this necessitates a review of the classical liberal theory of contract in respect of its adherence to out-dated notions regarding parties' bargaining powers and volition, particularly in the context of standardised contracts which contain provisions which may significantly alter a party's rights

[62] Ibid at para 9.

[63] 2002 (4) SA 1 (SCA) 91.

[64] Ibid.

[65] See Justice Pius Langa - prestige lecture delivered at Stellenbosch University for an account of the meaning of 'transformative constitutionalism': available at http://sun025.sun.ac.za/portal/page/portal/law/index.afrikaans/nuus/2006/Pius%2520Langa%2520Speech.pdf. (Accessed on 15 June 2012).

[66] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) *SAJHR* 10, 31-32.

[67] Ibid 31-32.

or affect its interests. In light of the above, transformative constitutionalism[68] will underlie my approach in this dissertation. I will argue in support of the emergence of a new conception of public policy and ubuntu as specific grounds for a substantive equity defence against standardised contracts which include exemption clauses.

Exemption clauses have already been significantly impacted upon by legislation in the form of the Consumer Protection Act[69] in which their use is now more strictly regulated in the context of consumer contracts. I shall briefly deal with the important provisions in this Act, but my focus will be to argue that exemption clauses which offend against constitutional values and the dictates of ubuntu may be deemed to be against public policy (in its constitutional context), and as a result may be unenforceable. This may augur a decline in the prevalence of inclusion of exemption clauses in standardised contracts and a promotion of consumer rights in line with the Consumer Protection Act and the Constitution.

1.2 Methodology

I will commence the analysis with discussion, in the following section, of the basic nature and characteristics of exemption clauses and how they are judicially viewed and treated in South African as well as English Law. South African courts have remained largely influenced by English law in the recognition of exemption clauses in contracts and have adopted a similar approach in respect of methods by which their effect may be limited if they are viewed as being used in an abusive manner or where they may offend public policy.[70] The English judiciary has always viewed these clauses with suspicion and scepticism, especially those clauses which seek to take advantage of consumers in a detrimental manner,[71] and has, amassed a wealth of precedent which depicts such judicial sentiments. It is for this reason that I have chosen to briefly examine English jurisprudence an example of as the sceptical and cautious approach required to be taken in relation to exemption clauses. This approach provides a useful background to the later discussion of the potential role of constitutional values and public policy in respect of these types of provisions.

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[68] For a further discussion of 'Transformative Constitutionalism' see D Moseneke 'Transformative Constitutionalism' (2009) *Stellenbosch Law Review* 3-11.

[69] 68 of 2008. Hereinafter referred to as the "CPA" or the "Act".

[70] *Wells v South African Alumenite Company* 1927 (AD) 69.

[71] J McGrath 'Excluding exclusions in contract law: Judicial reluctance to enforce exclusion clauses' *Cork Online Law Review* (2006) 13 137, 145.

I shall thereafter examine the most relevant and important provisions of the Consumer Protection Act and their impact on exemption clauses. I will continue the discussion with an examination of relevant case authority regarding the application of the Constitution to contractual relations, and will then address whether public policy and ubuntu may have a potential role to play in determining the validity and judicial treatment of these clauses. I will then examine whether contracting parties are expected to promote the values of the Constitution when contracting, and lastly, I will speculate on the potential impact that the constitutionalisation of contract law may have on commercial and legal certainty in the context of exemption clauses.

Section: 2

Exemption Clauses in the Law of Contract.

2.1 What are Exemption Clauses?

Exemption clauses are known by many names. They can be referred to as 'indemnity clauses', 'exculpatory clauses' 'disclaimers' or 'waivers' and are usually found in standardised contracts, displayed on notices or printed on tickets.[72] For purposes of this dissertation, the term 'exemption clause' will be utilised.

The typical wording of an exemption clause may appear as follows:

> "The LESSOR shall not be responsible or liable to the LESSEE for any damage suffered as a result of any negligent act or omission on the part of the LESSOR…"[73]
>
> Or
>
> "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".[74]

Exemption clauses are essentially terms which are used to limit or totally exclude the potential liability of a contracting party or parties which would normally arise from contractual relations.[75] They may also serve to exclude or limit other (e.g. common law) rights of a party, for example by excluding potential delictual liability. Exemption clauses are

[72] H Lerm *A Critical Analysis of Exemption Clauses in Medical Contracts* (LLD Thesis 2009 University of Pretoria) 8; Stoop (2008) 20 *SA Merc LJ* 496; Cohen (2007) *The Professional Accountant* 4.

[73] *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD). See also Brink, Cohen and Le Roux 'The scope and validity of exemption clauses in contracts' (2011) *Step Ahead First Quarter Newsletter* 1-4 for a detailed account of this case.

[74] *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 988. This exemption clause appeared on a window panel which was displayed as a notice to all patrons making use of the amusement park and its facilities.

[75] Van der Merwe et al (2007) 297; Stoop (2008) *SA Merc LJ* 496.

not a novel concept in contract law.[76] "They have their roots firmly based in Roman law[77] and Roman-Dutch law[78] as referred to in the writings of Grotius, Voet and Van Leeuwen".[79] With the growing use and convenience of standardised contracting, exemption clauses are being used on a wider scale[80] in contemporary society. In the words of Brand JA in *Afrox Healthcare Bpk v Strydom*: "nowadays exemption clauses in standard contracts are the rule rather than the exception".[81] It is now common for consumers to be presented with a standard form contract several pages long and often containing exemption clauses printed in small print discouraging even the most conscientious and prudent consumer from reading it, and which encourages such person to signing the document without reading it.[82] Even when consumers are not required to sign a contract, exemption clauses may still form part of the agreement.[83]

In the setting of a parking lot in a shopping centre or other building, it would be impractical to expect the supplier to contract out of liability for damage or theft of the vehicle in the form of a contract document[84] with each and every patron or consumer wishing to make use of the parking services. It is for this reason that suppliers often display prominent and conspicuous notices at entrances or dispense tickets which contain exemption clauses printed on the back by means of an automated push button ticket machine, thereby incorporating the exemption clause into the contract for parking services. Apart from parking garages, notices containing exclusion or limitation of liability clauses are now displayed in many public places such as

[76] Lerm LLD Thesis (2009) 8.

[77] Ibid Lerm (2009).

[78] K Hopkins 'Exemption Clauses in Contracts' (2007) *De Rebus* 23; Van der Merwe et al (2007) 297. The author states that "... voetstoots clauses, for example, which excluded the *ex lege* liability of a seller for latent defects in the thing sold, were well-known in Roman-Dutch law".

[79] Ibid Hopkins (2007) *De Rebus* 23.

[80] Van der Merwe et al (2007) 297.

[81] 2002 6 SA 21 (SCA) 42.

[82] See minority judgment of Sachs J in *Barkhuizen v Napier* with reference to standard term contracts at paras 357-381.

[83] T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) *Obiter* 217-231.

[84] *CSAR v McLaren* 1903 TS 727.

stadiums, laundromats, hospitals, shopping malls, cinemas, bars, restaurants, and clubs.[85] Service providers are not absolved from the responsibility of drawing such exemption clauses to the attention of a consumer.[86] In an effort to ensure that consumers are aware of the terms of the contract before entering into it, the courts have developed a set of rules to be complied with before a term can be said to be part of the contract concluded.
These include:

- The term must be in contractual form[87]

If the exemption clause is contained in a document such as a ticket or a receipt, the document must be one in which a reasonable person would expect to find contractual terms such as an exemption clause. If the document is one which a person would merely consider to be a receipt for money paid then it will not be regarded as a contractual document and any terms or clauses therein will not form part of the contract concluded.[88]

- The term should be contemporaneous with the contract[89]

Consumers cannot be held bound to any contractual terms which are brought to their attention after the contract has already been concluded. Clauses which attempt to exclude or limit liability will only provide protection to the contracting party if adequate notice is given prior to the conclusion of the contract, as "belated notices are considered valueless".[90] Therefore, in the scenario of a parking lot, the notice containing terms and exclusion of liability clauses is always situated outside the entrance of the parking lot. The intention is for the patron to be made aware of the terms and conditions upon which the parking services are being offered before concluding the contract by receiving a ticket from the machine and driving into the parking lot.[91]

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[85] Depending on the particular circumstances, sellers or service providers usually state that they will not be held liable in the event of loss, theft or damage to property when either entering a premise, handing in clothing or parking a car in the parking garage.

[86] McQuoid –Mason et al (1997) 39.

[87] *CSAR v McLaren* supra

[88] McQuoid –Mason et al (1997) 40.

[89] *Olley v Marlborough Court* (1949) 1 All ER 127 (CA).

[90] Cheshire, Fifoot and M. P. Furmston's *Law of Contract* 15th ed (2006), 205.

[91] See *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N). In the English case of *Olley v Marlborough Court Ltd*, after checking into the defendant's hotel at the reception, *Olley* became aware of an exemption clause

- Sufficient notification of the term must be given[92]

As indicated above, a party wishing to impose contractual terms such as an exemption clause must draw such terms to the attention of the other contracting party. If it is not commercially practicable to do so, then such terms can only form part of the contract if the contract imposer "takes all steps that is reasonably necessary" to ensure that such notice is seen by the consumer.[93] Even if the consumer does not see the notice or does not read the terms contained in it, they will be held bound to it if the service provider did what was reasonably necessary to bring those terms to their attention.[94]

Exemption clauses are contained in almost every standardised contract from gym membership contracts, cell phone contracts, insurance contracts, motor car service agreements, rental car agreements, sports event or concert tickets and even receipts. Since the introduction of the internet, websites which provide information, statistics, and odds for betting will often state by means of a disclaimer displayed on the webpage that no responsibility is undertaken for losses caused due to a reliance on the information supplied. Regardless of whether an exemption clause is contained in a contractual document or displayed on a notice board or computer screen, a common characteristic inherent in the nature of these clauses is their potential to operate unfairly against one of the contracting parties by limiting their right of redress available under the common law, whilst promoting the interests of the other party who is usually in a stronger bargaining position. As Pretorius suggests, the very nature of these clauses and their potential to operate unfairly by ousting

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excluding liability for theft on the part of the hotel displayed at the back of her bedroom door. When items of clothing were stolen from *Olley's* room after she left her key at the reception, the hotel sought to rely on the exemption of liability displayed on the door. The court of appeal as per Lord Denning held that the notice excluding liability displayed in *Olley's* room did not form part of the contract and that the contract was concluded in the reception of the hotel before she became aware of the notice displayed in the bedroom.[91] The court clearly stated that "... as a rule, the guests do not see them [notices in bedrooms] until after he has been accepted as a guest. The hotel company no doubt hope that the guest will be bound by them, but the hope is vain unless they clearly show that he agreed to be bound by them, which is rarely the case".

[92] *Bok Clothing Manufacturers v Lady Land* 1982 2 SA 565 (C) 570.

[93] McQuoid –Mason et al (1997) 41.

[94] *Durban's Water Wonderland (Pty) Ltd v Botha* supra; Woker (2010) *Obiter* 227. See also Woker (2003) 15 SA *Merc LJ* 110 for an account of some decisions which support the proposition that the onus is on a patron to actively seek out terms such as exemption clauses contained in a contract or displayed.

common law rights is what often prompts courts to invoke a method to circumvent their operation.[95]

Despite the often rather draconian tendency of exemption clauses, there are some occasions in which their use and enforcement is appropriate and even necessary in the circumstances.[96] According to McGrath, although exclusion clauses seem to cheat contracting parties out of what they have contracted for, some clauses are nevertheless a necessary evil to ensure the effective running of businesses especially 'procedural exclusion clauses' which prescribe time or notification requirements to facilitate dispute resolution in a timely manner.[97] Excluding liability also assists service providers to stay in business and prevents patrons from incurring additional costs for the insurance cover required to be taken by the service providers should they in fact decide not to exempt themselves from liability for loss, harm or injury suffered by the public making use of the services.[98]

Extreme adventure sports or any recreational activity[99] which involves a significant increased risk of physical harm or inherent danger are generally circumstances in which a service provider will be viewed as fairly and necessarily excluding or limiting liability for any loss, harm or injury suffered as a result of negligence. In these circumstances a patron is generally required to engage in the dangerous activity at their own risk. An exclusion of liability in these circumstances are generally considered to be fair and justified as it would be unreasonable to expect a service provider to continue to run a business or provide a service if he/she were to incur liability for loss, harm or injury sustained by a patron. Furthermore, exemption clauses in these circumstances are paramount since such extreme sports or recreational activities could probably never be offered if it were not for the use of such provisions.

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[95] C J Pretorius 'Exemption clauses and Mistake: *Mercurius Motors v Lopez*' 2008 3 SA 572 (SCA) 2010 (73) *THRHR* 491.

[96] Pretorius 2010 (73) *THRHR* 491. The author describes the tendency of exemption clauses to be draconian in nature. Definition of 'draconian' available at: http://legal-dictionary.thefreedictionary.com/Draconian+Laws. The term is derived from 'draco' and generally refers to something which is excessively harsh or severe in its implementation. (accessed on 26 October 2012).

[97] McGrath (2006) 13 *Cork Online Law Review* 137,138. See also *Barkhuizen v Napier* supra in which a time bar clause ousting judicial redress after 90 days upon a rejection of a claim was included in the insurance contract.

[98] Ibid McGrath (2006) 138.

[99] These activities may include skydiving, base jumping, mountain climbing, bungee jumping, white-water kayaking, bull riding etc.

While certain exemption clauses are necessary and needed for the continued efficiency of running a business or providing a service, a distinction must be drawn between necessary exemption clauses and those numerous unnecessary exemption clauses which seek to abuse, exploit or take advantage of a consumer.[100] Examples of such clauses would be those which leave consumers with no relief or avenue to seek judicial redress by excluding their common law rights or those which explicitly take advantage of a consumer's weaker bargaining position, leaving the consumer with no alternative choice but to accept the terms in the contract.[101] It is these types of exemption clauses which may ultimately offend public interest and the dictates of ubuntu and as a result may be struck down for offending public policy.

2.2 Enforceability and Validity of Exemption Clauses

Contracts which embody exemption clauses and which have been freely assented to by contracting parties are as a rule enforced.[102] The rationale for the recognition of these clauses is founded on the common law principle of freedom of contract[103] and the philosophy of *laissez-faire* (meaning that the law or court will not interfere with the contractual relations of people or play a paternalistic role by imposing anything on the parties which did not form part of their intentions at contracting),[104] which prevailed for much of the nineteenth and early twentieth century.[105] This is evident from the dictum of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson*,[106] where he stated:

> "... If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred..."

[100] McGrath (2006) 13 *Cork Online Law Review* 138.

[101] Ibid McGrath 139.

[102] Sharrock 8ed (2011) 235.

[103] Lerm LLD Thesis (2009) 8.

[104] Ibid Lerm (2009) 9; Hahlo (1981) *SALJ* 70. See also Sachs J's minority judgment in *Barkhuizen v Napier* supra.

[105] Ibid Lerm 9. See also Sachs J's minority judgment in *Barkhuizen v Napier* supra .

[106] (1875) LR 19 Eq 462, 465.

When considering the enforceability of exemption clauses, courts have often been faced with challenges based on a claimed lack of consensus between the contracting parties, or consensus that has been improperly obtained, or the working of public policy.[107] A contract is void when there is a lack of consensus.[108] A contract which contains an exemption clause may be invalidated in whole or in part should there be a lack of consensus.[109] This occurs when there is a mistake made by the contracting party who denies the existence of the contract or denies being bound by the exemption clause (an *error in negotio*), and where the mistake is both reasonable and material.[110]

In the context of exemption clauses a misrepresentation by non-disclosure may occur in cases where such provisions are unexpected, in which cases there is a legal duty on the part of the *proferens* to point out the relevant provision to the other party.[111] Consensus that has been improperly obtained refers to instances of misrepresentation, duress or undue influence.[112] Misrepresentation is of importance for the purpose of exemption clauses and it is a ground for rescission of any contract.[113] Of particular importance in respect of challenges to the enforcement of exemption clauses as mentioned above is the ground of public policy in which an exemption clause can be nullified by the courts if it is to be declared contrary to public policy.[114] Such judicial reasoning was evident even as far back as 1902 in *Eastwood v Shepstone*,[115] where Innes CJ stated the following:

> "Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It

[107] Stoop (2008) 20 *SA Merc LJ* 497.

[108] Ibid Stoop.

[109] Ibid Stoop; Van der Merwe et al (2007) 298.

[110] Ibid Stoop 498. See also *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) 166-172 in which the court found that *Allen's* mistake was both material and reasonable, therefore the contract was void.

[111] See *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A)*; Fourie v Hanson* & another 2001 (2) SA 823 (W); *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA).

[112] Stoop (2008) 20 *SA Merc LJ* 501.

[113] Ibid Stoop.

[114] Ibid Stoop 502; Van der Merwe et al (2007) 298; Sharrock 8ed (2011) 235.

[115] 1902 TS 294, 302.

> is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void".

Further, Innes CJ in *Morrison v Angelo Deep Gold Mines Ltd*[116] said:

> "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".

The common law of contract has always refused to recognise contracts deemed to be contrary to public policy.[117] This is evidenced by the dictum of Smalberger JA in *Sasfin v Beukes*[118]

> "No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to 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...".

Public policy generally refers to the interests of society as well as those of the individual contracting parties.[119] As stated above, in *Barkhuizen v Napier*,[120] Ngcobo J held that public policy represents the legal convictions of the community; it represents "those values that are held most dear by the society."[121] Furthermore, "public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. 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".[122]

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[116] 1905 TS 775, 779.

[117] *Sasfin v Beukes* 1981 1 SA 1 (A).

[118] Ibid at para 9. See also *Eastwood v Shepstone* 1902 TS 294; *Botha v Finanscredit* 1989 (3) SA 773 (A) 783; *Baart v Malan* 1990 (2) SA 862 (E).

[119] Van der Merwe et al (2007) 298; Stoop (2008) *SA Merc LJ* 502.

[120] 2007 (5) SA 323 (CC)

[121] Ibid at para 28.

[122] Ibid at para 29.

Exemption clauses which attempt to exempt a contracting party from liability for fraud,[123] or from liability for intentional breach or wilful misconduct will be deemed to be contrary to public policy and subsequently struck down.[124]

In *Johannesburg Country Club v Stott*[125] the question whether an exemption clause which excludes liability for negligently causing the death of another could also be deemed to be contrary to public policy was mooted.[126] The Supreme Court of Appeal however left the question open and noted that such an exemption clause would most likely be contrary to public policy because it runs counter to the high value that the common law and the Constitution place on the sanctity of life.[127]

The permissible limits of exemption clauses therefore are those which exclude liability for negligent conduct, or fundamental or material breach of contract.[128] An exemption clause may also exclude liability for gross negligence.[129] The Consumer Protection Act, however, the provisions of which will be discussed in detail below, now statutorily regulates the use of exemption clauses. Section 49 essentially requires exemption clauses contained in a contract or notice which concern any activity that is subject to risk of an unusual nature in that it exempts liability for serious injury or death and is a term or provision which a consumer cannot reasonably be expected to be aware of, to be brought to the attention of the consumer. In relation to gross negligence, section 51(1)(*c*)(i) of the Act now strictly prohibits any term or agreement which exempts the liability of the supplier or someone on his behalf for gross negligence.

[123] See Innes CJ in *Wells v SA Alumenite Co* supra at para 72.

[124] Stoop (2008) 20 *SA Merc LJ* 502 ; see also *East London Municipality v South African Railways & Habours* 1951 (4) SA 466 (E) 490; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) 805; *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 803.

[125] 2004 5 SA 511 (SCA).

[126] Christie 5ed (2006)186.

[127] *Barkhuizen v Napier* supra at para 6; Stoop (2008) 20 *SA Merc LJ* 503.

[128] Sharrock 8ed (2011) 235-236.

[129] Ibid 235.

2.3 Control of Exemption Clauses

2.3.1 Common Law Treatment

A decline of *laissez- faire* and the augmentation of state paternalism saw the emergence of a philosophy of consumerism in which the needs of the poor and illiterate and the prevention of their exploitation became necessary.[130] The past few decades have shown a reversion to what has been described as a truly consensual approach to contract law.[131] Such change has occurred not only due to the willingness of judges to overturn established common law principles in order to dispense with justice in a more discretionary manner taking into account individual circumstances of the case, but it has been coupled with a greater awareness and concern of the general society and the state in the regulation of contractual agreements.[132] There is now more emphasis on the achievement of a just result than a slavish adherence to doctrines established in cases which date back centuries ago.[133] One area where the need for such development may be illustrated is that of standard form contracts, which have a tendency to unilaterally introduce terms such as exemption clauses which were never expressly part of the bargain and, as a result, a consumer's will or consensus does not enter the spectrum or is simply non-existent.[134]

Characteristically, these clauses are in tiny print so as to be as inconspicuous as possible with the aim of ensuring the most limited prospects of liability to be undertaken by the service provider.[135] Contracts containing these clauses are often disparaged because whilst businesspeople are in a position to seek professional legal assistance in the scrutiny of these clauses, ordinary consumers on the street cannot afford the same privileges.[136] In the end, the contract concluded hardly ever represents true and real consensus but merely a document

[130] Hahlo (1981) vol 98 *SALJ* 70; Kotz 'Controlling Unfair Contract terms: Options for Legislative Reform' (1986) *SALJ* 406. The author states that "there is little doubt that in the evolution of modern contract law the principle of social control has steadily been on the increase". See also Lerm LLD Thesis (2009) 725. The author states that "the growth of consumer protection herald in a new era in the law of contract; the ethos of individualism was displaced and a consumer-welfare ethos was driven, in which, the interests of the consumer were taken more seriously".

[131] Sachs J's minority judgment in *Barkhuizen v Napier* supra at para 154.

[132] Ibid at para 154 citing Friedman *The Law of Contract in Canada* 4 ed (Carswell, Scarborough, 1999) at v.

[133] Ibid at para 154.

[134] Ibid at para 155.

[135] Ibid at para 156.

[136] Ibid at para 156.

which contains contractual terms strongly favourable to one side, affording no benefit or advantage to the weaker contracting party whose common law rights have been diminished.

Since exemption clauses seek to exclude common law rights and obligations of contracting parties which would otherwise arise, they have traditionally been viewed with suspicion in both South African and English law (and elsewhere), and as a result many methods have been developed by courts to limit their effect or invalidate them in appropriate circumstances.[137] These include a restrictive and narrow interpretation of such provisions, as well as legislative control of exemption clauses.[138]

Limitation by means of a narrow interpretation is taken if the wording of the exemption clause is ambiguous.[139] This is essentially an application of the *contra proferentem* rule. If the clause is clear and unambiguous, it will generally be enforced.[140] This rule was explained in *First National Bank of SA Ltd v Rosenblum*,[141] in which it was stated:

> "In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is absolved is plainly spelt out."

Scott JA, in *Durban's Water Wonderland (Pty) Ltd v Botha*,[142] further explained the treatment of exemption clauses as follows:

> "If the language of the disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that

[137] Cohen (2007) *The Professional Accountant* 4; Van der Merwe et al (2007) 298; Kotz (1986) *SALJ* 406. See also Lewis JA in *Van der Westhuizen v Arnold 2002 (6) SA 453* (SCA**)** stated: "But that does not mean that the courts are not, or should not be wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law... The very fact that an exclusion clause limits or oust common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in application."

[138] Stoop (2008) 20 *SA Merc LJ* 497; Lerm LLD Thesis (2009) 11.

[139] Christie 5ed (2006)188. This is as a result of the operation of the *contra proferentem* rule.

[140] Ibid Christie 189.

[141] 2001 4 SA 189 (SCA) 195 (as per Marais JA).

[142] *Durban's Water Wonderland v Botha and Another supra*; Christie 5ed (2006) 189.

> meaning. If there is ambiguity, the language must be construed against the proferens... the alternative meaning upon 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".

Exemption clauses which are also couched in very wide or general language and which do not exclude specific grounds of liability will attract this narrow approach of interpretation.[143] Thus if an exemption clause does not exclude liability on specific grounds, the general wording should be interpreted as far as possible to have been intended to protect a contracting party only against the less extensive liability.[144] Wide and ambiguous wording of an exemption clause could also potentially lead to uncertainty in the contract rendering it void.[145] The Supreme Court of Appeal in both *Drifters Adventure Tours CC v Hircock*,[146] and *Afrox Health Care v Strydom*,[147] held that exemption clauses couched in general terms of liability must be construed restrictively.[148]

The wide usage of exemption clauses in standardised contracts is not unique to the South African jurisdiction. In English law, it appears that exemption clauses were, since early days, used widely in contracts involving the carriage of goods, where the carrier would use the exclusionary clause to exclude his liability for damage to goods being transported.[149] English law has also experienced widespread criticism against the use of exemption clauses. The main reason motivating such criticism was that despite the assumption that contracting parties usually negotiate the terms of their agreement and do so on equal footing, most of the time this is not the case in reality.[150] More often than not, one of the contracting parties is usually in a weaker bargaining position and when the standardised contract contains exemption

[143] Van der Merwe et al (2007) 299; Stoop (2008) 20 *SA Merc LJ* 503; *Esssa v Divaris* 1947 1 SA 753 (A).

[144] Ibid Van der Merwe et al 298.

[145] Ibid 298, Stoop (2008) 20 *SA Merc LJ* 504.

[146] 2007 (2) SA 83 (SCA) 87. The Court stated: "The correct approach is well established. If the language of the 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*".

[147] *Afrox Health Care Bpk v Strydom* supra at para 9.

[148] Stoop (2008) 20 *SA Merc LJ* 504.

[149] Lerm LLD Thesis (2009) 724.

[150] Ibid. Lerm states that: "the position for the individual is merely 'one of adherence' since there is hardly ever negotiation of the contractual terms to the agreement."

clauses excluding liability, it often leads to hardship.[151] Even in the so-called 'ticket cases', consumers have little time and opportunity to read the exemption clauses, which are usually one-sided and act to the disadvantage of the consumer.[152]

In light of the above-mentioned problems with the use of these clauses, the English courts also adopted a few mechanisms to curb the detriment experienced by consumers subjected to such clauses.[153] These included the rule of incorporation, whereby the courts regarded an exemption clause to be ineffective and void if it is not part of the contract, which meant that a reasonable notice of the clause had to be given.[154] Should the exemption clause form part of the contract then the courts would apply the rule of interpretation (also known as the rule of construction).[155] This essentially entails the operation of the *contra proferentem rule* which dictates that should there be any ambiguity in a contractual term, then such a term is to be construed against the contracting party relying on such term.[156] Furthermore, the English courts adopted an assumption that in a situation of doubt it would be considered highly improbable that the weaker and innocent contracting party would have agreed to the exclusion of negligence.[157]

The famously quoted and memorable dictum of Lord Denning[158] reiterates the hostile attitude of English courts towards exemption clauses:

> "None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets, order forms and invoices... they were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No

[151] Ibid Lerm.

[152] Ibid Lerm.

[153] Ibid Lerm 725.

[154] Ibid Lerm. See also *Lloyds Bank Ltd v Bundy* (1975) QB 326 CA.

[155] Ibid Lerm 726.

[156] Ibid Lerm.

[157] Ibid Lerm.

[158] *George Michell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at paras 296-97. See also Lord Denning's judgment in *Lloyds Bank Ltd v Bundy* supra 339, [1974] 3 All ER 757, 765 where he states " By virtue of [the inequality of bargaining power], the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair...when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other".

> matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'... faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it. They still had before them the idol, 'freedom of contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called 'the true construction of the contract'... But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld, at any rate when the clause did not exclude liability entirely but only limited to a reasonable amount".

Lord Denning, as far back as 1957 in the case of *Anglo- Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd*,[159] stated:

> "We have repeatedly refused to allow a party to a contract to escape from his just liability under it by reason of an exemption clause, unless he does so by words which are perfectly clear, effective and precise".

Even though reference is made to these English cases, it remains relevant for South African law as the same approaches have been applied in South African contract law.

2.3.2 Legislative Treatment

The use and potential abuse of exemption clauses is controlled by both courts and the legislature.[160] Legislative control over abusive exemption clauses is considered as a vital tool in many foreign jurisdictions, with many countries promulgating specific legislation to curb the abuse of unfair contractual terms which have arisen out of non-negotiated contracts.[161] In English law, common law measures to control exemption clauses and unfair contract terms soon became unnecessary as the legislature stepped in and enacted the Unfair Contract Terms Act 1977, and the Unfair Terms in Consumer Contracts Regulations, 1994,[162] to serve as

[159] [1957] 2 QB 233 (CA) 269.

[160] Christie 5ed (2006) 191.

[161] Naude 'Unfair contract terms legislation: the implications of why we need it for its formulation and application' (2006) *Stell Law Review* 361.

[162] According to Lerm 726, "One of the primary reasons why legislative intervention was deemed to be necessary in Britain was said to be the artificial construction given by the courts to exemption clauses, often leading to great hardship. A further factor included the inconsistency of the courts in denouncing these types of clauses and to declare them to be contrary to public policy".

measures directing courts to declare exemption clauses void in certain circumstances.[163] The Act was promulgated subsequent to the English and Scottish Law Commission's report[164] which investigated and made recommendations.[165] In numerous provisions of the Unfair Contract Terms Act, reliance is placed on the concept of 'reasonableness' as the standard of control and guidelines are provided to determine reasonableness of a contractual provision.[166] Exemption clauses excluding liability for bodily injury or death as a result of negligence of a supplier are prohibited outright in terms of section 2(1) of the Act.[167] Section 3 of the Act provides that exemption clauses relating to breach of contract become subject to review only if they form part of standard business terms or if the other contractant deals as a consumer.[168]

South African law, however, remained largely unaffected by such developments elsewhere.[169] Should parties possess full contractual capacity and the wording of the exemption clause is clear and unambiguous, then contracting parties are required to accept and live with what they have agreed to be bound to unless the clause is contrary to public policy.[170] Hahlo, however, observed that while *pacta sunt servanda* remains the rule, numerous safeguards for the unsuspecting and the poor have become engrafted on it by both

[163] Lerm LLD Thesis (2009) 11; Hutchinson et al 26. See also the Australian legal system (Australian Trade Practices Act 1974), New Zealand's (Contractual Remedies Act 1979) and the (Uniform Commercial Code 1952) of the United States of America.

[164] The Law Commission and the Scottish Law Commission report on Exemption Clauses: Second Report (1975).

[165] Lerm LLD Thesis(2009) 726 -The findings upon which such recommendations were based included: " (1) notwithstanding the entrenched ethos of freedom of contract, unlimited or unrestricted freedom is likely to operate unreasonably and in many instances operate against public interest; (2) the ignorant often suffer at the hands of those that abuse their bargaining strength; (3) the notion that there should be complete freedom to contract is not acceptable as contracting parties often do not bargain from a position of equal strength. Contracts containing excluding clauses are often misused and abused; (4) Social policy dictates that exemption clauses should not take away rights or restrict rights; (5) judicial inconsistencies in handling exclusionary clauses is unacceptable; (6) the right to contract out of liability for negligence is not desirable".

[166] See section 2(2) of the Unfair Contract Terms Act 1977; Kotz (1986) *SALJ* 409-415; T Naude 'The consumers 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505, 524.

[167] Naude (2009) 126 *SALJ* 505,511.

[168] Ibid Naude 505,532.

[169] Hopkins (2007) *De Rebus* 22.

[170] Ibid Hopkins. The author states that "contractual provisions that violate public policy are unenforceable but the problem with public policy is that it also embraces *pacta sunt servanda* will honours the enforcement of the contract."

legislation and innovative judicial lawmaking.[171] With regards to legislation in South Africa, there has been no general Act regulating the use of exemption clauses in standardised contracts,[172] but there have been specific provisions in various pieces of legislation prohibiting the inclusion of exemption clauses.[173] However, the need for legislation to control unfair and unconscionable contract terms had been voiced by judges and the South African Law Commission[174] in their 1998 Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts.[175] The discussion paper was sought to elicit public response regarding the introduction of a proposed piece of legislation (Unfair Contractual Terms Bill) which sought to essentially grant the power of review to courts to "remedy contracts or contractual terms that are unjust or unconscionable... so as to avoid the injustices which would otherwise ensue".[176] Exemption clauses had been specifically identified as provisions that should receive the "critical attention of the legislature" whilst the research team "proposed a review of, but not a witch-hunt against exemption clauses".[177] It was stated that exemption clauses did in fact have a legitimate place however; they should not be tolerated where an implementation of them would lead to harsh and unfair results.[178]

SALC's project 47 marked a significant attempt to regulate contractual provisions which were unfair, unreasonable and unconscionable,[179] but a thorough analysis of the report is

[171] Hahlo (1981) vol 98 *SALJ* 71.

[172] Stoop (2008) 20 *SA Merc LJ* 506; Van der Merwe et al (2007) 300.

[173] Ibid Stoop; Van der Merwe et al (2007) 300[fn 327]. These include "s90 of the National Credit Act 34 of 2005 prohibiting the use of exemption clauses in credit agreements, s90(g) and (h) of the same act which prohibits clauses in which the credit supplier exempts any person acting on his behalf from liability for any act, omission or representation made by a person acting on behalf of the credit provider and s 15(1) (b) and (c) of the Alienation of Land Act 68 of 1981 which prohibits terms providing for the forfeiture of an enrichment claim in respect of necessary expenditure by a purchaser of land on instalments also prohibiting a seller of land from restricting or excluding his liability for eviction of the purchaser."

[174] The South African Law Commission was established by the South African Law Commission Act 19 of 1973, hereafter referred to as the "SALC" or the "Commission". The Members of the Commission included: Justice I Mahomed (chairman), Justice P J J Olivier (VC), Justice Y Mokgoro, Prof R T Nhlapo, Adv J J Gauntlett SC, Mr Z Seedat and Mr P Mojapelo.

[175] South African Law Commission Project 47 Discussion Paper 65 'Unreasonable Stipulations of Contracts and the Rectification of Contracts' (1998); T Naude (2006) *Stell Law Review* 361.

[176] SALC Project 47 Discussion Paper 65 (1998) at 7.

[177] Ibid SALC Project 47 Discussion Paper 65 (1998) at 11.

[178] Ibid SALC Project 47 Discussion Paper 65 (1998) at 11.

[179] Lerm LLD Thesis (2009) 724.

beyond the scope of this dissertation. The recommendations and findings of the Commission are indicative of the shift in public policy from the automatic and mechanical implementation of standard term contracts and contractual volition to an approach which shows greater concern and consideration for notions of fairness, good faith and the relative bargaining position of the contracting parties in order to achieve contractual fairness in the interest of both parties to the contract. It can hardly be disputed that such a shift is in keeping with constitutional values and the communal spirit of ubuntu.[180] Unfortunately the recommendations made in the report have to date not been implemented by the legislature. Nevertheless South Africa recently saw the enactment of the Consumer Protection Act in 2009, which brought about a significant codification of consumer protection and appears to incorporate a number of the principles advocated in the SALC report in the consumer context.

2.3.2.1 The Consumer Protection Act

Legislation protecting consumers against unfair contract terms has been long overdue in South Africa.[181] Existing protection measures for consumers had become outdated and fragmented.[182] The Consumer Protection Act was promulgated on 29 April 2009.[183] As the name suggests, the Act is responsible for protecting the interests of all consumers, ensuring accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace and to giving effect to internationally recognised consumer rights.[184] Section 3 sets out the purposes of the Act and what it aims to achieve. The Act seeks to mainly protect the social and economic welfare of not only consumers but, more importantly, vulnerable consumers.[185] Consumers are likely to be considered vulnerable when they have a low income, cannot speak English or come from a non-English speaking background, have poor literacy and numeracy skills, are very young or old or have an

[180] Sachs J's minority judgment in *Barkhuizen v Napier* supra at para173.

[181] Naude (2009) 126 *SALJ* 505.

[182] W Jacobs, PN Stoop, R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' 2010 (13) 3 *PER/PELJ* 303. See also E Van Eeden *A Guide to the Consumer Protection Act*, (2009).

[183] Naude (2009) 126 *SALJ* 505. The Act only came into full effect however in October 2010. (Sec 122 read with item 2 of Schedule 2).

[184] See the Preamble to the Act.

[185] Jacobs et al 2010(13) 3 *PER/PELJ* 303.

intellectual, physical, or neurological disability.[186] In South Africa, financial vulnerability amongst consumers has become a growing concern.[187] Many consumers are experiencing difficulty in their cash flow which leads to borrowed financing along with high interest rates.[188] Consumers are also reported to be financially illiterate or have little knowledge in financial management thus exposing them to financial vulnerability.[189]

The Act has a wide field of application and applies to every transaction occurring within South Africa for the supply and promotion of goods and services unless specifically exempted from the applicability of the Act.[190] The Act provides for and recognises a number of fundamental consumer rights in Chapter 2. These include the right to equality in the consumer market,[191] the right to privacy,[192] right to choose,[193] right to disclosure and information,[194] right to fair and reasonable marketing,[195] right to fair and honest dealing,[196] right to fair, just and reasonable contract terms and conditions[197] and, lastly, the right to fair value, good quality and safe goods.[198] Relevant provisions concerning the use of exemption clauses will be focused on below.

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[186] Looking out for the vulnerable consumer available at: http://www.ftc.gov.bb/index.php?option=com_content&task=view&id=149&Itemid=28. (accessed on 19 October 2012).

[187] K Magubane 'SA consumers' financial vulnerability 'remains high'' (2012) available at: http://www.bdlive.co.za/business/retail/2012/10/25/sa-consumers-financial-vulnerability-remains-high. (accessed on 26 October 2012).

[188] Consumer Financial Vulnerability Index (CFVI) for August 2012 available at: http://www.fanews.co.za/article.asp?Economy~43. (accessed 26 October 2012).

[189] Ibid. (CFVI) for August 2012 available at: http://www.fanews.co.za/article.asp?Economy~43. (accessed 26 October 2012).

[190] Section 5(1) (*a*)-(*d*); Jacobs et al 2010(13) 3 *PER/PELJ* 309.

[191] Section 8-10.

[192] Section 11-12.

[193] Section 13-21.

[194] Section 22-28.

[195] Section 29-39.

[196] Section 40-47.

[197] Section 48-52.

[198] Section 53-61.

Under the umbrella right to disclosure and information the Act provides for a specific right to information in plain and understandable language.[199] Any document, notice or visual representation produced for the consumer must be produced or displayed in a form which is compliant or prescribed by the Act.[200] Should there be no prescribed form then such information must be presented in plain and understandable language.[201] Plain and understandable language means that it is reasonable to conclude that an ordinary consumer in the class of persons for whom such notice or document is intended, with average literacy skills and minimal experience as a consumer, can be expected to comprehend the contents without undue effort.[202]

This provision has implications for contracting parties as it is clear that agreements must now be drafted in a way which will enable consumers to understand the terms upon which they are agreeing to contract and to make an informed choice.[203] It may also promote a culture of 'true consensus' in respect of provisions such as exemption clauses, since the consumer would be more aware of the limiting contractual provisions allowing them to comprehend such clauses and agree to be bound. Such consumer aid is welcome in the consumer sphere as it will also create more user-friendly agreements.[204] Although such provisions constitute a laudable effort in ensuring that consumers are aware of the risks undertaken when entering into contractual agreements which contain exemption clauses, it has also potentially given rise to a negative consequence in relation to a consumer's common law remedies. If a supplier or service provider is strictly required to bring exemption of liability clauses to the attention of consumers and has in fact taken steps to do so, then consumers may lose the ability to claim ignorance of a provision such as an exemption clause (i.e. *iustus error* as an exception to the *caveat subscriptor* rule) in consumer contracts.[205]

[199] Jacobs et al 2010 (13) 3 329.

[200] Section 22(1)(*a*)

[201] Section 22(1)(*b*).

[202] Section 22(2). See further section 22(2)(*a*)-(*d*) for factors to determine whether a document or notice is in plain and understandable language.

[203] Jacobs et al 2010 (13) 3 329.

[204] Ibid Jacobs et al.

[205] Pretorius 2010 (73) *THRHR* 491.

The Act under section 40 deals specifically with unconscionable conduct. Unconscionable conduct has been defined as displaying a character such as contemplated in section 40, or other improper unethical conduct that would shock the conscience of a reasonable person.[206] Section 40(1)(a)-(d) provides that a supplier or an agent of the supplier must not use physical force, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct against a consumer in connection with the marketing or supply of goods or services.

Since the common law prohibits undue influence and duress whilst contracting, it is said that section 40 has codified the common law and in effect has reinforced the idea that contracting parties should contract in good faith and their conduct must not be unconscionable or contrary to the *boni mores*.[207] Section 40(2) further prohibits unconscionable conduct by stating that is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was unable to protect their own interests as a result of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.[208] These provisions ensure that consumers cannot be taken advantage of as it takes into account the realities of consumers in South Africa and the fact that many of them are illiterate or ignorant.[209] It also imposes a burden on suppliers to ensure consumers understand the terms and conditions contained in the contract.

One of the specified aims of the Act is to protect consumers against unconscionable, unfair, unreasonable, unjust or improper practices.[210] Section 48 of the Act titled 'unfair, unreasonable or unjust contract terms' gives effect to such objective. Firstly, a supplier cannot supply, offer to supply or enter into an agreement for goods or services at a price or on terms that are unfair, unreasonable or unjust.[211] Further, a supplier cannot market, negotiate or enter an agreement for the supply of goods or services in a manner that is considered to be

[206] See section 1 in the CPA Act. Definition of 'unconscionable'.

[207] Jacobs et al 2010 (13) 3 347.

[208] Section 40(2).

[209] See Hopkins TSAR (2003) 150,155. The author states that "whilst it is true that the exploitation of historically disadvantaged and currently unsophisticated consumers is not a problem unique to South Africa, the Apartheid legacy is such that the majority of South Africans are either burdened by poverty or else they are illiterate. Both of these factors discriminate economically and socially in such a way that these vulnerable consumers become particularly susceptible to an abuse of power by unscrupulous capitalists in superior bargaining positions".

[210] Section 3(1)(*d*).

[211] Section 48(1)(*a*)

unfair, unjust or unreasonable.[212] Section 48 also prohibits a supplier from requiring "a consumer or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, assume any obligations or waive any liability of the supplier on terms that are unfair, unreasonable or unjust".[213] This last, of course, may hold significant potential to curb the use of widely-drafted and one-sided unfair exemption clauses in consumer contracts and may even render their inclusion in contracts impractical as it will be void in terms of the Act.

The Act then sets out the conditions under which a transaction, agreement, term or condition is considered to be unfair, unreasonable or unjust.[214] If either of them is (a) excessively one-sided in favour of any other party other than the consumer;[215] (b) if the terms or conditions of the agreement are so adverse to the consumer that it is inequitable;[216] or (c) if the consumer relied on a false, misleading, deceptive representation or a statement of opinion provided by or on behalf of the supplier which was to the detriment of the consumer;[217] then such terms or conditions shall be considered to be unfair, unreasonable or unjust. In addition, it will also be considered unfair, unreasonable, or unjust if (d) the transaction or agreement is subject to a term, condition or a notice which is unfair, unreasonable, unjust or unconscionable;[218] or if the fact, nature and effect of the term, condition or notice was not brought to the consumer's attention in a manner which satisfies the requirements of section 49(1).[219]

Section 49 deals with notice required for certain terms. It prevents an unsuspecting consumer from entering into an agreement which contains terms or provisions which may affect their rights in a detrimental manner and which are potentially unexpected.[220] These include terms which attempt to limit in any way the liability or risk of the supplier or any other person, a

[212] Section 48(1)(*b*).

[213] Section 48(1)(*c*).

[214] Section 48(2).

[215] Section 48(2)(*a*).

[216] Section 48(2)(*b*).

[217] Section 48(2)(*c*).

[218] Section 48(2)(*d*)(i).

[219] Section 48(2)(*d*)(ii).

[220] Jacobs et al 2010 (13) 3 357.

term which assumes the risk or liability to be undertaken by the consumer, a term which imposes an obligation on a consumer to indemnify the supplier or someone else for any other cause and lastly a term which constitutes an acknowledgement of any fact by the consumer.[221] An example of these terms would include indemnity clauses, owners risk clauses, exemption clauses and clauses which state to the effect that no representations were made to a consumer in any way.[222] Therefore should an agreement contain any one of these types of clauses, it must be brought to the attention of the consumer in the prescribed form and manner, be in plain and understandable language in accordance with section 22 and sufficient time and opportunity must be given to receive and comprehend the provision or notice .[223] In addition, should a provision or notice concern any activity or facility subject to risk of an unusual character or nature in which its presence cannot reasonably be expected by the consumer, which could result in serious injury or death, then the supplier must draw such fact, nature and potential effect of that risk to the attention of the consumer in the prescribed manner and form.[224]

It must be noted that the provisions of the Consumer Protection Act not only impacts on what goods and services are offered to consumers but also the manner in which they are offered.[225] Suppliers and service providers are now expected to re-examine their contractual documents especially any unexpected or unfair exemption of liability clauses which are hidden in tedious lengthy small print, with the aim of making these clauses clearly visible. These clauses are also expected to be worded in simple form so that consumers can understand them and not be presented with legalese. Any contractual terms, including exemption clauses, which appear to be excessively one-sided or potentially unfair to the consumer may have to be re-drafted by the supplier or service provider.[226] One may argue that the provisions of the Consumer

[221] Section 49(1)(*a*)-(*d*).

[222] Jacobs et al 2010 (13) 3 357.

[223] Section 49(3)-(5); Jacobs et al 2010 (13) 3 358. See also *Mercurius Motors v Lopez* 2008 (3) 572 (SCA) at para 33, in which the Supreme Court of Appeal held that "an exemption clause... that undermines the very essence of a contract...should be clearly and pertinently brought to the attention of customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause" as cited by Stoop (2008) 20 *SA Merc LJ* 499.

[224] Section 49(2) read with 49(3) and 49(5).

[225] The Consumer Protection Act: 'helping you to do good business, better' available at: http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf. (accessed on 30 October 2012).

[226] Ibid. available at: http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf. (accessed on 30 October 2012).

Protection Act have in many respects created onerous burdens on suppliers and service providers to ensure their business complies with the Act. A negative consequence is that such compliance comes at a cost. No longer can suppliers and service providers present consumers with contracts which contain endless provisions typed in a font as Sachs J puts it "sufficiently small enough to reduce the costs of the paper used whilst simultaneously discouraging any reasonable person from ploughing through it".[227]

The cost that suppliers and service providers incur in relation to compliance with the Act however, is often sustained by consumers who ultimately pay for greater consumer protection.[228] The Free Market Foundation of Southern Africa critically expressed their views in relation to the then Consumer Protection Bill and the issue concerning over-regulation of the consumer industry. The foundation was of the opinion that as much as regulation protects consumers, it also has the effect of retarding economic growth and imposing heavy burdensome expenses on businesses which are ultimately filtered down to the consumer's pockets, especially the poor.[229] "These may take the form of higher prices, fewer choices, less after sale service, or less products and services ... At the end of the day all costs of consumer protection are passed onto the consumer and it impacts disproportionately on the poor as they pay for consumer protection".[230]

Leaving aside the possible objections to strong legislative consumer protection, it bears considering the notification provisions of the Act which apply in respect of exemption clauses. The Act requires that the consumer, once made aware, must assent to such a provision or notice by signing the provision or conducting themselves in a manner which indicates that they have acknowledged the notice and are aware of and have accepted the risk and provision.[231] Notice is to be drawn to the consumer by the supplier in a conspicuous manner and form, likely to attract the attention of an ordinary alert consumer, to the nature

[227] See minority judgment of Sachs J in *Barkhuizen v Napier* supra at para 147.

[228] Consumer Protection Bill, 2006 Submission by the Free Market Foundation of Southern Africa available at: http://www.freemarketfoundation.com/ htmupload/PUBDoc1180.pdf (accessed on 31 October 2012).

[229] Ibid. available at: http://www.freemarketfoundation.com/ htmupload/PUBDoc1180.pdf (accessed on 31 October 2012).

[230] Ibid. available at: http://www.freemarketfoundation.com/ htmupload/PUBDoc1180.pdf (accessed on 31 October 2012).

[231] Section 49(2).

and effect of such provision or notice.[232] Such notice must be given speedily either before the consumer enters the agreement, before beginning to engage in the activity or entering a facility or before the consumer is required or expected to offer consideration for the agreement.[233]

The emphasis which is now placed by the Act on sufficient notification and ensuring that important contractual terms which involve an assumption of risk or liability on the part of the consumer, may potentially prevent contract deniers from abusing legitimate common law defences such as *iustus error*. If one had to apply the notification requirements in the Consumer Protection Act to the *Brink v Humphries & Jewell (Pty) Ltd*[234] case, it is likely that a court will find that the way in which the personal suretyship clause was positioned and embodied in the credit application agreement would have significantly fallen short of the 'conspicuous manner and form, likely to attract the attention of an ordinary alert consumer' standard set by the Act. In the *Brink* case, the personal suretyship clause was situated at the end of a document entitled 'credit application form', amongst a block of other contractual terms, not in bold print or depicted in any significantly conspicuous manner such as in red ink, led the majority of the SCA to find that "the manner in which the clause was included in the form accordingly did not suffice to alert a signatory to the fact that he was undertaking a personal obligation ... and was a trap for the unwary and the appellant was justifiably misled by it".[235] Under the Consumer Protection Act, the credit application form containing the personal suretyship provision in the *Brink* case would likely be found to be *void ab initio* for failure to bring such suretyship provision to the attention of the consumer in a conspicuous manner.[236] In order to be CPA compliant, the personal suretyship provision should preferably be typed in big bold print, in a different colour and possibility as a stand-alone provision so as to ensure that a consumer's attention is drawn to it.

Section 51 of the Act prescribes a list of prohibited terms, agreements or transactions which will be considered void should they purport to mislead, deceive, or subject the consumer to

[232] Section 49(4)(1)(*a*).

[233] Section 49(4)(1)(*b*).

[234] 2005 (2) SA 419 (SCA).

[235] *Brink v Humphries & Jewell* supra at paras 10-11.

[236] Section 49(4)(1)(*a*).

any fraudulent conduct.[237] Further, any terms or agreements which purport to directly or indirectly waive or deprive a consumer of their rights, allow a supplier to avoid their duty in terms of the Act, authorise a supplier to engage in unlawful activity in terms of the Act or fail to do something required by the Act is also void.[238] Section 51(c) has very important implications for exemption clauses. A term or an agreement which exempts the liability of the supplier or someone on his behalf for gross negligence is prohibited.[239] Exemption of liability for loss or damage due to gross negligence is now strictly prohibited in South African law.[240] This section also prohibits arrangements or terms which constitute an assumption of risk or liability by the consumer, or an imposition of an obligation on a consumer to pay for damages.[241]

It has been claimed that the Consumer Protection Act has not brought about any novel protection for consumers which was not already afforded by the common law (for example, liability for misrepresentation, duress or undue influence).[242] The promulgation of the Act and the provisions mentioned above, however, ensure that liability for ordinary negligence can be excluded provided the exemption clause is worded clearly and that the exclusion is not unfair, unreasonable or unjust.[243] The exemption clause must be brought to the attention of the consumer in plain and understandable language before or at the time of contracting.[244] What the Consumer Protection Act has ultimately done is promote a greater awareness and enforcement of consumer protection in South Africa and it has made it difficult for suppliers to rely on exemption clauses to exclude liability for negligence which is clearly unreasonable and unfair.[245] The Act's provisions will effectively see to the suppression and eradication of the use of exemption clauses in contracts which seek to primarily exploit consumers by

[237] Section 51(1)(*a*)(i)-(iii).

[238] Section 51(1)(*b*).

[239] Section 51(1)(*c*)(i).

[240] C Kok '*The Effect of the Consumer Protection Act on Exemption Clauses in Standardised Contracts'* (unpublished LLM Thesis, University of Pretoria, 2010) 44.

[241] Jacobs et al 2010 (13) 3 359.

[242] Hutchinson et al 34. For a discussion regarding criticism of the Consumer Protection Act, see T Naude (2009) 126 *SALJ* 505 and Cok LLM Thesis (2010) 55-61.

[243] Section 48(2); Hutchinson et al 34; Cok LLM Thesis (2010) 61.

[244] Hutchinson et al 34.

[245] Ibid 35.

imposing harsh and unfair terms and conditions upon them.[246] The Consumer Protection Act has now provides consumers with "a far bigger stick to wield over unscrupulous suppliers" and it also places a heavier burden on businesses to ensure that they comply with good business ethics when dealing with consumers.[247] An important point to make is that society is not seeking a total eradication of these clauses since much of the business world, especially in a capitalist society like South Africa, requires them to run effectively. The objective is to ensure the protection of unsuspecting consumers and the promotion of fairness in contractual relations.[248] Such objectives are in line with the Constitution and the underlying values it seeks to achieve.[249]

2.4 Conclusion

The preceding sections thus far have set out the legal and social context in which standardised contracts containing exemption clauses occur. Having provided this overview of the nature and treatment of exemption clauses in the contractual landscape of South African law, as well as the potential for significant legislative reform regarding the use of such provisions in consumer contracts, the focus will now shift to an analysis of the impact of the Constitution on exemption clauses. The influence of the Constitution on the enforceability and validity of contractual provisions such as exemption clauses remains a controversial issue in both academic and judicial spheres.[250] Recent case law, however, suggests some encouraging developments in the law of contract which suggests that a new meaning is to be attributed to public policy which is now deeply rooted in the Constitution.[251] It appears that

[246] Cok LLM Thesis (2010) 63.

[247] The Consumer Protection Act: 'helping you to do good business, better' available at: http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf. (accessed on 30 October 2012).

[248] Ibid. available at: http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf. (accessed on 30 October 2012).

[249] Ibid. available at: http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf. (accessed on 30 October 2012).

[250] Hopkins (2007) *De Rebus* 23.

[251] Ibid Hopkins, See *Barkhuizen v Napier* supra; *Brisley v Drotsky* 2002 (4) SA 1 SCA; *Afrox v Strydom* 2002 (6) SA 21 (SCA); *Everfresh Market Virginia Pty (Ltd) v Shoprite Checkers Pty(Ltd)* supra; Harms JA in *Johannesburg Country Club v Stott & Another* 2004 (5)11 (SCA) stated: "The conduct sought to be exempted from liability may involve criminal liability, however, and the question is whether a contractual regime that permits such exemption is compatible with constitutional values, and whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires adaption."

there has even been a suggestion that ubuntu has an important role to play in the law of contract.[252] In the section that follows, these issues shall be addressed in further detail.

[252] *Everfresh Market Virginia v Shoprite Checkers Pty (Ltd)* supra.

Section: 3

The Effect of the Constitution on Contract Law

3.1 Direct and Indirect Horizontal Application of the Bill of Rights to Contract law

The enactment of the interim Constitution[253] sparked a debate as to whether the Bill of Rights applied vertically (that is, between the state and private individuals) or also horizontally (that is, between two or more individuals, for example, in private contractual relations).[254] A further issue concerned whether such application was meant to be direct (meaning a litigant could, for example, directly invoke any of the substantive rights in the Bill of Rights) or indirectly (meaning that a litigant would be required to rely on the development of the common law in that, for example, a contractual provision which infringed a constitutional right would be deemed to be contrary to public policy and illegal under common law).[255]

The Constitutional Court, in application of the interim Constitution at that time, declared in *Du Plessis v De Klerk*[256] that the Bill of Rights did apply to private contractual relations, both horizontally and indirectly.[257] The supremacy clause in section 2 of the final Constitution provides that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled". Furthermore, section 39(2) provides for the indirect application of the Bill of Rights and provides that "when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It has been stated that the purpose of section 39(2) is to ensure that the common law is now infused with the values of the Constitution.[258] Evidently all law, including the common law of contract, is now subject to the Constitution and its values,[259]

[253] Constitution of the Republic of South Africa Act 200 of 1993 (repealed), hereinafter referred to as the "Interim Constitution".

[254] Hutchinson et al 35.

[255] Ibid 35.

[256] 1996 (3) SA 850 (CC).

[257] Hutchinson et al 35.

[258] Ibid 36. See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) 17.

[259] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 6; *Barkhuizen v Napier* supra 15.

and "the common law of contract is shot through with open-ended concepts such as good faith, public policy and reasonableness."[260] These concepts are now informed by the Bill of Rights and its underlying values. With regards to a direct horizontal application of the Bill of Rights the application clause in section 8 provides as follows:

> "(l) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
>
> > *(a)* in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;
> >
> > and
> >
> > *(b)* may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1)."

An interpretation of section 8(2) suggests that not all fundamental rights bind private individuals; it will only be binding to the extent that it is applicable.[261] Section 8(3) makes it clear that should a right in the Bill of Rights find application in the private sphere, it will be given effect through the development of the common law rather than directly.[262] The majority of the Constitutional Court in *Barkhuizen v Napier*[263] expressed that testing the constitutionality of a contract term directly against a right in the Bill of Rights would result in many difficulties.[264] This is because if a contractual term were to limit a constitutional right, such limitation would have to be justified under section 36 (limitation of rights clause) of the

[260] Hutchinson et al 36.

[261] Hutchinson et al 37- "socio-economic rights such as the right to housing, health care, water etc are to apply against and bind the State".

[262] Ibid 37. See also S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) *SALJ* 762 and IM Rautenbach 'Constitution and contract – exploring "the possibility that certain rights may apply directly to contractual terms or the common law that underlies them"'(2009) 1*TSAR* 613 in which the authors advocate the possibility of a direct application of the Bill of Rights to private contract terms.

[263] *Barkhuizen v Napier* supra.

[264] Ibid at paras 23-30.

Constitution.[265] Section 36 only permits a limitation of rights if it is 'in terms of a law of general application', which means it applies to everyone. A contractual provision cannot be such a law.[266] Furthermore, section 172(1)(a) of the Constitution mandates a court to declare 'any law or conduct' which is inconsistent with the Constitution to be invalid to the extent of its inconsistency, and the Court expressed the opinion that a contractual term is neither 'law' nor 'conduct' for purposes of this provision.[267]

As a result, the majority agreed that an indirect application under section 39(2) of the Constitution is the correct approach to be taken in consideration of the constitutionality of a contractual provision.[268] Ngcobo J stated: "In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[269] Section 39(2) provides the portal for this exercise to be undertaken, as the constitutional values are considered and applied in the process of promoting the spirit, purport and objects of the Bill of Rights.

As was stated above, according to the traditional approach of our courts, exemption clauses were upheld and enforced on account of a strict adherence to the principle of sanctity of contract, unless the exemption clause violated public policy. The problem with pre-constitutional public policy was that it also prioritised the enforcement of a contract to the

[265] See section 36 of the Constitution which states:
"(1) The rights in the Bill of Rights may be limited only in
terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[266] *Barkhuizen v Napier* supra.

[267] Ibid.

[268] Ibid.

[269] *Barkhuizen* supra at para 30. See also the separate concurring judgment of Langa CJ in disagreement with the majority of the court as per Ngcobo J at para 186.

letter of the law.[270] According to Sutherland, it appeared that too much emphasis had been placed on freedom of contract[271] and "the sanctity of contract rule became the epitome of public policy in contract law".[272] This had the direct effect of essentially creating social inequalities which in turn allowed for domination and exploitation of weaker contracting parties.[273] The 'new', post- constitutional concept of public policy however, is generally considered to be significantly welcomed as it is said that public policy, is no longer entrenched in the principles of *pacta sunt servanda* but rather it is now also deeply and richly rooted in the underlying values of the Constitution.[274] A contract or a provision (more importantly in this context, an exemption clause) which violates any constitutional values such as dignity, equality, and freedom, will be contrary to public policy and therefore unenforceable.[275]

Hopkins is in strong agreement with such proposition as he argues that the Bill of Rights is incorporated into the Constitution because it represents the values that society holds most dear, which is ultimately described as public policy.[276] For this reason the Constitution and the Bill of Rights represents the most reliable statement of public policy.[277] If one is to take such a premise seriously, then it must follow that contracts which violate the provisions in the Bill of Rights or the values which underlie it should be considered unconstitutional and unenforceable for violating public policy.[278] It is now evident that the Constitution is applicable to the law of contract and that it does have a bearing on the enforceability of contractual terms, especially exemption clauses.[279] The Supreme Court of Appeal and the

[270] Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* supra at para 465 cited with approval in *Wells v South African Aluminite Co* supra at para 73, *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 SA (N) at 505 and *Basson v Chilwan* 1993 (3) SA 742 (A) at 761; *Eastwood v Shepstone* supra; *Burger v Central South African Railways* supra; *Brisley v Drotsky* supra; *Barkhuizen v Napier* supra; Hahlo (1981) *SALJ* 70; Bhana & Pieterse (2005) 122 *SALJ* 867.

[271] Sutherland (2009) *Stell Law Review* 53.

[272] K Hopkins 'The influence of the Bill of Rights on the enforcement of contracts' (2003) *De Rebus.*

[273] Hawthorne 'Distribution of wealth, the dependency theory and the law of contract' (2006) *SALJ* 52.

[274] *Barkhuizen v Napier* supra; Hopkins (2007) *De Rebus* 23.

[275] *Barkhuizen v Napier* supra.

[276] Hopkins (2003) *De Rebus*, *Barkhuizen v Napier* supra.

[277] *Barkhuizen v Napier* supra, *Afrox Health Care v Strydom* supra.

[278] Hopkins (2007) *De Rebus* 25.

[279] Ibid 22.

Constitutional Court, however, have been accused of continuing to observe an adherence to the sanctity of contract principle, with continuing reluctance to declare contracts which limit or infringe constitutional rights unenforceable.[280] Such adherence may well be based in a particular reading of the constitutional values, namely that self-autonomy, which includes contractual autonomy and the ability to regulate one's own affairs even to one's detriment, is considered by the courts to be the very essence of both freedom and dignity.[281] Despite the criticism levelled against the Supreme Court of Appeal for following such an approach, and the judicial reasoning in *Brisley v Drotsky* and *Afrox Health Care v Strydom*,[282] the willingness of the highest court in the land in both *Barkhuizen v Napier* and *Everfresh Market Virginia v Shoprite Checkers* to infuse contract law with public policy, in light of constitutional values (including the recognition of ubuntu and its role in the promotion of contractual fairness between parties), leads one to believe that in the future, a constitutional shift in the court's thinking might be more radical. The potential for courts to make more significant use of the new encompassing constitutional value-meaning of public policy and ubuntu to strike down unfair and abusive exemption clauses will be discussed below.

3.2. Case Law on Exemption Clauses and the Constitution

Since the advent of our Constitutional dispensation in 1994, initial indications showed that contract law would also rise to the challenge of aligning itself and becoming congruent with the spirit, purport and objects of the Constitution and of re-establishing its principles so as to be consonant with the values of freedom, equality and dignity.[283] Recent judgments, however, had indicated that this has not occurred or, at least, not to the extent that some observers have been hoping would be the case.[284] What follows is a brief examination of a few controversial judgments handed down by the Supreme Court of Appeal in which it has been called upon to rule on the enforceability of exemption clauses in light of the Constitution. These judgments

[280] D Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 *SALJ* 269; Bhana & Pieterse (2005) 122 *SALJ* 865; Hopkins (2007) *De Rebus* 22; F Marx & A Govindjee 'Revisiting the interpretation of exemption clauses: *Drifters Adventure Tours CC v Hircok* 2007 2 SA 83 (SCA) *Obiter* (2007) 622; *Brisley v Drotsky* supra; *Afrox Health Care v Strydom* supra.

[281] *Brisley v Drotsky* supra at para 35; *Afrox v Strydom* supra at para 38; *Barkhuizen v Napier* supra at para 341; Hutchinson et al 176-177.

[282] See Bhana & Pieterse (2005) 122 *SALJ* 865.

[283] Ibid 865.

[284] Bhana & Pieterse (2005) 122 *SALJ* 865. See *Brisley v Drotsky* supra; *Afrox v Strydom* supra; *Johannesburg Country Club v Stott* supra; *Napier v Barkhuizen* supra.

have been widely criticised for displaying a measure of judicial conservatism in respect of the application of the Constitution to private contractual disputes, and they may hold some lessons for our courts going forward.

3.2.1 *Afrox Health Care Bpk v Strydom*

The appellant was the owner of a private hospital to which the respondent had been admitted for an operation.[285] Upon admission the respondent signed an admission agreement which contained an exemption clause excluding the liability of the hospital and its employees for all negligent conduct.[286] Negligent conduct of the nursing staff at the hospital caused the respondent to suffer injury and damages. The respondent consequently instituted action against the hospital for such damages. In defence, the hospital sought to rely on the exemption clause contained in the admission agreement. Initially the High Court had found in favour of the respondent, but the SCA upheld an appeal against the judgment.

The SCA held that as far as exemption clauses were concerned, in terms of the common law approach exemption clauses could be declared contrary to public policy and as such be deemed unenforceable.[287] Despite such acknowledgement, the court held that there appeared to be no evidence indicating that the respondent was in an unequal or weaker bargaining position in relation to the appellant at the time of concluding the admission agreement.[288] It was held that in consideration of whether a contractual term was in conflict with the public interests, that the values underpinning the Constitution had to be taken into account.[289] Public interest supports that contracts entered into freely and seriously by parties having the necessary capacity are required to be upheld and enforced by a court of law, and as a result the respondent's contention that the exemption clause of the hospital which excluded the liability for the negligent conduct of its nursing staff was contrary to public interest could not be supported.[290] It was further contended that when a court deals with the enforcement of contractual terms, the court has no discretion and does not operate on the basis of abstract

[285] at para 27 .

[286] Hopkins (2007) De Rebus 24.

[287] at para 34.

[288] at para 35.

[289] at para 37.

[290] at para 38.

considerations such as good faith and *bona fides* as argued by the respondent, but rather on the basis of established legal rules.[291] It was held further that persons who sign a written agreement without reading it do so at their own risk, and will consequently find themselves bound by the contractual provisions contained therein as if they had been aware of such terms and expressly agreed to it (unless there exists a legal duty to point out certain provisions).[292] The respondent's subjective expectations about what terms a hospital admission agreement contained played no role in deciding whether there existed a legal duty to point out such clause. What had to be determined was whether, objectively speaking, such an exemption clause was unexpected resulting in the duty to have such an exemption clause pointed out.[293] The SCA found that the exemption clause was not, objectively viewed, unexpected, and there existed no legal duty upon the admission clerk to bring it to the respondent's attention. Therefore the respondent was held bound by the exemption clause.[294]

Bhana and Pieterse submit that the SCA's reasoning that inequalities of bargaining power do not play a role in admission contracts is erroneous and submit that if contracts such as the one entered into by Afrox do not warrant greater judicial scrutiny for public policy compliance, then "it may seriously be doubted whether any contract would ever qualify as such."[295] This is because the case concerns a situation where the ability of a patient to contract on or negotiate more favourable terms is impaired in light of the reality of the need of medical attention and the emotional factors such as fear being experienced.[296] Even if the 'would-be patient' does not accept the terms of admission, it would lead to a refusal by the hospital to provide medical treatment needed in circumstances where similar institutions are not easily accessible or would likely insist contracting on similar terms.[297] In criticism of the SCA's approach the authors submit that the court did not consider inequality of bargaining power as legally relevant and failed to take into account "normative considerations of good faith,

[291] at paras 40-41.

[292] at para 41.

[293] at para 42.

[294] Ibid.

[295] Bhana & Pieterse (2005) 122 *SALJ* 886.

[296] Ibid 886.

[297] Ibid 887.

fairness and equality that were at play in the circumstances".[298] Based on a "limited notion of formal consensus", the court decided to uphold the principle of *pacta sunt servanda*.[299]

Naude and Lubbe further have criticised the reasoning of the SCA in the *Afrox* decision.[300] The authors submit that the court erred in finding that the exemption clause contained in the medical admission agreement was not unexpected as "a clause which purports to vary the consequences of the contract in a manner contrary to the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties is 'surprising'... a party may reasonably expect the terms of a written document to be consistent with the typical purpose of the envisaged contract... if this expectation is contradicted by the document, it is certainly surprising and there is ... a legal duty to point it out...".[301] The essence of the contract in this case entailed that the hospital and its medical staff would act with a "degree of care and skill reasonably expected of a medical service provider" and a clause which essentially purports "to exempt the service provider from liability for lack of such skill is contrary to the essence of the agreement...".[302]

As a result, an exemption clause contained in a medical agreement effectively allows a hospital to provide medical service that is substantially different from that envisaged by the parties to the contract especially the would-be patient, "namely the provision of professionally acceptable medical care".[303] The authors further submit that the SCA merely treated the medical contract like any other commercial transaction and failed to take into account policy considerations relating to a medical contract.[304] They criticise that the approach adopted by the SCA "overlooks the foundations of the medical profession – that of a caring relationship between a health care worker and a patient... and as such a contract to

[298] Ibid.

[299] Ibid.

[300] T Naude & G Lubbe 'Exemption Clauses: A rethink occasioned by Afrox Healthcare Bpk v Strydrom' (2005) 122 *SALJ* 441.

[301] Ibid 454.

[302] Ibid 456-457.

[303] Ibid 459.

[304] Ibid 460.

obtain medical care is not a simple commercial transaction".[305] As a result an exemption clause which excludes all liability for injury to a patient in a hospital admission agreement ought to be regarded as void as it "erodes the patients trust" in the service provider who appears to be more concerned with commercial interests than the provision of professional health care which may be contrary to public policy.[306]

It is submitted that the *Afrox* decision highlights the dismay experienced by many consumers who often are required to enter into admission medical agreements which are laden with widely worded exemption clauses due to the increased risk of potential litigation being brought against a hospital as a result of the potential negligence of its medical and nursing staff. Unfortunately, in practice, many people that are in need of medical care or emergency treatment do not have time to go shopping around for better medical-admission contract terms and will often out of desperation and concern for their health or that of others (for example, a minor child), speedily sign an admission contract and with it lose their rights of recourse. This case represents an example of how harsh, dangerous and oppressive the implementation of an exemption clause can be on a contracting party.

Yet another decision considered in the Supreme Court of Appeal concerning the enforceability of an exemption clause in light of the Constitution and public policy was that of *Johannesburg Country Club v Stott*.[307]

3.2.2 *Johannesburg Country Club v Stott and Another*

The respondent and her late husband were members of the appellant golf club.[308] Whilst playing golf at the club a rain storm occurred and Mr Stott sought shelter under a cover of some sorts when lightning struck him. He was left severely injured and later passed away as a result of his injuries.[309] The respondent, Mrs Stott, sought to hold the country club liable for her loss as she alleged that her husband had been killed as a result of their negligence.[310] Mr

[305] Ibid.

[306] Ibid 456.

[307] *Johannesburg Country Club v Stott* supra.

[308] at para 1.

[309] Ibid.

[310] Ibid.

and Mrs Stott, however, as members of the club were bound by the club membership rules which contained an exemption clause exempting liability for personal injury or harm caused.[311] The golf club sought to rely on the exemption clause, whilst Mrs Stott pleaded that she was not bound by such clause because she had not been aware of it.[312] The question to be decided by the court was whether the exemption clause absolved the club from liability for a dependant's claim.[313] The case had essentially been argued and reasoned on the common law approach to exemption clauses and the meaning attributed to the words 'personal injury or harm however caused ... on the club premises' in relation to Mrs Stott's claim for loss of support.[314]

The SCA held that in answering the above question, Mr Stott as a member of the club could not relinquish the autonomous claims of dependants.[315] Personal harm caused did not include a dependant's claim for loss of support but rather a claim for financial loss.[316] More importantly, Harms JA held that to permit an exclusion of liability for damages for negligently causing the death of another would be against public policy as it runs counter to the high value the common law and the Constitution places on the sanctity of life.[317] Interestingly, the court requested the parties to provide them with argument on the above but decided that on a proper reading of the exemption clause there was no need to consider such arguments and the appeal was subsequently dismissed.[318] Harms JA was quick to caution that he did not wish to create the impression that he was lending support to the conception that an

[311] The relevant part of the exemption clause read: "The Club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guest brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and or grounds".

[312] at para 2.

[313] at 512.

[314] at 517.

[315] at 512.

[316] at 518.

[317] Ibid. See also [fn4] of Harms JA's judgment, *S v Makwanyane and Another* 1995 (3) SA 391 (CC)(1995 (2) SACR 1; 1995 (6) BCLR 665); *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC)(2001 (2) SACR 66; 2001 (7) BCLR 685); *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC)(2002 (2) SACR 105; 2002 (7) BCLR 663).

[318] at para 12.

exclusion of liability for negligently causing an individual's death is necessarily contrary to public policy or constitutional values.[319]

An analysis of these two judgments indicates that the SCA acknowledged that public policy is now deeply rooted in the Constitution. According to Hopkins, however, despite such acknowledgement the court remained hesitant and seemingly unwilling to actually declare contracts which limit constitutional rights unenforceable.[320] In both *Afrox* and *Stott* the SCA chose to question the enforceability of exemption clauses against the Bill of Rights but later dismissed or found it to be inapplicable against constitutional scrutiny.[321] As a result, in both cases the exemption clauses were not tested adequately against the Constitution.[322] The SCA thereafter adopted a similar approach in *Brisley v Drotsky* as discussed below.

3.2.3 *Brisley v Drotsky*

Brisley concerned the validity of a non-variation clause in a lease agreement in which any variations to the terms or conditions of the contract were required to be recorded in writing and assented to by the contracting parties in order to be valid. The landlord in bad faith attempted to cancel the lease agreement and eject the tenant from his property for failing to pay rent despite orally granting the tenant a period of grace and extended time to pay. The tenant had sought to argue that the written lease agreement should not be enforced as its implementation in light of the oral variation granted would be unreasonable, unfair and contrary to public policy as informed by the values which underlie the Constitution. The SCA rejected the tenant's arguments and chose to uphold the well know *Shiferen* principle,[323] which invalidates any oral variations if not committed to writing and assented to by the parties to the contract. The SCA also found that the lease agreement was a contract freely negotiated and entered into and that it should thus be upheld. Bhana and Pieterse argue that the SCA's failure to take into account the inequality of bargaining power when entering into a lease agreement, ignores the fact that in reality, standard-form lease agreements are drafted

[319] at para 14.

[320] Hopkins (2007) *De Rebus* 24.

[321] Ibid Hopkins 25.

[322] Ibid 25.

[323] The *Shiferen* principle was enunciated in *SA Sentrale Ko-op Graanmaatskappy v Shiferen* 1964 (4) SA 760 (A).

in a manner whereby the "obligations of the lessee are usually more pressing than those of the lessor" affording the lessor maximum protection.[324] Furthermore, in relation to exemption clauses, the authors submit that "whilst the lessor is exempted from liability for damage suffered by the lessee from any cause whatsoever, the lessee is liable to compensate the lessor for any damage to the property..."[325] The *Brisley* case highlights the fact that even in a simple lease agreement which many South African consumers enter into on a daily basis, the non-variation clause exempting the landlord from liability under a verbal variation of the contract illustrates how dangerous, one-sided and unfair an exemption clause can potentially be in operation against a weaker contracting party such as the tenant in this case.

3.2.4 *Napier v Barkhuizen*

Shortly after the controversial reasoning in *Afrox* and *Brisley*, the case of *Napier v Barkhuizen* was decided by the SCA. The case involved the inclusion of a time bar clause restricting an insured from bringing any civil action against an insurance provider, unless such action is brought within 90 days of rejection of a claim, and essentially amounted to an exemption clause as it effectively takes away potential liability of the insurer under a pre-existing ground (the insurance contract) and prohibits the insured from access to court to prove liability (thereby also limiting the constitutional right of an individual who wishes to have a dispute settled in a court of law regardless of the source of that right).

Cameron JA endorsed the approach taken by the same court in both *Brisley* and *Afrox* in recognising that the common law was now subject to the Constitution and that courts were to take into account fundamental constitutional values of equality, dignity and freedom when developing the common law of contract in accordance with the spirit, purport and objects of the Constitution.[326] The SCA however, warned that this did not mean judges now had the power to strike down contracts or declare them unenforceable based on their subjective perceptions of fairness, justice or good faith but that they should declare contracts or their terms unenforceable when they were contrary to public policy as informed by the values which underlie the Constitution.[327] It is submitted that insurance contracts are notorious for

[324] Bhana & Pieterse (2005) 122 *SALJ* 885.

[325] Ibid 885.

[326] *Napier v Barkhuizen* supra at para 6; Bhana (2007) 124 *SALJ* 271.

[327] *Napier v Barkhuizen* supra at para 7; Bhana (2007) 124 *SALJ* 271.

being drafted in such a manner so as to ensure that the insurer is equipped with all possible mechanisms in order to repudiate a claim, and the time bar clause in *Barkhuizen* is again an illustration of how unfair and one-sidedly detrimental these types of provisions can be to a consumer. While our courts have on many occasions recognised the benefits and positive aspects of both statutory and contractual time bar provisions, one must ask whether a 90 day-limitation such as that found in a standard form contract in *Barkhuizen*'s case is reasonable and fair. In South Africa it is hardly a stretch of the imagination to assume that many working class people do in fact pay monthly premiums towards some kind of insurance whether it is for their motor vehicles or households. Therefore in the context of commercial reality millions of consumers who are in a weaker bargaining position in relation to large insurance companies can potentially be affected negatively and subjected to these potentially unfair, one-sided clauses that may very well limit their constitutional rights.

Despite the court's recognition of the importance of constitutional values however, it once again reaffirmed its adherence to the classical liberal theory by adopting a laissez-faire interpretation.[328] The court found that the constitutional values of dignity and freedom inform contractual autonomy and the individual's ability to regulate their own affairs.[329] Contractual autonomy coupled with the principle of sanctity of contract led to the insurance contract in *Barkhuizen*'s case being upheld as a legitimate, voluntarily concluded contractual agreement, and the time bar clause was not found to be unfair or unreasonable.[330] As discussed above, the matter finally ended in the Constitutional Court where the constitutionality of the time bar clause was tested. The Constitutional Court confirmed that public policy had to be determined with reference to the constitutional values and if a contractual term violates a constitutional value it would by definition be contrary to public policy and unenforceable.[331]

In light of the above judgments it is necessary to consider the 'new' role of public policy and constitutional values, specifically in respect of the future treatment of contractual exemption clauses by our courts.

[328] Ibid Bhana 271.

[329] *Napier v Barkhuizen* supra at para 12.

[330] Ibid at para 10.

[331] Ibid at para 29.

3.3 Constitutional values and their application to exemption clauses

Both the Supreme Court of appeal and the Constitutional Court have confirmed that constitutional values of freedom, dignity and equality inform public policy and that contractual provisions (including exemption clauses) which infringe a constitutional value can be struck down or declared unenforceable in terms of the common law for offending public policy. In the context of contracts, constitutional values of freedom and equality may be implicated when the relative bargaining positions of the contracting parties are considered.[332] A typical non-negotiated standard form contract containing exemption clauses provides a good illustration of a potential situation in which the constitutional values of freedom and equality may be severely undermined and potentially violated since a contracting party may be held bound to non-negotiated terms on a take- it- or- leave- it basis and the only real exercise of freedom the contracting party has is the choice to accept and assent to a contract wholly and subject to its exemption provisions, or to not contract at all.[333]

In light of the above, a natural conclusion to be made is that standard term contracts which contain exemption clauses may undermine and violate constitutional values and should therefore be vulnerable to a finding of being unenforceable or void for being contrary to public policy. This proposition is supported by Cameron JA in *Napier v Barkhuizen* in which the SCA recognised that when a plaintiff, as a result of a significantly unequal bargaining power, is forced to contract on terms which infringe their constitutional rights to equality and dignity it may be necessary for a court to develop the common law of contract in order to invalidate such term.[334] The counter- argument to such a proposition, however, will always be that contractual autonomy also embodies the constitutional values of freedom and dignity and that respect is to be afforded to consenting adults in the exercise of such contractual autonomy and subsequent conclusion of contracts even if it that contract is to their detriment.[335] Such an approach is squarely in line with the one adopted by the Supreme Court of Appeal in the cases mentioned above. It appears that not all standard form contracts containing exemption clauses which undermine freedom and equality are unenforceable and

[332] Hopkins (2007) De Rebus 25.

[333] Bhana & Pieterse (2005) 122 *SALJ* 884-885; Hopkins (2003) *TSAR* 150, Turpin (1956) *SALJ* 145, K Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 157.

[334] *Napier v Barkhuizen* supra at para 16.

[335] Hopkins (2007) *De Rebus* 25; *Barkhuizen v Napier* supra at para 57. See also Bhana & Pieterse's discussion of the 'empowerment' and 'restraint' conceptions of dignity.

that not every case of inequality in the bargaining power which is a commercial reality should result in a judicial sanction, since legal certainty would be compromised.[336] But where it is evident that the enforcement of the contract containing the exemption clause is unduly one-sided, harsh or unconscionable, then such sanction may be necessary in light of public policy.[337] This proposition is duly supported by the Constitutional Court in *Barkhuizen v Napier*[338] as per the majority judgment of Ngcobo J in which the test for fairness of a contractual term is considered. In order to determine the fairness of a contractual term, the court stated that two questions needed to be answered. "The first question was whether the clause itself was objectively unreasonable, and secondly, if it were found to be reasonable, then whether it should be enforced in the circumstances".[339] Further citing with approval the *Bafana Finance Mabopane v Makwakwa and Another* case,[340] the SCA unanimously found that "a clause which had merely a tendency, rather the than the result of depriving a party of the right to approach a court for redress was inimical to public policy".[341] Accordingly, the two- stage test for fairness adopted in the *Barkhuizen* case allows a court to first examine whether a contractual term is objectively reasonable. Should the court find that it is, the second enquiry is whether it should be enforced in the particular circumstances relevant to the case and relevant to the relative situation of the contracting parties.[342] The court went on to state that in the *Afrox* case, "although the Court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours".

The Constitutional Court in addition stated that "Public policy imports the notions of fairness, justice and reasonableness and would preclude the enforcement of a contractual term if its

[336] Hopkins (2007) *De Rebus* 26.

[337] Ibid.

[338] supra.

[339] *Barkhuizen* supra at para 56.

[340] 2006 (4) SA 581 (SCA).

[341] See also *Naidoo v Birchwood Hotel* (2010/47765).

[342] *Barkhuizen* supra at paras 58-59.

enforcement would result in an injustice".[343] Further, "while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view the hands of justice can never be tied under our constitutional order".[344] In respect of the two-stage test for fairness of a contractual provision, Sachs J and Moseneke DCJ, in their dissenting minority judgments preferred a more objective approach to the second question and stated that "public policy cannot be determined at the behest of the idiosyncrasies of the individual contracting parties".[345] However, they both agreed that fairness and reasonableness is the correct approach to be adopted in determining whether the contractual provision if enforced would be contrary to public policy.

3.4 Conclusion

Judicial reasoning on the part of the Supreme Court of Appeal in the cases mentioned above call for a reiteration of the fact that the Constitution is now the supreme law of South Africa. All law including the common law of contract is now subject to constitutional control.[346] Despite initial indications of a smooth transition, the SCA has displayed an unsettling reversion to the preferred classical theory of contract law and a general antagonistic attitude towards the infiltration of constitutional values and broader notions of equity, fairness and good faith which have been held to now inform public policy.[347] Like all other areas of South African law, contract law is also required to "re-establish itself in a constitutional dispensation" but the SCA has displayed its unwillingness to really do so in cases such as *Brisley*, *Afrox*, *Stott*, *Bredenkamp*[348] and *Barkhuizen.*[349] Despite recognising the need for the

[343] *Barkhuizen* supra at para 73

[344] Ibid.

[345] *Barkhuizen* supra at para 93.

[346] Section 2 of the Constitution of the Republic of South Africa.

[347] Bhana & Pieterse (2005)122 *SALJ* 865. See *also Naidoo v Birchwood Hotel* in which the SCA, although decided on the principles of delict, held that to deny Naidoo the right to redress for his injuries sustained as a result of the negligent conduct of Birchwood Hotel, offended the notions of fairness and justice and to enforce the exemption clause of the Hotel would be unfair and unjust.

[348] 2010 4 SA 368 (SCA).

[349] Ibid 865.

common law of contract to be infused with constitutional values, the SCA has done so in a manner which places "values of equality and dignity purely within a classical liberal understanding of contract law".[350] It is submitted that this approach cannot be said to be in consonance with the general spirit, purport and objects of the Bill of Rights and the intended application of public policy in a constitutional context. The SCA has been criticised for merely paying lip-service to the incorporation and consideration of constitutional values.[351] In addition, Lubbe argues that "The judgments in *Brisley* and *Afrox* buttress freedom and sanctity of contract constitutionally, on the basis of values of freedom, dignity and equality".[352] This last is a dangerous development in the view of those who have called for less rigid adherence to the principle of sanctity of contract, and who support greater substantive justice in our law of contract.

The consequence is that public policy as informed by constitutional values is not adequately being utilised in a manner which can be effectively used to address potentially unfair contract terms or one-sided, oppressive and abusive exemption clauses, by declaring them to offend public policy. Nevertheless, the Constitutional Court has indicated that apart from constitutional values being infused with public policy, other ideals such as ubuntu, which embodies numerous values and notions of good faith, justice, morality, equality and dignity (to name a few), may also be implicated as relevant notions which require equal consideration in determining the fairness of contracts and their provisions. It is submitted that ubuntu as infused with the new meaning of constitutional public policy may have a significant role to play in the review of the validity of exemption clauses and as a potential standard against which these clauses are to be tested in order to determine whether they violate the dictates of public policy. Since the anticipated shift in judicial thinking and the transition and development of the common law of contract to reconstitute itself in a constitutional era has been arguably slow,[353] it is submitted that the growing trend towards the recognition and elevation of the spirit of ubuntu may provide an alternative mechanism to which the constitutionality of exemption clauses contained in standard term contracts may be tested. The suggestions made in the South African Law Commission report Project 47 and the

[350] Bhana (2007) 124 *SALJ* 274.

[351] Ibid 275.

[352] G Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law (2004) 121 *SALJ* 395, 420.

[353] See Bhana (2007) 124 *SALJ* 269.

subsequent promulgation of the Consumer Protection Act represent evidence of a powerful legislative will and apparent persistence to combat unfairness in consumer contracts, especially in respect of exemptions clauses. These efforts *per se* are a powerful indication and representation of the current status of public policy in the context of contract law and the concerns over unfair exemption clauses contained in standard form contracts. It is within this climate of consumer protection against abusive, unfair exemption clauses that ubuntu may obtian judicial support. These arguments and sentiments are discussed in the section to follow.

Section 4

Post-Constitutional Public Policy

4.1 Public Policy incorporating Ubuntu and Good faith

Apart from constitutional values, the effects of a contract or its provisions on the individual interests of contracting parties also play a role in determining whether contracts and their provisions are to be considered contrary to public policy.[354] The need to encourage the doing of simple justice between contracting parties and addressing inequality of bargaining power are both considered to be in the public interest.[355] When Ngcobo J stated that "public policy takes into account the necessity to do simple justice between individuals and that it is informed by the concept of ubuntu",[356] it appeared that notions of good faith in contractual dealings and ubuntu are to be applicable to contract law.[357] It is possible that incorporation of this latter concept into contract law may serve to ensure the achievement of greater contractual fairness and the promotion of equality between contracting parties. Unfortunately, however, the ideal of ubuntu is not easy to define,[358] and I need to briefly consider the content of this principle. Mokgoro has defined it as follows:

> "Ubuntu is a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho babangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings".[359]

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[354] Hutchinson et al 182.

[355] *Sasfin (Pty) Ltd v Beukes* supra at para 9; *Afrox v Strydom* supra at para 35; *Barkhuizen v Napier* supra at paras 339-341.

[356] *Barkhuizen* supra at para 51.

[357] See later discussion of *Everfresh v Shoprite Checkers* supra.

[358] JY Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1(1) *PELJ* 2; see also R English 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 *SAJHR* 641.

[359] Mokgoro (1998) 1(1) *PELJ* 2.

There are various interpretations and descriptions of ubuntu. Some define ubuntu as the moral quality of what makes up a person whilst others view it as a philosophy, a phenomenon or an ethical world view according to which we are all as persons interconnected.[360] Ubuntu is said to be a novel concept that is not static and is highly susceptible to change.[361] Despite being regarded as a purely ethnic African ideal or philosophy with its origins in the Bantu language, ubuntu is said to be a worldly view.[362] According to Mokgoro, its meaning is to be viewed in a social context which encompasses "group solidarity, conformity, compassion, respect, human dignity, human orientation and collective unity as the key social values"[363] which make up ubuntu. Similar descriptions have been made by Nussbaum, who describes ubuntu as follows:

> "The capacity in African culture to express compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community with justice and mutual caring. Ubuntu... speaks to our interconnectedness, our common humanity and the responsibility to each other that flows from our deeply felt connection. Ubuntu is consciousness of our natural desire to affirm our fellow human beings and to work and act towards each other with the communal good in the forefront of our minds".[364]

Recently, Lamont J in *Afri-Forum and Another v Malema and Others*[365] expressed a comprehensive understanding of ubuntu as follows:

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[360] C B N Gade 'What is *Ubuntu*? Different Interpretations among South Africans of African Descent' (2012) *South African Journal of Philosophy* 31(3), 484-503. Electronic copy available at: http://pure.au.dk/portal/files/48387009/What_is_Ubuntu._Different_Interpretations_among_South_Africans_of_African_Descent.pdf. (accessed 26 October 2012).

[361] TW Bennett 'Ubuntu: An African Equity' (2011) 14 (4) *PELJ* 4.

[362] C B N Gade 'The Historical Development of the Written Discourses on Ubuntu' (2011) *South African Journal of Philosophy* 30(3), 303–329. Electronic copy available at: http://pure.au.dk/portal/files/40165256/The_Historical_Development_of_the_Written_Discourses_on_Ubuntu.pdf. (accessed 26 October 2012).

[363] Mokgoro (1998) 1(1) *PELJ* 2, 3.

[364] B Nussbaum 'African Culture and Ubuntu': Reflections of a South African in America (2003) World Business Academy 17(1). Electronic copy available at: http://barbaranussbaum.com/downloads/perspectives.pdf. (accessed 26 October 2012).

[365] (20968/2010) [2011] ZAEQC 2 at para 18.

> "Ubuntu is a concept which is to be contrasted with vengeance; dictates that a high value be placed on the life of a human being; is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;... dictates good attitudes and shared concern; favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;... operates in a direction favouring reconciliation rather than estrangement of disputants; works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant; promotes mutual understanding rather than punishment; favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; favours civility and civilised dialogue premised on mutual tolerance".

Ubuntu has also been described by Archbishop Desmond Tutu as follows:

> "Ubuntu speaks particularly about the fact that you can't exist as a human being in isolation. It speaks about our interconnectedness. You can't be human all by yourself, and when you have this quality – ubuntu – you are known for your generosity. We think of ourselves far too frequently as just individuals, separated from one another, whereas you are connected and what you do affects the whole world. When you do well, it spreads out; it is for the whole of humanity".[366]

According to Maluleke, "pre colonial and pre- apartheid African culture, traditions and customs were based on ubuntu."[367] Despite colonialism and imperialism, the living nature of customary law saw the survival of the African ideal of ubuntu.[368] "Ubuntu underscores the importance of agreement or consensus".[369] The concept of ubuntu made its debut in South African legal discourse in the 1993 Interim Constitution.[370] Thereafter, it became part of

[366] Desmond Tutu on ubuntu available at: http://www.beliefnet.com/Inspiration/2004/04/Desmond-Tutus-Recipe-For-Peace.aspx?p=2. (accessed on 30 October 2012). See also D Tutu *No future without forgiveness* (2000).

[367] M J Maluleke *PER* / *PELJ* 2012(15).

[368] Maluleke *PER* / *PELJ* 2012(15).

[369] Ibid.

[370] Bennett (2011) 14(4) *PELJ* 4.

judicial precedent in the Constitutional and High Courts.[371] Recently, there has been debate about the potential role it may play in modern contract law in balancing out the excesses and dominance of the principle of freedom of contract, also acting as a vehicle in the development of contract law to promote fairness in contracting between parties.[372] According to Bennett, however, its application in the field of contract law proved to be arduous since the common law already had mechanisms to deal with the issues to which ubuntu may be applied.[373] An example of these was the former *exceptio doli generalis* which it was generally assumed provided a remedy and could be utilised to address unfairness in contractual terms, declaring them unenforceable.[374] In 1988, a majority of the then Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas*[375] held that the *exceptio doli generalis* had never been part of Roman-Dutch law and was thus never received into modern South African law.[376] Harms DP expressed his views concerning the *exceptio doli generalis* in *Bredenkamp v Standard Bank,*[377] and stated the obiter footnote in Crown Restaurant read with *Barkhuizen* gave some the impression that the Constitutional Court had revived the *exceptio doli generalis* defence.[378] This is because the formulation of the defence in *Barkhuizen* is said to be very similar to the *exceptio doli generalis.*[379] Although the Constitutional Court has recognised the possible defence of unfair or unreasonable enforcement of a contract being contrary to public policy, the Constitutional Court is criticised for failing to define the limit of such a defence.[380] However, Harms DP in examining the history of the *execptio* states that "the majority in Bank of Lisbon... found that the *exceptio* had not been part of our law. It was part

[371] Ibid 4.

[372] Hutchinson et al 27.

[373] Bennett (2011) 14(4) *PELJ* 4, 13.

[374] Ibid 16. See also *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16, 2007 (5) BCLR 453 (CC) fn 1.

[375] 1988 (3) SA 580 (A) 607.

[376] Hutchinson et al 28; Bennett (2011) 14(4) *PELJ* 4, 16.

[377] supra.

[378] Ibid at paras 32- 39. See also G Glover 'Lazarus in the Constitutional Court: An exhumation of the exceptio doli generalis?'(2007) 124 *SALJ* 499 at 455 and A J Kerr 'the defence of unfair conduct on the part of the plaintiff at the time the action is brought: The exceptio doli generalis and the replicatio doli in modern law'125 (2008) *SALJ* 241.

[379] Hutchinson et al 186.

[380] Ibid.

of the Roman law of procedure and never a substantive rule, and was used to alleviate the strictness of contracts that were not based on bona fides. Since all contracts in our law are considered to be *bonae fide*, the *exceptio* had no purpose in modern law".[381] It is submitted that although the defence of unfair or unreasonable enforcement of a contractual term being contrary to public policy is similar to the formulation of the defence of the *exceptio*, it is unlikely that the *Barkhuizen* judgment could lead to a revival of the *exceptio doli generalis* due to its history.[382]

Despite the demise of the *exceptio doli* the South African law of contract could still rely on the principle of good faith to ensure fairness in contracts.[383] The common law principle of good faith has always been fundamental to our law although it has been afforded limited application.[384] Good faith is said to be a means by which the unlimited freedom of contract embodied in *pacta sunt servanda* can be curtailed.[385] In *Sasfin v Beukes* it was argued that good faith would serve as a counter-weight in the scale of public policy against freedom and sanctity of contract.[386] As a result, the public interest in adhering to the principle of *pacta sunt servanda* or sanctity of contract had to be balanced against the interest to preserve good faith in contractual relations between parties.[387]

Olivier JA in his minority judgment in *Eerste Naionale Bank van Suidelike Afrika Bpk v Saayman*,[388] in approval of such an interpretation, reiterated that there existed a close link between good faith and public policy.[389] Brand[390] succinctly explains Olivier JA's views as follows: "Broadly stated, (the respondent was not bound to the contract she signed) on the

[381] *Bredenkamp* supra at para 33.

[382] Glover (2007) 124 *SALJ* 449, 458.

[383] Hutchinson et al. The author states that "the idea of good faith as an informing principle of the law of contract lived on... parties to a contract were required to conduct themselves in a manner consistent with good faith , when the defence of the *exceptio doli* was raised, he or she was merely alleging that the plaintiff's behaviour fell short of this standard".

[384] F D J Brand 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 *SALJ* 71.

[385] Lerm LLD Thesis (2009) chp10, 553.

[386] Hutchinson et al 29.

[387] Ibid Hutchinson.

[388] 1997 (4) SA 302 (SCA).

[389] at 319-320.

[390] Brand (2009) 126 *SALJ* 71, 77.

basis that in the circumstances of the case, principles of *bona fides*, equity and good faith militated against the strict application of established rules of contract and that, in the event the court is entitled to refuse to enforce the terms of the contract between the parties, though such enforcement may be dictated by the strict rules of contract law".[391] The opinion expressed by Olivier JA was subsequently followed by several provincial decisions.[392] The SCA, however, subsequently stated clearly in a line of cases commencing with *Brisley v Drotsky* that "good faith, reasonableness and fairness although fundamental to the law of contract, do not constitute independent substantive rules which a court can use to intervene in contractual relations; such interference can only be made if permitted by hard law and as such these abstract values merely inform such hard law".[393]

Shortly after *Brisley*, the SCA was tasked with dealing with a similar issue in *Afrox v Strydom.* Strydom attempted to rely on the minority judgment in *Saayman*, but the court confirmed its decision in *Brisley* that "good faith, and reasonableness and fairness do not provide an independent or free floating basis for interfering with contractual relationships".[394] The SCA, in *South African Forestry Co Ltd v York Timbers Ltd*,[395] again confirmed the position it had taken in *Brisley* and *Afrox*.[396]

The significance attributed to Constitutional values such as good faith, fairness and reasonableness were again considered by the SCA in *Bredenkamp v Standbank* [397] in which Harms DP had to consider the argument put forward by the appellants that the cancellation of the bank accounts by Standard Bank in light of an express provision provided for in the banking contract although valid, would operate unfairly and unreasonably against them if enforced. The appellants argument proceeded on the basis that 'fairness' is a core value of the

[391] *Saayman* supra at 326; based on Brand's translation from the original Afrikaans (see fn 39).

[392] See *BOE Bank v Van Zyl* 2002 (5) SA 165 (C) at para 63; *Janse van Rensburg v Grieve Trust CC* 2001 (1) SA 315 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at paras 474-475; *Miller & Another NNO v Dannecker* 2001 (1) SA 928 (C) at para 1.

[393] Brand (2009) 126 *SALJ* 71, 81.

[394] Ibid 81. See also *Maphango & Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at paras 22-25 and *Potgieter & Another v Potgieter No & Another* 2012 (1) SA 637 (SCA) at paras 32-34.

[395] 2005 (3) SA 323 (SCA).

[396] Brand (2009) 126 *SALJ* 71, 82.

[397] supra.

Bill of Rights and that any conduct which is unfair , would be in conflict with the Constitution and therefore void.[398] Harms DP held that "fairness is not a free-standing requirement for the exercise of a contractual right... fairness remains a slippery concept as was illustrated by the fact that Jajbhay J found that the closing of the account was unfair while Lamont J, on basically the same facts, found otherwise."[399] This approach was adopted by Brand JA in *Maphango v Aengus Lifestyle Properties (Pty) Ltd*,[400] whereby the appellants sought to argue that the "termination of their leases was in the circumstances, unreasonable and unfair and should therefore not be enforced on grounds of public policy".[401] Brand JA in agreement with the finding of Harms JP found that "reasonableness and fairness are not freestanding requirements for the exercise of a contractual right".[402] He then extensively quoted from the dictum in *South African Forestry Co Ltd v York Timbers Ltd* [403] stating that:

> ... "Although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty".

The SCA concluded that a court cannot therefore refuse to give effect to a contract simply because if such a contract is implemented it will be regarded by the individual judge to be unreasonable and/or unfair and "unless the Constitutional Court holds otherwise, the law is as stated by this court in *SA Forestry Co*, *Brisley* and *Bredenkamp*".[404] As recent as 2012, the

[398] *Bredenkamp* supra at paras 26-27.

[399] Ibid at paras 53-54.

[400] supra.

[401] *Maphango* supra at para 22.

[402] Ibid at para 23.

[403] supra at para 27.

[404] *Maphango* supra at para 25.

SCA in *Potgieter & Another v Potgieter No & Others* [405] reaffirmed the approach adopted in *Brisley*, *Bredenkamp*, *Maphango* and *SA Forestry Co* in finding that good faith, reasonableness and fairness do not constitute free standing and independent substantive rules to be used to interfere with contractual undertakings.[406] The court further held that:

> "In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty... judges may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge...if judges were allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge".

The approach of the SCA was then seemingly confirmed by the Constitutional Court in *Barkhuizen v Napier*, as the court held that "as the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common law rule that contractual clauses that are impossible to comply with should not be enforced".[407] However, Ngcobo J went on to say that, in the same paragraph that "whether, under the Constitution, this limited role for good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, unfortunately not questions that need be answered on the facts of this case and I refrain from doing so".[408] This suggests that the door in fact remains open for development and the Constitutional Court has not expressly endorsed the approached supported by the SCA that good faith alone can never be an independent self-standing rule to counteract a contract entered into. All that the Constitutional Court acknowledged is that, that approach reflects how the law currently stands.

In his minority judgment, Sachs J further makes important remarks concerning the role of good faith in contract law. He states that:

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[405] supra.

[406] *Potgiete*r supra paras 32 -34.

[407] *Barkhuizen* supra at para 82.

[408] Ibid.

> "Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community - a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected... But the principles of equality and dignity direct... that parties to a contract must adhere to a minimum threshold of mutual respect in which the "unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts ... oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*."[409]

He further remarks that in determining whether a contract is contrary to public policy, an important consideration to take into account is "the doing of simple justice between man and man".[410] In consideration of the SALCR's findings and international legislation, he further highlighted that "public policy is more sensitive to justice, fairness and equity than ever before"[411] and that legislation in several European countries have already developed laws which are based on the principle of good faith when concluding contractual agreements.[412]

It is evident that good faith and the principle of doing simple justice between man and man are interconnected and interrelated. Good faith when contracting as the Constitutional Court has indicated, takes into account the necessity for mutual respect and the promotion of more than just one's individual self interests. As Ngcobo J explained in *Barkhuizen*, the notion of good faith "encompasses the concepts of justice, reasonableness and fairness".[413] These

[409] Minority judgment of Sachs J at para 140.

[410] Ibid at para 159.

[411] Ibid at para 163.

[412] Ibid.

[413] Ibid at para 80.

fundamental concepts and principles are central to the very essence of what makes up ubuntu. However, it evident that the Supreme Court of Appeal makes it clear that good faith alone can never be independently employed by the courts to strike down contractual terms which are excessively unfair, as may be the case with abusive exemption clauses. This leaves one to ask whether recourse by the courts to ubuntu may play a more proactive role in addressing the apparent vacuum left by the demise of the *exceptio doli* and the accepted judicial notion of the more limited role of good faith. Bennette suggests that ubuntu is now being used to perform functions that go beyond the concepts of good faith and public policy and acknowledges that ubuntu does in fact contain good faith and that "it can be realised in situations where the courts would refuse to invoke good faith".[414] I believe that the case law referred to provides a clear indication that there is a need for substantial engagement with the issue, especially in respect of contractual exemption clauses.

The Supreme Court of Appeal on more than three different occasions in the cases discussed above were presented with the opportunity to recognise grounds to challenge substantive unfairness in contractual provisions, yet the court chose to display a conservative attitude and an adherence to the dictates of sanctity of contract.[415] The continued unwillingness of our courts to afford a greater role to good faith in the law contract is indicative of how even more dangerous exemption clauses can be to a contracting party who has entered into an agreement in which the exemption clause has been incorporated or enforced in possible bad faith.

For those who have been calling for a greater role for good faith in our law of contract,[416] it appears as though ubuntu may come to its rescue in providing a constitutionally sound alternative basis for in the regulation of potential unfair contract terms and exemption clauses. Since ubuntu has been recognised by the highest court in the country to inform public policy and our constitutional order,[417] it must therefore follow that contracts or

[414] Bennett (2011) 14(4) *PELJ* 4.

[415] See Bhana & Pieterse (2005) 122 *SALJ* and Bhana (2007) 124 *SALJ* 269 for detailed criticism of *Brisley v Drotsky* supra *Afrox v Strydom* supra and *Barkhuizen v Napier* supra .

[416] See Bhana & Pieterse (2005) 122 *SALJ* 899.

[417] *Barkhuizen v Napier* supra at para 51; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 *(Pty) Ltd and Another* 2012 (2) SA 104 (CC) where it was held that: "This court has also recognised the concept of ubuntu as underlying the Constitution"; *Joseph and Others v City Of Johannesburg And Others* 2010 (4) SA55 (CC) also held: "Batho Pele gives practical expression to the constitutional value of ubuntu"; see also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) in which the

contractual provisions such as exemption clauses which may be unfair and contrary to the social values which define ubuntu as described above, may also be deemed to be contrary to public policy and thereby unenforceable. I will explore this possibility in what follows.

4.2 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*

I now turn to the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*[418] and the opinons expressed by Yacoob J (minority) and Moseneke J (majority). This case marked the first attempt by the Constitutional Court to consider the role and importance of the concept of ubuntu in our law of contract. The dispute concerned a clause (referred to as clause 3)[419] requiring the parties (Everfresh and Shoprite) to engage in negotiations in relation to the renewal of a commercial lease. The appellant argued that the respondent was obliged to make a *bona fide* attempt to agree on the terms of renewal and that the law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith.[420] The respondent's counter-argument was that the provision was unenforceable because good faith is too vague. Yacoob J in his minority judgment made important remarks regarding ubuntu and its interaction with principles of contract, and the principle of good faith:[421]

> "The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law

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Constitutional court held: "...The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order".

[418] supra.

[419] Clause 3 read as follows: "Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of four years and eleven months commencing on 1st April 2009, such renewal to be upon the same terms and conditions as in this Lease contained save that there shall be no further right of renewal, and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calendar months prior to the date of termination of this Lease. In the event of no such notice being received by the Lessor, or in the event of notice being duly received but the Parties failing to reach agreement in regard to the rentals for the renewal period at least three (3) calendar months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void."

[420] at paras 9, 16, 19.

[421] at paras 23-24.

> and Roman Dutch law... It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu".

From the above it is patently clear that for Justice Yacoob, the values embraced by an appreciation of ubuntu are relevant in the process of determining the spirit, purport and objects of the Constitution and that the notion that the concept of ubuntu is not implicated in private relations is too a narrow an approach. He further made an important remark, that the "law of contract cannot confine itself to the colonial tradition alone".[422] The majority of the court, in agreement with Yacoob J's views, stated that "it is indeed, highly desirable and in fact necessary to infuse the law of contract with constitutional values, including the value of ubuntu, which inspire most of our constitutional compact".[423] The content and meaning of ubuntu was described by the majority as follows:[424]

> "On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity ... Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional

[422] at para 23.

[423] at para 71.

[424] Ibid 71.

values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith".[425]

In light of the above, one may argue that ubuntu, which was a fundamental concept in the Interim Constitution, appears to have been brought back to the fore by Moseneke J in the current constitutional regime.[426] It appears that the learned judge equates constitutional values with the concept of ubuntu.[427] Thus, if as stated above in *Barkhuizen*, any contractual terms offending any constitutional values are unenforceable and will be held to be against public policy, then so too any contractual term that offends the concept of ubuntu should also be found to offend public policy since public policy is said to be informed by constitutional values. The CC unfortunately decided that it was "unnecessary to decide the merits of these difficult questions",[428] and as a result we currently have no judicial authority on how ubuntu, as a constitutional value, may be applied in contractual relations.

Since the judgment in *Everfresh*, legal practioners have levelled criticism against it stating that it will introduce uncertainty in the law of contract.[429] It has been argued, however, that elements of uncertainty arise even when the law is applied to rules as opposed to open-ended normative values and norms such as ubuntu and good faith.[430] What is evident thus far is that the ideals which make up good faith (i.e. to do simple justice between individuals)[431] are congruent with the notions of ubuntu to ensure fairness between contracting parties. If such a premise is accepted then one can agree that ubuntu may play a role in the promotion of good faith in contractual relations.

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[425] at para 72.

[426] A Louw - Advanced Contract Law (unpublished Lecture notes, University of Kwazulu- Natal, 2012) ('Fairness, equality, and good faith in contract; unfair contract terms legislation; consumer protection') 12-13.

[427] Ibid.

[428] at para 73.

[429] See R Green 'The renewal of leases and Ubuntu' article by Attorney of Cox & Yeats, 2 available at: http://www.coxyeats.co.za/Publications/Staff/4/Roger-Green. (accessed 16 July 2012). The author states: "This case whilst noble in its endeavour to introduce the principle of good faith into the interpretation of contracts also introduces an element of uncertainty. No longer will it be possible to interpret a contract strictly in accordance with the common law or even in accordance with the clear meaning of the words. The concept of ubuntu, not yet a clear legal principle, will need to be taken into account".

[430] M Kruger 'The role of public policy in the Law of Contract, Revisited' 2011 (128) *SALJ* 714.

[431] Hutchinson et al 31.

That in turn shall have a direct impact on the way standardised contracts which contain exemption clauses are treated. Excessively unfair and one-sided exemption clauses which undermine the dictates of both good faith and ubuntu (i.e. lack of openness, fairness, justice, honesty, equality, and which undermine dignity by limiting an individual's contractual autonomy) will arguably in turn undermine public policy. As Kruger states: "the Constitution prizes more than one ideal, more than one value and aims for more than just one end".[432] Notions of fairness, justice and equality can no longer be dismissed on the grounds that they may potentially give rise to uncertainty.[433] "The time in which our courts can be shy of policy considerations has long since passed".[434] Initial uncertainty is to be expected but a marginal sacrifice of certainty is worth the potential gains of substantive fairness that can be achieved as a result of the constitutionalisation of contract law.[435] This viewpoint is underscored in the SA Law Commission Report of Project 47 where it was stated that: "contractual uncertainty is a price that must be paid if greater contractual justice is to be achieved, that certainty is not the only goal of contract law, or of any other law..."[436]

5. Conclusions

Like all other branches of South African law which had to re-establish their legitimacy in a constitutional milieu,[437] so too the law of contract is subject to the Constitution and its values. Accordingly, ubuntu could be viewed as an overarching constitutional value or value system which encompasses the other constitutional values which, in terms of constitutional supremacy, may serve as a benchmark for adjudication of the constitutionality of private contracts and contractual terms. What may be a strong argument in support of the notion that ubuntu is a constitutional value is the fact that the founding values of the Constitution (i.e. human dignity, equality, promotion of human rights and freedoms, accountability and openness) have a close corrolation with several key elements of the current understanding of ubuntu (such as human dignity, respect, compassion, honesty, conformity, etc).[438]

[432] Kruger 2011 (128) *SALJ* 714,739.

[433] Ibid 739.

[434] Ibid Kruger citing J Dugard 'The judicial process, positivism and civil liability' (1971) 88 *SALJ* 181, 182.

[435] Bhana & Pieterse (2005) 122 *SALJ* 866.

[436] SALC Project 47 Discussion Paper 65 (1998).

[437] Bhana & Pieterse (2005) 122 *SALJ* 865.

[438] Mokgoro (1998) 1(1) PELJ 2, 7.

Furthermore, the values of group solidarity and collective unity which make up ubuntu can be related to the spirit of national unity in the new democratic society of South Africa.[439] Ubuntu, it appears, is intrinsically interwined into the spirt of the Constitution. It must be reiterated that the potential new role to be played by ubuntu in contracts could mean that courts, despite the continued reluctance on the part of SCA, will indirectly ascribe to a much more active and prominent role for good faith as the dicates of ubuntu and good faith are intrinsically interwined. Good faith has always underlined Roman - Dutch law as it is a fundamental principle that "as a matter of good faith, all serious agreements ought to be enforced and all contracts are now said to be consensual and *bona fidei*".[440] Ubuntu can be similarly said to be reflected as an underlying value in the customary law of contract as it requires extensive dicussion and consensus to be reached on terms of the contract between the contracting parties. As the Constituional Court has confirmed, ubuntu is a value that applies universally including in our Roman-Dutch based common law of contract.

It can be argued further that in a constitutional dispensation that proclaims the supremacy of the Constitution over all law and conduct, which recognises horizontal application of fundamental rights and also enjoins the courts to develop the common law in light of the spirit, purport and object of the Bill of Rights, it may be non-negotiable to recognise ubuntu as a benchmark for private conduct. Power is often abused in private relations because of our socio-economic realities and the capitalist society we live in.

Davis J in *Mozart Ice cream Franchises Pty (Ltd) v Davidoff and Another*[441]corroborated this viewpoint when he stated that:

> "In our country there should be no need to remind the legal community of the importance of power and its abuse, even when sourced in private hands ... Private power in South Africa is also accountable to the principles of the Constitution. Madala J reminds us of this important point in our history when he wrote in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) ... "Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its

[439] Ibid Mokgoro.

[440] Hutchinson at 12.

[441] 2009 (3) SA 78 (C)

> effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society"'.[442]

Exemption clauses imposed in standard form, adhesionary contracts are one very prevalent example of how man is only out to secure his best interests often at the sacrifice of a anothers rights. As a result, what may often equate to a selfish and self-centred, one-sided promotion of an individual's own interests at the cost of the interests of others, should be closely interrogated and subjected to the principles and values inherent in ubuntu. In the context of the main theme of this dissertation, it bears considering that exemption clauses, by definition, generally serve to promote or protect the interests of one (often stronger) contracting party to the detriment of the other. One must ask whether this might mean that exemption clauses by their very nature and purpose run counter to the central premise of ubuntu, in terms of constituting a prominent example of the selfish promotion of individual interests without due consideration of the communal interest (in this context, including the interests of the other party to the contract). It would appear that the legislature, in enacting the Consumer Protection Act, has recognised the dangers in this regard, and that the Act's provisions relating to unconscionable conduct, generally, and to exemption clauses, more specifically, may indicate a shift in public policy regarding the use of such provisions.

In this most unequal society in the world, a vexing question which has to be asked in this context is whether the law should allow business expediency or commercial justifications for provisions such as often excessively one-sided exemption clauses, or a strict application of *pacta sunt servanda* in circumstances where true, real consensus is often questionable, to outweigh the potential harm, opressiveness and unfairness that can arise when an exemption clause is imposed and enforced. Does the often one-sided pursuit of gain of the corporate businessman at the cost of potential social injustice often experienced by the poor and illiterate or weaker consumer, comply with the value system of ubuntu - which places the communal good at the fore - rather than promotion of the self-interest of the individual? It could certainly be argued that such a *status quo* as evidenced by our courts' rather conservative attitude to date to substantive fairness in contract law does not comply with the

[442] Judgment of Davis J at 89.

nature and spirt of ubuntu (let alone the spirt, purport and objects of the Bill of Rights in the Constitution).

Whilst it is acknowledged that the use of exemption clauses are a valid mechanism which is often employed by businesses to serve a legitimate function in the efficiency of the running of a business, it is suggested that ubuntu may serve the same function that the unconscionabilty test in *Sasfin* was aimed at. Such an approach would take into consideration that not all unfair contracts containing exemption clauses should be declared void and unenforceable, but if they are so unfair so as to be viewed as unconscionable then they are deemed to offend public policy. By parallel reasoning, ubuntu could similar to the standard of unconscionability also serve as the benchmark for excessive unfairness in exemption clauses, by curbing the abuse of private power which offends against the principle of communal good over self-interest. Where an exemption clause is imposed on a party in a situation of significant inequality of bargaining power and the imposition of such term tilts the scales of fairness excessively in the favour of the *proferens*, the imposition and enforcement of such a term might constitute the abuse of private power which implicates the value of ubuntu. This should make such a provision vulnerable to a declaration of invalidity on the basis of public policy. I believe that our courts would be warranted (indeed, required by section 39(2) of the Bill of Rights) to examine the viability and desirability of such a proposed approach. This would be one way to pursue greater substantive justice in respect of notoriously problematic provisions which have always (and with good reason) been treated with suspicion by our courts.

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