Freedom of contract and the enforceability of exemption clauses in view of section 48 of the Consumer **Protection Act**

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Mini-Dissertation submitted in partial fulfillment of the requirements for the degree Magister Legum in Import and Export Law at the Potchefstroom Campus of the North-West University

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2014



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ABSTRACT

The law of contract in South African affords parties the freedom to enter into a contract and who they wish to enter with. The general requirements for a legally enforceable contract are consent, good faith, and the sanctity of contract. The contractual freedom of parties also offers them freedom to choose the terms of their contract. Part of these terms is the freedom to incorporate exemption clauses in contracts. An exemption clause is a waiver of liability or the apportionment of risk in the event of an occurrence materialising as defined in the contract. Exemption clauses have become the norm rather than the exception and parties must therefore expect a contract to contain an exemption clause, albeit unfair. Until recently, there was no legislation that declared exemption clauses as unfair. The Consumer Protection Act is South Africa's first legislative regulation on unfair contract terms and the waiver of liability. The Act does not address the contractual freedom of parties to incorporate exemption clauses and whether they will be unenforceable in the light of section 48. The Act cannot be implemented without considering the freedom of contract to rely on exemption clauses. A literature study will be undertaken in order to establish the influence of section 48 of the Consumer Protection Act on South African law of contract and exemption clauses.

Keywords: Contractual Freedom, Exemption clauses, *Consumer Protection* Act, Unfair, Bring under attention of parties, Consent.

ABSTRAK

Kontraktereg in Suid-Afrika verleen partye die vryheid om kontrakte aan te gaan met wie hulle wil. Die wetlik-afdwingbare vereistes vir 'n kontrak is instemming, goeie trou en onskendbaarheid. Die kontrakteursvryheid van partye laat hulle toe om self die bepalings vir die kontrak te kies. Deel van hierdie bepalings is die vryheid om vrystellingsklousules in te sluit. 'n Vrystellingsklousule is die kwystskelding van aanspreeklikheid vir enige risiko of enige risikotoedeling vir gebeurlikhede soos bepaal in die kontrak. Vrystellingsklousules is die reël eerder as die uitsondering en partye moet daarom verwag dat kontrakte 'n vrystellingsklousule sal bevat, al is dit ook hoe onbillik. Tot op hede het daar geen wet bestaan vrystellingsklousules as onbillik verklaar nie. Die Wet go Verbruikersbeskerming is Suid-Afrika se eerste wetlike verordening wat handel onbillike kontraktuele terme kwytskelding en aanspreeklikheid. Die wet roer nie die kwessie van kontrakteursvryheid van partye om vrystellingsklousules in te sluit aan nie, en bepaal ook nie of laasgenoemde in terme van artikel 48 afdwingbaar sal wees al dan nie. Die wet kan daarom ook nie tot uitvoering gebring word sonder om die reg van kontrakteursvryheid om op vrystellingsklousules te steun in ag te neem nie. Literatuurstudie is gedoen om die invloed van atikel 48 van die Wet op Verbruikersbeskerming op vrystellingsklousule in die Suid-Afrikaanse kontraktereg te bepaal.

Kernwoorde: Kontrakteursvryheid, Vrystellingsklousules, Wet op Verbruikersbeskerming, Om onder die aandag van partye te bring, Instemming.

LIST OF ABBREVIATIONS

CC Constitutional Court

JBL Journal of Business Law

LAWSA The Law of South Africa

MJSS Mediterranean Journal of Social Science

PELJ Potchefstroom Electronic Law Journal

SALJ South African Law Journal

SAMLJ South African Mercantile Law Journal

SCA Supreme Court of Appeal

THRH Tydskrif vir Hedendaagse Romeins Hollandse Reg

FOREWORD

I would like to thank my wife for all of her love, understanding and assistance during a difficult time in my life. I would also like to express my sincerest gratitude to Michélle Schoeman who has been the driving force behind me to complete this mini-dissertation. Thank you for all of the motivating and understanding when I wanted to give up.

1 Introduction and Methodology

1.1 Introduction

The historical development of the South African legal system was strongly influenced by Roman law. The Roman legal system developed over a period of 1300 years and is the basis of South African common law and legal interpretation. The notion of contract derived from Roman principles substantially influenced Dutch writers. It thus became Roman Dutch law and was a component of South Africa's common law before the British occupation. After the Cape colony was occupied by British rule, Roman Dutch law was not abolished, but was incorporated by British authorities in South Africa through British interpretation. The South African common law today is thus a combination of the development of Roman Dutch law through the influence of English law.

Within the South African legal framework, private law is that part of law which regulates the relationship between individuals in their own private capacity.⁵ It determines the rights and duties that persons may have in relation to one another, which duties find their origins in contracts.⁶ A contract obligates one person to perform in a specified manner towards another, in exchange for some object or thing, and *vice versa*. Parties are free to choose whether or not to enter into any contract and who they wish to contract with.⁷ Parties are free to choose the terms and conditions of their contract. This is done in order to further and/or protect their vested interest in the event of an infringement.⁸ This infringement may be as a

¹ Cornelius Principles 7.

² Hutchison "The Law of Contract in South Africa"11.

³ Nagel Kommersiële Reg 2011 6.

⁴ Cornelius Principles 7 - 10.

⁵ Van der Merwe et al Kontrakte Reg Algemene Beginsels 1.

⁶ Christie The Law of Contract 9 - 13.

In Everfresh Market Virginia v Shoprite Checkers 2012 (1) SA 256 (CC) 257 it was held that an individual is free to decide not to contract. The court held that where a contract is governed by a term of renewal and that person fails to exercise the renewal after s/he becomes aware of the new terms applicable to the contract, the non-renewal of the contract does not constitute a breach.

⁸ Hutchison "The Law of Contract in South Africa"11.

result of either total or partial contractual non-performance by one party against the other or a breach of contract justifiable by agreement.

This fundamental freedom to structure the legal consequence of one's agreement is the doctrine of freedom to contract. Embedded in this freedom is the autonomy to incorporate any term the parties so choose. Therefore, cognizance must be taken of the broad principles of legality and public policy when entering into contracts as well as when varying the terms and conditions thereof in order for them to be valid and enforceable.⁹

1.2 Creating Enforceable Obligations and Deviating from Such Obligations.

Visser defines a contract as:10

A lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts which are possible of performance.

A contract therefore reflects what the contracting parties' rights and duties are as well as what the consequences of failure to comply are, thus highlighting the contracting parties' contractual freedom. An integral part of the contractual freedom of parties is the notion of incorporating exemption clauses into contracts. Exemption clauses form as much part of the law of contract as the principles of having the agreement in writing and concluded in good faith. An exemption clause may be defined as a contractual agreement whereby one party seeks to limit or exclude his liability in the event of an unforeseen circumstance that would normally flow in the event of the occurrence's materialising.¹¹

⁹ Loubser "The Law of Delict in South Africa" 198.

¹⁰ Visser et al South African Mercantile and Company Law 9

¹¹ Stoop 2008 South African Mercantile Law Journal 496. An agreement not to recover damages is known as a pactum de non petendo in anticipando. Cohen and Costa The Professional Accountant 4; Letzler 2012 De Rebus 23; See Stoop 2008 South African Mercantile Law Journal 496. An exemption clause may also be referred to as

The principal purpose of an exception clause is to exclude the recovery of damages by one party from another if it is found that the party causing the damage was the reason for the damage in the first place. However, the event that prompted the recovery of damages is not limited only to persons causing such harm. They may also be caused by incidents or actions "of whatever nature". In order to avoid liability and the recovery of damages the party who seeks to be absolved relies on the exemption clause. In *Van der Westhuizen v Arnold* Lewis AJA held that:

There does not, therefore appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. But that does not mean that 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. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited....

1.3 The Need for Consumer Protection

In the light of the judgement in *Van der Westhuizen v Arnold*¹⁵ it has become clear that there is a need to protect consumer rights. The application of an exemption clause may limit the rights of an aggrieved party that he or she would ordinarily have had, but the existence of an exemption clause extinguishes that right. Under the common law a contract is measured against the principles of consent, good faith and the sanctity of contract. When these criteria are met a legally enforceable contract is the outcome thereof.

a disclaimer, a waiver and/or an exception clause. The inference that may be drawn is that they are one and the same thing and for the purpose of this dissertation they shall be construed as such.

¹² See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA), where Lewis AJA held that the primary purposes of an exemption clause is to limit a party's common law right.

¹³ See Durban's Water Wonderland (Pty) Ltd v Botha and another 1999 (1) SA 982 (SCA).

¹⁴ Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) at 469 E – 469 G.

¹⁵ Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA).

¹⁶ Van Zyl History and Principles of Roman Private Law 253 – 258.

The idea that parties enter into a contract honestly and with integrity encapsulates the contractual requirement of good faith. The contract concluded should be dealt with fairly and without dishonour. 18 The terms and conditions for the validity of a legally binding contract are open for interpretation and argument. The terms and conditions which constitute good faith by one party are not necessarily regarded as good faith by another. The same applies to the requirement of reasonableness in the absence of a clear description of what exactly constitutes reasonableness. This effectively means that a contract which passes these criteria alone must be enforced. Where a contracting party is of the opinion that a contract contravenes the abovementioned principles, there has been no legislative intervention or establishment criteria in terms of which a contract may be declared excessively one-sided or unfair. The judgement in Van der Westhuizen v Arnold clearly shows that no statutory control exists over the application of contract terms that are viewed as unfair. The suspected unfairness of the contractual term may take various forms and parties may claim that they are excessively one-sided in favour of one party to another, or that a contractual exclusion deprives a party of their common law rights. The development of the law of contract and the common law principles of good faith and honour that specifically deal with suspected unfair contract terms have long been regarded as insufficient. 19

The values of good faith, reasonableness and fairness remain abstract in nature and are not independent rules that may be relied upon in order to substantiate the validity of an exemption clause.²⁰ These concepts remain stagnant to the changing interpretations and application of the law of contract. It is against this background that on 1 April 2011²¹ the *Consumer*

¹⁷ The concept of good faith is also known as bona fides.

¹⁸ Hutchison "The Law of Contract in South Africa" 27 - 29.

¹⁹ See Hopkins *De Rebus* 22 for a discussion on the effects of the Constitution on contracts and the argument on the Bill of Rights as a reflection of public policy in the development of South African Contract Law.

²⁰ Hutchison "The Law of Contract in South Africa" 30.

On 29 April 2009 the *Consumer Protection Act* was published in Government Notice R526 in *Governtment Gazette* 32186 of 29 April 2009. The early effective date was 24 April 2010, where only the first provisions took effect, namely the interpretation, purpose and application contained in chapter 1, the governing institutions in chapter 5, regulations by the Minister in section 120 and the transitional provisions contained

*Protection Act*²² was promulgated. The Act is highly regarded as the first progressive South African legislation for the protection of consumer rights in general and unfair contract terms in particular. The Act aims not only to create statutory rights for consumers,²³ but also to protect the exploitation of susceptible consumers from unfair, unreasonable and unjust contract terms.²⁴ As an exemption clause aims to waive rights that are protected in terms of common law, the Act seeks to directly prohibit clauses aimed at excluding or limiting liability.²⁵ The Act specifically prohibits parties from doing so.²⁶

The advocators for the promulgation of the Act are of the opinion that exemption clauses in their current use are by definition within the ambit of section 48 of the Act.²⁷ The result is that they are unfair, unreasonable and unenforceable as viewed by the Act.²⁸ Because of the historical influence of

in schedule 2. It was only on 1 April 2011, known as the general effective date, that the remaining provisions took effect – under Government Notice R917 in *Government Gazette* 33581 of 23 September 2010.

- 22 The Consumer Protection Act 68 of 2008, hereinafter referred to as the Act.
- 23 In terms of section 1 a consumer is defined as a person to whom goods or services are marketed, who enters into a transaction with a supplier, uses goods supplied, or receives or benefits from services rendered.
- 24 In terms of Section 48(2) (1) an agreement is unfair, unreasonable or unjust if a)it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - b)the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - c)the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - d)the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and—
 - i)the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - ii)the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.
- In terms of section 48 (1) (c) a supplier may not require a consumer to waive any right, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- 26 Melville The Consumer Protection Act made easy 1.
- 27 See Naude and Lubbe 2005 SALJ 442; Van Loggerenberg 1988 TSAR 3.
- 28 See Naude and Lubbe 2005 SALJ 452 where the author's conclusion is that exemption clauses which infringe the essence of a contract by undermining the reciprocal rights through an exemption clause will be regarded as problematic, as they tend to place one party in a weaker bargaining position than the other. This placement is referred to as "reducing a contacting party to an object of economic gratification of the other".

English law in South Africa, the position in English law must be examined to find possible similarities and/or different approaches in dealing with contractual freedom and exemption clauses.²⁹ English common law recognises that a contract is an agreement between parties reflecting the intentions of the parties to willingly accept the specific terms associated thereto.³⁰ Historically, they too had an absence of legislation specifically dealing with exemption clauses and when such clauses would contravene public policy or be considered unreasonable. They have subsequently taken a proactive approach by adopting the *Unfair Contract Terms Act* 1977, which specifically deals with exemption clauses in contracts. This is similar to South Africa which has adopted the *Consumer Protection Act* to deal with unfair, unreasonable and unjust contract terms in section 48 of Act.

1.4 Methodology and Research Question.

This dissertation seeks to understand the impact of the Act, if any, with specific reference to section 48 on the freedom to contract. The research question that this study will answer is "What is the influence of Section 48 of the *Consumer Protection Act* on exemption clauses in the South African law of contract?"

The background to the research question is provided for in the introductory chapter. Chapters 2 and 3 will discuss the general principles and characteristics of contract law and exemption clauses specifically. Chapter 4 will provide a discussion of Section 48 of the Act, whereafter chapter 5 will briefly set out the English position by focusing on Section 2 of the English Unfair Contract Terms Act. A brief comparison between the English and South African positions will be provided in chapter 6, whereafter a conclusion will be given in chapter 7.

²⁹ Cornelius Principles 3.

³⁰ Anon http://www.a4id.org.

2 General Principles and Characteristics of Contract law

2.1 Introduction

In order for an agreement to be binding and recognised as a valid contract, the agreement must meet the general requirements therefore, namely consensus, legality, the possibility of performance, the capacity to act, and compliance with any prescribed formalities.31 However, a legally binding contract that creates reciprocal obligations cannot be regarded as a legally enforceable contract merely because it meets the formal requirements alone.

Certain contracts aim to create obligatory terms in respect of performance, while others seek to limit or absolve obligations.³² Under Roman law, the law of obligations was unfamiliar with a generic approach to contracts and contract theory.³³ This meant that standard contracts could not be altered. Contracts that had been altered or that deviated from the recognized contract forms were unenforceable, even if they complied with the general requirements of consent and the sanctity of contract. Roman law recognised only four specific forms of contracts that were legally enforceable. These were the contractus re, contractus verbis, contractus litteris and lastly the contractus consensu.34 The contractus consensu is the most important in our legal system as consensual agreement forms the basis of the South African law of contract.35 This

³¹ Hutchison "The Law of Contract in South Africa"6.

Hutchison "The Law of Contract in South Africa" 4.Hutchison "The Law of Contract in South Africa" 11.

³⁴ See Van Zyl History and Principles of Roman Private Law 277 – 287. The contractus re was created by consensus between the parties, and accompanied by a delivery or transfer of the object in question. The second form of contract, contractus verbis, entailed a verbal contract. These were formal words used to express the oral intentions or undertakings of contracting parties. The third specific contract, the contractus litteris, related to the recording or written entries of debt by one person to another in a ledger, and lastly there was the contractus consensu. The contractus consensu was a contract created by consensual agreement.

³⁵ Cornelius Principles 3 – 4; Van Zyl History and Principles of Roman Private Law 287.

chapter will focus briefly on the concepts of consent, the sanctity of contract and the good faith principles of South African contract law.

2.2 Consent as a Basis for Contractual Freedom.

In the absence of consensus no contract will be regarded as valid, and consent is a prerequisite for the enforceability of a contract.36 When establishing the existence of consent to a contract the intention or will of the parties needs to be established rather than the impression that they have entered into an agreement.³⁷ Where it is found that the parties to a contract acted fraudulently, were under duress when concluding the agreement, or that there is an error in the material terms, consent is absent. Such material terms could be a wrong description of the size of a property, or of the year model of a motor vehicle, or a misrepresentation of the true owner of the subject matter, for instance. In Allen v Sixteen Sterling Investments³⁸ the defendant misrepresented a certain property to the plaintiff in terms of which the plaintiff purchased the property based on the misrepresentation. The court held that the misrepresentation did not constitute consent and was therefore invalid. 39 Misrepresentation should, however, be distinguished from the making of a reasonable mistake made by one party to another. Where there is a bona fide mistake, even if it is not material to the contract, it cannot be argued that there is true consensus.40

2.3 Good Faith

Paramount to the principle of consent is the notion of good faith. The concept of good faith entails that parties to a contract act so honestly as to bring any matters not normally associated with a contract to each

³⁶ Van Zyl History and Principles of Roman Private Law257.

³⁷ Hutchison "The Law of Contract in South Africa" 14.

³⁸ Allen v Sixteen Sterling Investments 1974 (4) SA 164 (D).

³⁹ Misrepresentation is a subjective intention by one contracting party to deceive another in signing a contract. It cannot be argued that consent was properly obtained if that is the case.

⁴⁰ Christie The Law of Contract 346 - 347.

other's attention. By doing so, the parties show through their conduct that they act in good faith by disclosing all of the material terms of the contract. By failing to do so the non-disclosure amounts to misrepresentation. The function of good faith is therefore to give expression to what is fair, reasonable and just in the view of the legal convictions of a community.⁴¹

A party signing a document freely and without duress is bound by its contents. Where consent is improperly obtained misrepresentations, the party who perpetrated the misrepresentation will be seen as acting in bad faith and as contravening public policy. In Burger v Central South African Railways⁴² it was held that a legal duty rests on a party to disclose the existence of non-standard contractual terms, and that the non-disclosure thereof amounts to misrepresentation.⁴³ It follows then that misrepresentation is not only in bad faith, but does not constitute consent. This is illustrative of the notion that consent and good faith are inextricably bound to one another, as one cannot be achieved without the other. This notion was confirmed by the Appellate Division in Du Toit v Atkinson Motors. 44 Atkinson Motors concluded an agreement with Du Toit for the sale of a motor vehicle subsequent to an oral agreement between the parties. The agreement contained an exemption clause absolving Atkinson from any liability for any misrepresentation regarding the year of manufacture of the motor vehicle. Du Toit later discovered that the year model was significantly different from what he had been leaded to believe by Atkinson, and he instituted legal action for the cancellation of the contract. The court held that Atkinson mislead Du Toit by not informing

⁴¹ See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*1997 (4) SA 302 (SCA), where the Supreme Court of Appeal *per* Olivier JA described in a minority judgement what constitutes good faith and the purpose of measuring a contract against the notion of good faith.

⁴² Burger v Central South African Railways 1903 TS 578.

⁴³ See George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A), where Fagan HR referred to the Burger-case and added that where a mistake is made due to a misrepresentation, the party who is prejudiced by such a misrepresentation will not be bound, whether the misrepresentation was made fraudulently or innocently; See Shepherd v Farrell's Estate Agency 1921 TPD 62.

⁴⁴ Du Toit v Atkinson Motors 1985 (2) SA 893 (A).

him of the existence of the exemption clause in the contract and could, on that basis, not rely on the exemption clause.⁴⁵

Although there exists no general legal duty in South African law to bring a specific clause to the contracting party's attention, such a duty may be present in particular circumstances. Failure to do so may be viewed as acting in bad faith and may render the contract unenforceable. This will apply where a contracting party is aware that his counterpart is unaware of the existence of a clause and fails to bring the existence thereof to his attention. The requirement that the parties to a contract act in good faith entails that a party relying on the clause is tasked with establishing, with great conviction, that it was brought to the attention of the party it aims to enforce it against, in order to constitute good faith.

2.4 Sanctity of Contract

Under the Roman principle of *ex nudo pacto non oritur actio* contracts and informal agreements that fell outside of the contract categories were unenforceable and gave rise to no action.⁴⁹ Dutch institutional writers opted for a different approach to contract law and sought to have as a basis for Roman Dutch Law a notion of generalisation.⁵⁰ The fundamental principle was that all serious agreements ought to be enforced as a matter of good faith. Serious agreements were those to which the party intended to have consequences. Roman Dutch law in essence did away with categorising a

⁴⁵ Du Toit v Atkinson Motors 1985 (2) SA 893 (A) 903.

⁴⁶ See Fouché "Requirements" 52 – 53. In *CSAR v McLaren* 1903 TS 727 the court held that a railway station had a duty to disclose to its customers the terms and conditions on the reverse side of a ticket, and the nondisclosure thereof resulted in the railway not being able to rely on an exemption clause.

⁴⁷ Stoop 2008 South African Mercantile Law Journal 498;

⁴⁸ See Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers (2001) 2 All SA 646 (NC) where the court established the test to determine under which conditions a party would be bound by terms or conditions brought to his attention, and when not. The court held that a party who know that the contract contains conditions relative to the contract is bound by those terms, irrespective of whether he reads them or not. If, however, he can establish that he knew there were terms but was unaware that those terms were incidental and relevant to the contract, he will not be bound.

⁴⁹ See Chapter 2.1 above for the different forms of contract recognized under Roman law

⁵⁰ Hutchison "The Law of Contract in South Africa" 12.

contract into one of the four specific contract forms in order for it to be enforceable. Instead, it examined the true intentions of the parties to contract, as a means of creating legally enforceable obligations. This was in essence the adaptation of the Roman principle of *animus contrahendi.*⁵¹ The principle adopted was that all agreements made consensually to have intended consequences should be enforced. This principle is known as the *pacta sunt servanda*. All agreements by Roman Dutch standards were now regarded as consensual and in good faith. The founding principle of consensualism was to establish the subjective intentions of the parties to the contract. English law on the contrary adopted an objective view when establishing the intentions of contracting parties.⁵² Due to the strong influence of British law on the South African law of contract, the Appellate Division, *per* Innes J, chose to adopt an objective view when examining the intentions of contracting parties.⁵³

Historically, South African Courts hesitated between the subjective Roman Dutch approach and the objective English approach.⁵⁴ Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd.*⁵⁵ emphasised the notion that the objective approach in ascertaining the parties' intentions was to be followed in South African contract law. There is, however, a *caveat* to be heeded with respect to regarding South African law as considering only the objective intentions of the parties in

⁵¹ Animus contrahendi is the intention to create enforceable obligations. In this system the subjective intentions of the parties are taken into consideration to establish the existence of a legally enforceable contract.

⁵² Hutchison "The Law of Contract in South Africa" 16.

In Pieters & Co v Salomon 1911 AD 137 the court held that: "when a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promissor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware."

⁵⁴ See Wells v South African Alumenite Company 1927 AD 69.

South African Railways & Harbours v National Bank of South Africa 1924 AD 715 – 716, where the court held that "the law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestations of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, loom to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement".

determining their true intentions. Hutchison⁵⁶ is of the opinion that this would be a futile exercise as there is strong evidence to suggest that South African contract law regards the subjective intentions of the parties to a contract as highly relevant.

One example advanced is the nullification of a contract if it is found that any party entering into that contract made a justifiable mistake. The court will in all likelihood find that the subjective intentions of the parties should then be examined rather than the objective meaning of the words.⁵⁷ The maxim by Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd* should however not be regarded as cast in stone. This was prevalent in *Saambou-Nasionale Bouvereniging v Friedman*⁵⁸ where the Appeal Court held that the subjective consensus of the parties are indeed relevant to establish their intentions and not the objective view established in English law.⁵⁹

A further underlining principle of the sanctity of contract is that contracting parties should manage their own affairs without external interference by third parties, such as a court of law, where a valid and binding contract is established. It would be inappropriate for courts to intervene in the substantial fairness of the contract and they should do so only when required by law. On In Van Rensburg v Staughton Innes CJ stressed the principle of the sanctity of contract when he held that "those who enter into onerous or one-sided agreements have only themselves to thank". He added that "a court of law cannot assist them merely because the results are harsh". A court will not come to the aid of an aggrieved party if it feels, after signature, that the agreement contained terms that are

⁵⁶ Hutchison "The Law of Contract in South Africa" 18 – 19.

⁵⁷ Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 465.

⁵⁸ Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A).

⁵⁹ Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A) 994 – 996.

⁶⁰ Hawthorne SALJ48.

⁶¹ Van Rensburg v Staugton1914 AD 328.

⁶² Similarly see *Grinaker Construction v Transvaal Provincial Administration* 1982 (1) SA (A) 96 where the Appellate Division, *per* Viljoen JA held that: "if the plaintiff has struck a bad bargain, the Court cannot, out of sympathy for him, amend the contract in his favour". Mupangavanhu 2014 *PELJ* 1167.

regarded as unfair and one sided. A court will further not interfere and modify the terms of a contract when it is found to operate strongly in favour of one party at the expense of another.⁶³

2.5 Standard Contract Forms and The Caveat Subscriptor Rule.

A well-accepted principle of the law of contract states that a signatory to a contractual document binds himself to the content thereof upon signature.⁶⁴ Where a contracting party signs a contract without taking cognisance of the full extent thereof, such failure does not negate his responsibilities in terms of such an agreement. 65 This view was reaffirmed as far back as the nineteenth century in Burger v Central South African Railways⁶⁶ where the court held that a person signing a document without reading the content thereof does so at his own peril and is bound to the terms of such an agreement as if he had read the contract and had the intention of being bound by it. Similarly, in George v Fairmead⁶⁷ it was held that a party signing a contract knows it is a contract in the first place that will undoubtedly contain certain terms and conditions applicable thereto. By failing to read the contract but proceeding to sign it the guest of the hotel was bound to the contract by way of the caveat subscriptor rule. Where a party to a contract thus signs it without reading the full extent thereof and the terms applicable thereto, s/he will be bound to the terms. In Brink v

⁶³ Tamarillo (Pty)Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 436.

The caveat subscriptor rule dictates that a party that signs a contract knowing the content thereof and the implication of, binds himself thereto and to the consequences that flow from such an agreement. See Burger v Central South African Railways 1903 TS 578, where it was held that where a party failed to read the contract and the content thereof and nonetheless proceeded to sign it, the party was held to the terms of the contract; See also Nzimandi I 2009 Without Prejudice, discussing the exception to the caveat subscriptor rule where a person is misled to the nature and purpose of the content in order to obtain his signature.

See Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA) 127-128, where the applicant argued in the alternative that when signing an admission document of a hospital containing an exemption clause he was not bound by such a clause, as the admission clerk had an *onus* to bring the clause to his attention, and the fact that he had failed to do so rendered the clause unenforceable. The court rejected the submission and held that "a person who signs a contract without reading it does so at his own risk, and is bound by the contents as if he was aware thereof"

⁶⁶ Burger v Central South African Railways 1903 TS 578.

⁶⁷ George v Fairmead 1958 (2) SA 465 (A) 470.

Humphries & Jewel (Pty) Ltd⁶⁸ the Supreme Court of Appeal gave effect to the caveat subscriptor rule in commercial contracts. In the Brink-case⁶⁹ it was emphasised that "in this way the law gives effect to the sound principle that a person signing a document, unless such signature was obtained under false pretence or misrepresentation, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature".

2.6 Conclusion

A party signing a document freely and without duress is bound by its contents. Where a contracting party signs a contract without taking cognisance of the full extent of the terms of the contract, such a failure does not negate his responsibilities and his failure is at his own peril. The freedom to regulate one's affairs is evident in the case law referred to above, and is summarised by Moseneke⁷⁰ DCJ, who states that:

The notion of contractual autonomy belongs to a larger worldview and ideology. It flows from classical liberal notions of liberty and the neoliberal penchant for free, self-regulating and self-correcting markets driven by individual entrepreneurs who thrive on freedom of choice and freedom to strike handsome bargains. The law of contract is meant to facilitate the securing of market needs. It is meant to be a value-neutral set of muscular but predictable rules that curb uncertainty whilst inspiring confidence in the market place. For that reason, rules of contract ordinarily permit little or no judicial discretion.

Freedom to contract allows parties to manage their own affairs without external interference by third parties. In *Barkhuizen v Napier*⁷¹ the court reaffirmed this notion of contractual freedom where it held that "our constitutional values allow individuals the dignity and freedom to regulate their affairs".⁷²

⁶⁸ Brink v Humphries & Jewel (Pty) Ltd 2005 2 SA 419 SA (SCA).

^{69 421}H - 422A.

⁷⁰ MosenekeD 2009SLR 9.

⁷¹ Barkhuizen v Napier 2007 (5) SA 323 (CC) 325.

⁷² See Jameson's Minors v Central South African Railways 1908 TS 575, where the court held that an agreement not to claim damages for harm caused by the conduct of another has to comply with the same requirements as any other contract.

3 Exemption Clauses in Contracts

3.1 Introduction

Exemption clauses aim to discharge or limit obligations and are regarded as absolving agreements. This is due to the fact that the right to claim damages is absolved through the reliance on the clause itself as a contractual term. 73 The subsistence of exemption clauses in commercial contracts has not been as a result of the evolution of contract law, but rather the influence thereon Roman Dutch Law, as adopted in South Africa.⁷⁴ Hopkins's view is that the South African Law of contract has not developed over the past century and is still founded on the theoretical principles of 18th and 19th century European contract law.⁷⁵ Party autonomy dictates that parties are free to contract on the terms they so choose. The idea that individuals are free to enter into a contract in the first place, before they decide who to enter into with and on what terms, is the fundamental cornerstone of law of contract.⁷⁶ Where parties enter into a legal contract they should in principle be held to its terms. This notion was confirmed by the English court in Printing & Numerical Registering Company v Sampson, " where it held that men have the utmost liberty of contracting if there is a competent understanding between them. When agreements are entered into freely and voluntarily, public policy requires for them to be enforced.78

Part of the freedom to contract is the freedom to exclude the recovery of damages by prior agreement if one person's conduct causes harm to another. The contents of *pro-forma* contracts are standard. Because the content is fixed and determined unilaterally by the person seeking to enforce the contract, the other party has a choice only of accepting the

⁷³ Kanamugire and Chimuka 2014 MJSS 165.

⁷⁴ Hopkins 2007 De Rebus 22; See Hutchison "The Law of Contract in South Africa" 11.

⁷⁵ Hopkins 2007 De Rebus 22

⁷⁶ Hutchison "The Law of Contract in South Africa" 11.

⁷⁷ Printing & Numerical Registering Company v Sampson (1875) LR 19 EQ 465.

⁷⁸ This also encompasses the sanctity of contract as discussed in chapter 2 above.

⁷⁹ Loubser "The Law of Delict in South Africa" 196.

contract on those terms or rejecting it.⁸⁰ For this reason the argument is that freedom to contract is only a theoretical freedom containing the sole element of deciding to contract or not. It does not include the freedom to include or exclude the exemption clause itself, as the exemption clause is not a stand-alone contractual term. It cannot be isolated and forms part of the complete contractual agreement.⁸¹ These exemption clauses have been found not to be in contravention of public policy and are enforceable on the basis of contractual freedom and party autonomy.⁸²

3.2 The Purpose of Exemption Clauses

A contractual agreement entails the performance by one party to another and is fundamentally a promise or undertaking to deliver something in exchange for something else. An exemption clause is in essence a *non facere*⁸³ or promise not to claim damages in the event of non-performance. In its simplest form it may be viewed as an undertaking to refrain from instituting legal action.⁸⁴ Many individuals have relied on the incorporation of exemption clauses into contracts. A party anticipating possible harm or financial loss seeks to enforce an exemption clause with the intention of being exempted from liability *in toto* or limiting the recovery of damages. It follows then that should parties in general consent to the inclusion of an exemption clause in the contract, and should it be possible to justify exemption clauses, it should form part of the contract by consent.⁸⁵

⁸⁰ Stoop 2008 South African Mercantile Law Journal 497.

⁸¹ Stoop 2008 South African Mercantile Law Journal 497. The main criticism against exemption clauses is that one contracting party is placed in a weaker bargaining position than the other in that the available choice is limited to contracting or not. More often than not, signatories have no option other than to accept the contract containing the exemption clause. By waiving their right to claim they are placed in a weaker bargaining position than otherwise.

⁸² See Afrox Healthcare Bpk v Strydom2002 (6) SA 21 (SCA).

⁸³ Non performance.

⁸⁴ Hutchison "The Law of Contract in South Africa"7.

⁸⁵ Van Wyk *Uitsluitingsklousules:Die Huidige Status in die Suid Afrikaanse Kontraktereg* 1.

Where a party claims that he has suffered damages as a result of the actions or non-performance of another, the action can either be founded in delict or in contract. If it is found that the party causing harm acted negligently and grossly at that, the action is founded in delict. Where parties enter into a written contract and either party fails to honour the contract, the claim is instituted by breach of contract.⁸⁶

3.3 Contractual Liability

A contract containing an exemption clause creates a contractual defence for the recovery of damages. The exemption clause is specifically relied upon to cloak the contracting party who is responsible for the damage with a complete defence against harm. This damage also includes damages that have not yet realized but that may materialise in future through an unknown or unanticipated event. An exemption clause in essence constitutes an agreement not to claim damages, and is contractual. In Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd.87 the court held that where the defendant had contractually excluded liability for negligently causing harm, the plaintiff could not recover damages through delict but rather had to lodge a contractual claim. The reason for this was that although damages had been caused through negligence, such damages had been excluded contractually and the claim was therefore regarded as invalid.88 One of the rationale behind the incorporation of exception clauses into standard contracts is to curb the possibility of one of the contracting parties injuring another through negligence that manifests in an act or omission.89

⁸⁶ Christie The Law of Contract 209 - 218.

⁸⁷ Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A) 807.

⁸⁸ See Sasfin (Pty) Ltd v Beukes1989 (1) SA 1 (A) 15.

⁸⁹ See Kruger v Coetzee 1966 (2) SA 428 (A), where the test for negligence was formulated by the court to indicate that a reasonable person in the position of the defendant would have foreseen harm and would have done anything to prevent the occurrence. The court took cognisance of what steps were available to the defendant to guard against or prevent harm from occurring.

3.4 Delictual Liability

Negligence is based on the conduct of a wrongdoer as opposed to his state of mind as a form of fault. With negligence the conduct of one person is measured against a reasonable, objective standard that is accepted by society. The fictitious reasonable person test is applied by stating what the "reasonable" person, if placed in the position of the defendant, would have done in a particular set of circumstances. It is thus an objective standard used to measure the conduct of a person and whether or not it conforms to the standard expected by society. The reasonable person test depends on a number of factors such as geographical location, and what a community perceives as being morally correct and acceptable.

The test for negligence was laid down in *Kruger v Coetzee*, ⁹⁴ where the court held that the decisive question to be answered in establishing if any conduct amounts to negligence is twofold. Firstly it should be ascertained whether a reasonable person in the position of the defendant would have foreseen the possibility of his conduct causing harm to another, and secondly whether the defendant took any reasonable steps to guard against such an event. ⁹⁵ The court emphasised the second criteria. As a gate on Kruger's property was continuously left open and Kruger persisted in allowing his horses to occupy the land, Coetzee argued that Kruger had in fact been negligent. The court took a stance adverse to that of Coetzee and held that Kruger had taken reasonable steps, as he had foreseen that the horses could cause harm and had reported the matter to the council twice. The court was of the opinion that he could not have taken any further

⁹⁰ Loubser "The Law of Delict in South Africa" 113.

⁹¹ See Kruger v Coetzee 1966 (2) SA 428 (A).

⁹² See Loubser "The Law of Delict in South Africa" 113 for a comprehensive discussion of the concept of negligence and the characteristics of what constitutes a reasonable person. See further Herschel v Mrupe 1954 (3) SA 464 (A) 490, where the court held that the characteristics of a reasonable person include neither exceptional skill nor unskilled thoughtlessness. The characteristics of a reasonable person are those of an average person with average skill taking reasonable precautions and reasonable chances.

⁹³ Loubser "The Law of Delict in South Africa" 114.

⁹⁴ Kruger v Coetzee 1966 (2) SA 428 (A) (hereafter the Kruger-case).

⁹⁵ Kruger v Coetzee 1966 (2) SA 428 (A) 430

measures, and consequently held that he had not been negligent.⁹⁶ This illustrates that conduct will amount to negligence, where the consequences were reasonably foreseeable, but no actions were taken.

Exemption clauses in contracts provide for the exclusion of negligence. When applying the theoretical approach described above to exemption clauses in commercial contracts, differentiation must be drawn between gross negligence and normal negligence. When exactly conduct will amount to gross negligence as opposed to ordinary negligence was examined in Rosenthal v Marks.97 The court held, per Didcott J, that conduct will amount to gross negligence where there is an entire failure to give consideration to the consequences of one's actions and this amounts to recklessness.98 An agreement to exclude liability caused by reckless conduct will therefore be regarded as invalid. 99 The exclusion of liability for normal or ordinary negligence on the other hand may be regarded as valid. 100 Where a party therefore performs under the contract, but such performance amounts to a positive breach as opposed to total nonperformance altogether, the positive yet incomplete performance will not be construed as gross negligence. 101 The impression, then, is that positive mal-performance will be condoned more readily than total nonperformance.

⁹⁶ See Lomagundi Sheetmetal and Engineering (Pty) Ltd v Basson1973 (4) SA 523 (RA), where the court identified very broad criteria which are useful in measuring if harm could reasonably be foreseen.

⁹⁷ Rosenthal v Marks 1944 TPD 180.

⁹⁸ See also *Adlington & Co and Naylor v Munnik*3 Searle 187, where the court held that a carrier could exempt itself from ordinary negligence, but not from gross negligence.

⁹⁹ See *Hughes v SA Fumigation Co (Pty) Ltd* 1961 4 SA 799 (C) 805G, where it was held that a contractor who deliberately caused a fire was prohibited from relying on an exemption clause due to the intentionality of his actions.

¹⁰⁰ Sasfin (Pty) Ltd v Beukes1989 (1) SA 1 (A) 15.

^{101 1989 (1)} SA 1 (A) 430.

3.5 The Impact of the Constitution on Exemption Clauses

3.5.1 The Effect of the Constitution on Contracts in General

The influence of the *Constitution* on contracts remains a controversial topic founded both in literature and in recent judgements of the Supreme Court of Appeal. The common law notion is that a contract is based on principles of good faith, reasonableness and public policy. The underlying principles of the *Constitution* are democracy, accountability, the rule of law, and the idea that government should be limited to the powers it derives from the Constitution. Any conduct by the citizens of the Republic or law that contravenes these principles may be declared invalid. When examining the constitutionality of exemption clauses, it stands to reason that the Bill of Rights should be taken into account to ascertain what constitutes public policy. Academics are also in accord that cognisance has to be taken of the constitutional bearing on contracts in general and on exemption clauses specifically. Academics

Hopkins¹⁰⁵ is of the opinion that "the court is reluctant to take the final step and actually declare the contracts that tend to limit constitutional rights unenforceable". Where a contractual term undermines the spirit, purpose and objects of the Bill of Rights it should be declared invalid. This view has been welcomed by Marx and Govindjee,¹⁰⁶ who are of the opinion that certain recent decisions by the Supreme Court of Appeal, viewed as the "upper custodian of the common law", have not necessarily been informed by interpreting exemption clauses from a constitutional point of view.

¹⁰² Hopkins 2007 De Rebus 22. See Brisley v Drotsky 2002 (4) SA 1 (SCA) and Napier v Barkhuizen2006 2 All SA 469 (SCA).

¹⁰³ See Hopkins 2007 *De Rebus* 22 quoting *Wells v South African Aluminite Co* 1927 AD 69, where the public policy principle is reaffirmed as the legal convictions of the community. The fundamental rights incorporated into the Constitution represent the values of a community and form the basis of what constitutes public policy.

¹⁰⁴ Hopkins 2007 De Rebus 22.

¹⁰⁵ Hopkins 2007 De Rebus 22.

¹⁰⁶ Marx and Govindjee 2007 Obiter 622.

3.5.2 The Effect of the Constitution on Exemption Clauses Specifically

When examining the impact of exemption clauses on the fundamental rights contained in the Bill of Rights, the freedom to contract cannot be selectively overlooked. It forms part and parcel of the Bill of Rights in equal measure to the principles of fair and equitable contractual terms. In *Barkhuizen v Napier*¹⁰⁷ the Constitutional Court, *per* Ngcobo J, held that there exists great doubt over the suitability of testing a contractual term against the Bill of Rights directly. This view is shared by the majority of the Constitutional Court judges¹⁰⁸ in so far as should a contractual term limit a right contained in the Bill of Rights the court has to enquire if such a limitation may be reasonably justifiable in terms of Section 36.¹⁰⁹ A contractual agreement and the exemption clause that flows from such an agreement is thus not law. As it is not regarded as law, it would therefore be difficult to establish that it is inconsistent with the Bill of Rights.

In the light of the above, the Constitutional Court prefers to apply the Constitution indirectly to contractual agreements. Where a contract contravenes public policy, the contract must be regarded as invalid. What constitutes public policy and the breach thereof will in turn have to be measured against the values of the Bill of Rights.¹¹⁰

3.6 Interpretation of Exemption Clauses

3.6.1 Introduction

Courts are more often called upon firstly to interpret the meaning of the wording in the contract itself, and the wording connoting objects, before they can scrutinise the intended wishes of the parties thereto.¹¹¹ The

¹⁰⁷ Barkhuizen v Napier 2007 (5) SA 323 (CC)

¹⁰⁸ Hutchison "The Law of Contract in South Africa" 37.

¹⁰⁹ Section 36 of the Constitution is referred to as the limitation clause. A right may be reasonably and justifiably limited in terms of a law of general application.

¹¹⁰ Hutchison "The Law of Contract in South Africa" 37.

¹¹¹ See Cornelius Principles 25 – 40; Swart v Cape Fabrix (Pty) Ltd 1979 1 SA 195 (A) 202C.

traditional approach to interpretation requires the court to consider the intentions of parties after it has established the meaning of the wording itself. When interpreting the agreement, the court should regard the circumstances leading to the conclusion of the contract irrespective of uncertain or ambiguous word constructions. It is trite that parties should fully comprehend the terms and meanings governing the contract before entering into them. When parties sign the contract they consent to the terms thereof and bind themselves to the *caveat subscriptor* rule. Deviation from the rule will be permissible only where it is found that a party mistakenly signed the contract or was reasonably unaware of the existence of an exemption clause.

When discrepancies do arise regarding the construction of an exemption clause and the extent of its ambit, the court is tasked to firstly determine what the exact purpose of the words of the exemption may be. It can only thereafter address any of the legal issues in dispute. After the wording used has been clarified, courts then need to establish to what extent liability, if any, is to be excluded. Lastly the courts needs to factor in the external object to which the words and/or exemption clause relates. This serves as a method of connecting the object to the word it relates to, and to better understanding the purpose of the exemption clause and its definitive aim. For the purpose of construing the true meaning of the words used, it is permissible to take "background circumstances" into account. This stands in contradiction to the parol evidence rule, but is justifiable. The parol evidence rule states that a contract reduced to writing is the exclusive record of the parties and no evidence may be

¹¹² Cornelius Principles 28.

¹¹³ Van der Westhuizen v Arnold 2002 4 All SA 331 (SCA) 332

¹¹⁴ See Chapter 2 on the applicability of the *caveat subscriptor*rule and the implication to parties to a contract.

¹¹⁵ See Diners Club SA (Pty) Ltd v Livingstone & Another 1995 (4) SA 493 (W); Similarly in Mercurius Motors v Lopez 2008 (3) SA 572 (SCA), where the Supreme Court of Appeal held that a hidden exemption clause that seeks to undermine the natural consequences of a contract is to be declared invalid where it was not brought to the attention of the contracting party.

¹¹⁶ Marx and Govindjee 2007 Obiter 624

¹¹⁷ Jaga v Dönges1950 4 SA 653 (A) 662H.

adduced to prove the terms of the contract. The admissibility of evidence to prove the intentions of the parties is prohibited where such evidence will result in qualifying or altering the terms of the contract. The parol evidence rule is limited in application, however, and a strict, inflexible approach could lead to injustice if parties are precluded from leading evidence to clarify clauses having more than one meaning. Parties should be able to lead evidence on what they actually meant by their words. In *Coopers & Lybrand v Bryant* Joubert JA concluded that the correct approach is to have regard to the context in which the words are used within the contract. The examination of a context would relate to the purpose of the contract and the minds of the contracting parties when doing so. This is illustrative of the fact that the parol evidence rule is flexible in its application.

The aspirations of the drafter of an exemption clause are to ensure that the maximum protection of party interest is obtained with the least amount of exposure. In order to achieve this, parties wanting to rely on an exemption clause incorporate different formulations to maximise their exemption from liability. For this calculated and cognisant reason in the limitation of liability, word constructions that include phrases such as "whatever nature" and "any injury" are commonly used in standard exemption clauses. 123

3.6.2 Exemption Clauses Aimed at Excluding Liability of "Whatever Nature" and for "However Caused"

A party relying on an exemption clause containing the words "for whatever reason" or "however caused" will argue that he is covered by the exemption clause in so far as it does not specifically state how

¹¹⁸ Cornelius Principles 99.

¹¹⁹ Christie The Law of Contract 220; Cornelius Principles 100 - 101.

¹²⁰ Coopers & Lybrand v Bryant 1995 (3) SA 761 (A)

¹²¹ Coopers & Lybrand v Bryant 1995 (3) SA 761 (A) 768 A - 768 E

¹²² Marx and Govindjee 2007 Obiter 624.

¹²³ See Afrox Healthcare Ltd v Strydom 2002 6 SA 21 (SCA); Drifters Adventure Tours v Hircock2007 (2) SA 83 (SCA).

damage should have been caused in order for it to result in liability. The party will contend that the inclusion of these words makes the ambit of the exemption clause wide enough for liability for "any damage" of "any nature" to be excluded. Such clauses do not specifically set out the exact legal grounds for liability to be excluded or limit the loss to an individual incident. Specific incidents to be excluded may include the right of an employer to be exempted from liability for theft from his employee 125 or the correct description of a specific object.

However, the wording used should be read within the context it operates in, and isolating it for the purposes of interpretation purposes may lead nowhere. 127 If an approach is followed that "all liability" for "any damage" is to be excluded, the words used may have different meanings when read within different contexts. In considering the use of a portmanteau exemption clause containing words such as "however caused" or "whatever nature", the court was of the opinion in *Minister of Education v* Stuttaford & Co (Rhodesia) (Pty) Ltd¹²⁸ that clauses containing such wording must mean any loss, however caused, by whatever nature. There is thus a tacit implication that negligence is included. The court added, per Squirres J, that such clauses so worded are excessive and are deemed to be unsuited to the purpose for which they are included. 129 It is therefore fundamental that the liability to be exempted must be described within the appropriate context. In Durban's Water Wonderland (Pty) Ltd v Botha and Another 130 Ms Botha and her young daughter were hurled from a vertical amusement ride as a result of the failure of a hydraulic valve. The mechanical problem resulted in serious injuries to

¹²⁴ Christie The Law of Contract 215.

¹²⁵ Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 2 SA 794 (A); Goodman Brothers (Pty) Ltd v Rennies Group Ltd 1997 4 SA 91 (W) 99E – 99G.

¹²⁶ See Agricultural Supply Association v Olivier 1952 2 SA 661 (T) where an exemption clause was upheld which excluded liability for the correct description and result of a seed plant.

¹²⁷ Christie The Law of Contract 215.

¹²⁸ Education v Stuttaford & Co (Rhodesia) (Pty) Ltd 1980 4 SA 517 (Z)

¹²⁹ Education v Stuttaford & Co (Rhodesia) (Pty) Ltd 1980 4 SA 517 (Z)523 I - 523 H.

¹³⁰ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA). (hereafter the Durban's Water-case).

both Ms Botha and her daughter, and Ms Botha instituted a claim for damages. The respondent relied on an exemption clause contained in a contract which exempted it from liability. The clearly visible notice on the cashiers' window where tickets to the park were purchased read:¹³¹

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.

The court had firstly to decide on the liability of the respondent, if any, and would stand over the extent of the plaintiff's injuries to a later stage. The court had to decide on three issues. The first issue was if a notice painted on an amusement park's ticket office is a tacit part of the contract that governs the park's amenities. Secondly, it had to decide if the respondent had in fact been exempted from liability, taking into consideration the proper wording of the exemption clause. Lastly, it had to decide if the respondent had been negligent, and if the mechanical failure to the amusement ride was a result of the negligence. After the magistrate found in favour of the plaintiff on all three issues, the respondent appealed to the Natal Provincial Division with no success. With the leave of the court, Durban's Water Wonderland, now the appellant, then turned to the Supreme Court of Appeal.

The Supreme Court of Appeal, *per* Scott JA, held that exemption clauses containing words such as "do not accept liability" or "unable to accept liability" are not an attempt at denying plaintiffs their respective day in court should they feel a defendant has a claim to answer to. They further do not amount to the adoption of an uncompromising attitude by defendants which could involve denying that a claim could possibly exist should a plaintiff institute legal action. The court adopted a systematic approach in reaching its conclusion by firstly examining the word construction of the exemption

¹³¹ Durban's Water Wonderland (Pty) Ltd v Botha and Another1999 (1) SA 982 (SCA)988C.

clause itself. The use of such wording should be read in the context in which it is intended to be used. This conforms to the principle laid down in *Coopers & Lybrand v Bryant*. The purpose of the exemption clause is to clearly state that the defendant will not incur liability if the claim resonates within the ambit of the exemption clause. Where the terms of the clause clearly articulate the meaning in clear and unambiguous terms, effect must be given to the exemption clause. From the wording of the exemption clause, it is evident that the park aimed to exclude liability if so caused by negligence, and the language used clearly fell within this ambit. There was specific reference to the design and construction of the amusement park and its amenities, and this was the defence which was relied upon. The actions that followed, resulting in the injury to the plaintiffs, fell within the ambit of the exemption clause and the park was therefore exempted. See the context in the context i

In Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd¹³⁶ it was held that the words "from whatever cause arising" were wide enough in scope not only to cover any source from which the damages could originate, but also the extent of "any damage." This clause was found to be wide enough to exclude the liability for damages for the failure to maintain a wall that resulted in damages to a lessee. Similarly, in Chubb Fire Security (Pty) Ltd v Greaves 138 the court held that the words "for whatever reason" encompassed a very wide meaning and that the parties, without proof to the contrary, had no intention of limiting the

¹³² Coopers & Lybrand v Bryant 1995 (3) SA 761 (A)

¹³³ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA) 991-991A.

¹³⁴ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA) 989 H-989 I.

¹³⁵ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA) 990A-990E.

¹³⁶ Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd1975 4 SA 391 (D) 395B – 395D.

^{137 1954} SA 391 (D and CLD) 391D-E.Similarly in *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 371 it was held by Innes CJ that "in its natural and ordinary sense 'any' – unless restricted by context- is an indefinite term which includes all the things to which it relates."

¹³⁸ Chubb Fire Security (Pty) Ltd v Greaves 1993 4 SA 358 (W)361H – 361I (hereafter the Chubb Fire-case).

meaning of the words to specific meaning.¹³⁹ In the Chubb fire case¹⁴⁰ the court further held that a restraint of trade clause containing the words "for whatever reason" had a very wide meaning and there was no clear indication that either the applicant or the respondent intended the grounds for the termination of employment to be limited to the grounds listed in the restraint only.

The *Durban's Water* case clearly illustrates the principle that an exemption clause may be relied upon to function as it was intended to. Where an exemption clause is correctly constructed it may include the words "however caused" or "for whatever reason". They should be relied upon with caution, however. Courts have been found to not automatically uphold such a clause.¹⁴¹

3.6.3 Exemption Clauses Contrary to Public Policy

Reliance on contractual freedom does not afford parties *carte blanche*¹⁴² to incorporate any term they deem fit into a contract. Courts will attempt to protect the public by limiting the effect of exemption clauses or interpreting them very narrowly if they deem fit.¹⁴³ Although courts have discretion to render a contract and an exemption clause invalid, they will rarely do so. This will occur only if the court is thoroughly satisfied that enforcing the contract and exemption clause will be contrary to public policy.¹⁴⁴

¹³⁹ See also *Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd* 1980 4 SA 517 (Z) where the court held *per* Squires J that "any loss" meant loss of any kind and nothing supported the interpretation that it excluded loss attributable to negligence.

^{140 361}H - 361I.

¹⁴¹ See Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds 1998 4 SA 466 (C), where Hlophe J declined to uphold an exemption clause after a fire was deliberately started by a security guard.

¹⁴² Power to do as you see fit.

¹⁴³ See *Van der Westhuizen v Arnold* (2002) 4 All SA 331 (SCA), where the court disregarded an exemption clause in the interest of public policy.

¹⁴⁴ See *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) note 9 in paragraph 8, where the court held that a contract will be against public policy where it is excessively one-sided and unfair. The unfairness results in its being contrary to public policy and unenforceable.

In *Afrox Health Care Bpk v Strydom*, ¹⁴⁵ the Supreme Court of Appeal had to decide whether or not the decision to uphold an exemption clause in a hospital contract would be contrary to public policy based on the unfairness of the exemption clause in a contract. The appellant ¹⁴⁶ had been admitted to a hospital owned by the respondent ¹⁴⁷ for surgery and subsequent post-operative treatment. During admission the parties concluded a written agreement containing an exemption clause indemnifying: ¹⁴⁸

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

Following the operation, Strydom suffered complications as a result of the negligent conduct of a nurse resulting in damages to Strydom. He contended that the signature of the hospital on the contract implied that there was a tacit undertaking by the hospital and its staff to take reasonable care of him in a professional manner. Strydom instituted action against Afrox on the basis that he did not expect a clause which exempted the hospital from liability to be in a hospital contract. The exemption clause itself was contrary to public interest. In terms of Section 27(1)(a) of the Constitution "each individual has the right to access to adequate healthcare", and it was in the context of this provision that Strydom contested that given the fact that Afrox was a hospital and the fact that Strydom was entitled to such healthcare, Afrox had failed to discharge its

¹⁴⁵ Afrox Health Care Bpk v Strydom 2002 (6) SA 21 (SCA).

¹⁴⁶ Hereafter referred to as Strydom.

¹⁴⁷ Hereafter referred to as Afrox.

¹⁴⁸ Afrox Health Care Bpk v Strydom 2002 (6) SA 21 (SCA) 128.

¹⁴⁹ Afrox Health Care Bpk v Strydom 2002 (6) SA 21 (SCA)126.

¹⁵⁰ See Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 9B – 9F for confirmation of the courts' approach that a contract containing terms that are unreasonable and contrary to public policy will be regarded as legally unenforceable, but it cautions that "the power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases...one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offends one's individual sense of propriety and fairness".

¹⁵¹ Constitution of the Republic of South Africa, 1996.

duty to provide healthcare by excluding liability.¹⁵² The fact that the duty bestowed on Afrox in terms of section 27 was circumvented by an exemption clause amounted to a violation of public policy.¹⁵³

The court held that the existence of the exemption clause did not limit Strydom's access to medical service or obstruct the provision thereof. The clause was therefore not contrary to public policy. The essence of the court's decision in *Afrox* was that exemption clauses that are unambiguous, clear in definition and the liability they intend to exclude will be enforceable. Such enforceability will, however, depend on the clause's being subject to public policy. Where it contravenes public policy, it follows that it will be regarded as unreasonable. The court held in *Wells v South African Alumenite Company*¹⁵⁴ that an exemption clause which excludes accountability for fraud amounted to an infringement of public policy and was consequently unenforceable.

3.6.4 Exemption Clauses Are to be Expected in Standard Contracts

Exemption clauses should be expected in contracts and have become standard contracting terms.¹⁵⁵ In the *Durban's Water*-case¹⁵⁶it was held that exemption clauses that are prominently displayed and visible are a tacit undertaking to be bound by such clauses. The predominant display thereof is inconsistent with the notion that these exemption clauses are "unexpected" as they are clearly visible. The clear and present display thereof is thus grounds for conclusion that there is tacit consent by the parties to be governed by the terms of the contract they enter into. Where these exemption clauses are reasonably expected to be found, plaintiffs

¹⁵² Afrox Health Care Bpk v Strydom 2002 (6) SA 21 126.

¹⁵³ See Hopkins 2007 *De Rebus* 22 for a discussion of the reason why the respondent failed in claiming damages and the argument that exemption clauses limit the constitutional rights to access to courts and should be regarded as invalid. Hopkins is of the opinion that Afrox was not "adequately" tested against the Constitution and has the respondent selected the correct constitutional rights that exemption clauses seek to limited or exclude, Strydom would have been successful.

¹⁵⁴ Wells v South African Alumenite Company 1927 AD 69 72.

¹⁵⁵ Sharrock "Judicial Control" 116; Kanamugire and Chimuka 2014 MJSS 165.

^{156 982.}

cannot rely on the defence that they were unaware of their existence. The painting of an exemption clause on a window of a ticket office is sufficient action by a *proferens* to discharge his onus to bring such an exemption clause to the attention of client. The mere act of displaying it is a representation of its applicability.

3.6.5 Exemption Clauses that are Ambiguous

Although an exemption is created to purposefully exempt a party relying thereon in the widest possible terms, such an exemption will not be interpreted outside of the ambit in which it was intended. Where these words are ambiguous and could denote more than one meaning, it is trite that they will be interpreted against the party relying on them. 159 The exemption clauses should clearly cover the liability they are intended to cover. The liability that is to be excluded should be excluded expressly. 160 In *Drifters Adventure*¹⁶¹ the appellant, a tour operator that operates across borders from South Africa, was involved in an accident while travelling in Namibia. As a result of the negligent driving of one of the operators of the appellant, Hircock¹⁶² was injured. The respondent instituted legal action by means of vicarious liability against the appellant on the basis that the employee acted within the course and scope of his duties, and damage caused by the employee was damaged caused by the appellant. The Appellant denied liability on the basis that the respondent signed an exemption clause which exempted him from any legal action for negligence

^{157 992}A - 992C.

^{158 992}C - 992D.

¹⁵⁹ See Stott v Johannesburg County Club2003 4 SA 559 (T), where, while playing golf on the respondent's premises, one of the members of the club was fatally struck by lightning. His wife, as his dependant, proceeded to institute legal action against the golf club for a loss of support. The golf club relied on an exemption clause containing the words "however caused" and contested that it was absolved from liability as the cause of death fell within the ambit of the exclusion. From the analysis a fleeting look would suggest that the words "however caused" would refer not only to any possible manner in which damage could be caused but to whoever the damage was caused to as well. But the harm was not caused to the deceased but to his wife, in the form of a loss of support. The court held that the clause was ambiguous and that it had to be construed against the club that relied on it in order to discharge its liability.

¹⁶⁰ Pegler v Wang (UK) Limited (2000) BLR 218.

¹⁶¹ Drifters Adventure Tours CC v Hircock2007 (2) SA 83 (SCA) (Hereinafter referred to as the Appellant).

¹⁶² Hereinafter referred to as the Respondent.

however caused. The exemption clause on which the appellant relied stated that 163

I have read and fully understand and accept the conditions and general information as set out by Drifters in their brochure and on the reverse side of this booking form. I acknowledge that it is entirely my responsibility to ensure that I am adequately insured for the above venture. I further absolve Drifters, their staff and management and affiliates of any liability whatsoever, and realise that I undertake the above venture entirely at my own risk

On the reverse side of the booking form to which the abovementioned clause refers, the Booking Conditions and General Information further stated that:¹⁶⁴

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

The Supreme Court of Appeal was tasked with deciding if the exemption clause, undersigned by the respondent, absolved the appellant from liability as a result of the negligent conduct by one of its employees. It is apparent from a normal reading of the above clause that the appellant's purpose was to absolve himself from any claim of any nature, however caused. The appellant had attempted to cast the proverbial net as wide as possible in order to be covered should any deleterious event materialise. At face value it is palpable that the exemption clause on which the defence of the appellant rested contained ambiguous wording which, if placed in a different context, could have an entirely different meaning. In its judgement, the court held that in the event where the terms are ambiguous, the contract should be dissected and scrutinized as a whole and that the exemption clause should not be read in isolation. Exemption clauses that remain ambiguous in respect of the conduct or terms it aims to exclude will

¹⁶³ Drifters Adventure Tours CC v Hircock 2007 (2) SA 83 (SCA) 86E - 86F.

^{164 88}F - 88G.

^{165 88}B.

in all likelihood be interpreted against the individual relying on such clauses. 166

The court then continued to analyse the enforceability of the exemption clause by examining the rationale for excluding "driving". This is in essence the appellants' business, as he cannot operate without driving his clients around from place to place. The word "drive" in the context is reliant on the "nature" of the physical driving of the bus itself and the way in which the driving is conducted. The court held that "driving" does not refer to negligent driving, but only to driving in third-world countries as construed in the exemption clause. Based on the interpretation of the word "driving" the court held that the exemption clause could bear more than one meaning i.e. driving in third-world countries and driving from one place to another outside of those third-world countries. On that basis, the exemption clause had to be interpreted in such a manner that it least favoured the appellant, as the negligent driving of the employee on public roads did not exclude liability. The word "drive" in the context had more than one meaning, and the appellant was unsuccessful in contracting out of liability.

3.7 Conclusion

The onus to establish the enforceability of an exemption clause is hackneyed. The party wishing to rely on it bears the onus of proving its validity. Contracts containing exemption clauses are no different from those without them, and should still comply with the requirements of the sanctity of contract, contracting in good faith, and public policy. The sanctity of contract, contracting in good faith, and public policy.

Parties who willingly enter into a contract should be bound by the terms as an adherence to the *pacta sunt servanda* rule. The sanctity of contract

^{166 88}G - 88H

¹⁶⁷ See *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA), where it was held that the ambiguity of a word must be read against the person so wishing to rely on it.

¹⁶⁸ Marx and Govindjee 2007 Obiter 624.

¹⁶⁹ Pacta servance sunt.

¹⁷⁰ Fritz M The effect of the Consumer Protection Act on Contractual Freedom 7; Stoop 2008 SAMLJ 496.

is supported by the words of English Judge Jessel MR in *Printing* & *Numerical Registering Company v Sampson:*¹⁷¹

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 courts of justice.

Exemption clauses are not applied with no holds barred, and will be seen as unreasonable where a party wishing to exclude liability does so for the very nature of the business it operates. The chronological discussion of the Afrox and Drifters cases from the earliest judgements to the most recent has been purposeful, the purpose being to illustrate the court's pattern of interpreting exemption clauses within the widest possible application. It also indicates judicial innovation on the interpretation of exemption clauses. It is clear that the interpretation of the legality of exemption clauses has evolved from being a generic nature by incorporating words such as "any damage", "however caused" or "for whatever reason" to very specific exclusions. The second of the legality of the second of the legality of the second of the legality of

Prior to the promulgation of the *Consumer Protection Act*, no substantive limitation on contractual freedom existed. Parties were free to structure the outcome and consequences of their agreement.¹⁷⁴ The impact of the *Consumer Protection Act* on the future existence of exemption clauses is

¹⁷¹ Printing & Numerical Registering Company v Sampson 1875 LR 19 Eq 465.

¹⁷² This argument was underlined by the Supreme Court of Appeal in *Drifters Adventure Tours CC v Hircock*2007 2 SA 83 (SCA)89G, where it held that the appellant would not contract out of liability *in toto* and to insinuate such a though would be "so perverse that we cannot accept that the appellant would have done so".

¹⁷³ See Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363; Chubb Fire Security (Pty) Ltd v Greaves 1993 4 SA 358 (W); Drifters Adventure Tours CC v Hircock2007 2 SA 83 (SCA); See Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd 1983 1 SA 254 (A), where it was held that the words "any legal action" donot limit the ambit of losses which had been contemplated in such a way as to limit loss caused by negligence.

¹⁷⁴ Naude and Lubbe 2005 SALJ 444; See Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A), where it was held that at that point in time no statutory rules existed that placed a limitation on parties against the incorporation of such wide clauses in their contracts.

fittingly summarized by *Melville*, ¹⁷⁵ who states that the expression "buyers beware" will no longer resonate within future commercial contracts. The Act will instead result in a situation in which the seller should beware as a consumer will have greater power in possibly exiting the contractual relationship if it is found that he has waived his rights by way of consenting to an exemption clause. The common law devices for regulating exemption clauses are few in number, which is why the Act has been promulgated in order to regulate the apparent abuse of exemption clauses. ¹⁷⁶

The Act has been drafted in such a way as to aid the consumer by providing better protection against apparent abuse, and to protect him/her from falling into an unequal bargaining position.¹⁷⁷ The following chapter deals with the *Consumer Protection Act* with specific reference to Section 48 of the Act and the incorporation of exemption clauses in commercial contracts after promulgation of the Act.

4 The Consumer Protection Act.

4.1 Introduction.

Historically South Africa has not possessed any statutory control over exemption clauses. There have also been no regulatory controls over unfair terms of contract or a statutory determination of when exemption clauses amounted to an unfair contractual term. The common law position was applied in order to determine the conclusion of legal matters. The introduction of the *Consumer Protection Act* aims to change the common law. This is the reasoning behind the implementation of the Act.

¹⁷⁵ Melville The Consumer Protection Act mad easy 2.

¹⁷⁶ Naude and Lubbe 2005 SALJ 441 - 442.

¹⁷⁷ See Section 3(1) on the purpose of the Act.

¹⁷⁸ Naude and Lubbe 2005 SALJ 441.

¹⁷⁹ Consumer Protection Act, 68 of 2008.(hereinafter referred to as the Act).

4.2 Purpose of the Act

The purpose of the Act is to protect the interest of consumers as well as of vulnerable minority groups who are not familiar with legal terms. ¹⁸⁰ The Act was also an outcome of South Africa's commitment to international law and consumer rights. ¹⁸¹ Ina Wilken, a consumer activist and the winner of the Department of Trade and Industry Award for Consumer Champions in 2007, hails the Act as one of the "best consumer protection acts on the continent". ¹⁸² The promulgation of the Act seeks to regulate the common law right of contracting parties to incorporate exemption clauses in contracts. Where an exemption clause seeks to waive rights under the pretence of freedom of contract, the Act seeks directly to prohibit the inclusion of such a waiver. The Act specifically prohibits parties from waiving such rights. ¹⁸³ It aims not only to create statutory rights for consumers, but also to prevent the exploitation of apparently unfair, unreasonable and unjust contract terms. ¹⁸⁴

4.3 Interpretation of the Act

Under common law a contract must be interpreted by examining the language in the contract and giving it the most logical and ordinary meaning. Where contracts contain ambiguous wording the words will be interpreted against the person aiming to rely thereon. This principle is known as the *contra proferentem* rule. The rule also extends to those persons responsible for generating the contract and does not contravene

¹⁸⁰ Melville The Consumer Protection Act made easy 19.

¹⁸¹ See section 3(1) of the Act.

¹⁸² Melville *The Consumer Protection Act made easy* xii. Also see Haupt "Consumer Protection Act" 335.

¹⁸³ Section 48 of the Act.

¹⁸⁴ Haupt "Consumer Protection Act" 335.

¹⁸⁵ Christie *The Law of Contract* 234. See *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A), where the court *per* Joubert JA adopted a four step approach when interpreting contracts.

¹⁸⁶ See Cornelius *Principles* 180 – 182 for a discussion on the *contra preferentum* or *contra stipulatorem* rule.

¹⁸⁷ The person responsible for the wording is referred to as the *proferens*, and where wording lends itself to ambiguity or to the derivation of more than one meaning the reasoning behind the rule is that the person who drafted the contract has an

the parol evidence rule in order to establish tacit or implied terms.¹⁸⁸ This practice should be adopted cautiously as a last resort, where all other methods of interpreting the intentions of the parties have failed.¹⁸⁹

The Act must be interpreted in a manner that gives effect to its purpose in section 3.¹⁹⁰ In terms of the Act, words containing more than one meaning will be interpreted in favour of the consumer.¹⁹¹ This notion is consistent with the *contra proferentum* rule in so far as the consumer did not draft the wording of the contract and should therefore not be prejudiced.¹⁹² Where the *contra proferentum* rule stipulates that ambiguous wording should be interpreted against the person who aims to rely on it, the Act guarantees the protection of the consumer against ambiguous wording when interpreting the Act.¹⁹³

4.4 Application of the Act

The Act regulates the conduct of suppliers of goods and services and the relationship between suppliers and consumers.¹⁹⁴ Where these parties enter into an agreement for the supply and delivery of goods or perform services in exchange for monetary consideration, the Act will apply.¹⁹⁵ In terms of Section 5, the Act will apply to every transaction concluded within the Republic of South Africa for the supply and delivery of goods from one party to another.¹⁹⁶ This definition also includes the promotion of any goods

opportunity to correctly construct the contract with the correct wording, but did not do so

¹⁸⁸ Cornelius Principles 100 - 101.

¹⁸⁹ Florida Road Shopping Centre (Pty) Ltd v Caine 1968 (4) SA 587 (N) 593G - 593H.

¹⁹⁰ Section 2(1) of the Act.

¹⁹¹ Haupt "Consumer Protection Act" 336.

¹⁹² See Footnotes 198 and 199 above.

¹⁹³ Section 4(4)(a) of the Act; Naude 2009 SALJ 506.

¹⁹⁴ See Section 1 for a definition of a "consumer" and "supplier".

¹⁹⁵ Haupt "Consumer Protection Act" 336.

¹⁹⁶ In terms of Chapter 1, section 1, a transaction is defined as an agreement between one person and another for the supply or the potential supply of any goods or services. This agreement is an arrangement that leads to the establishment of a relationship between them. See section 5(6), where the definition of a transaction also includes the supply of any goods by a trade union, club or association sharing a common purpose, even if it is free of charge or requires no contribution by its members.

or services.¹⁹⁷ The Act also applies to government as a supplier of goods and services, voluntary associations, trade unions, associations and societies providing goods or services to their members and the promotion and marketing of goods and services.

Although government is considered as a supplier under the Act, and the way it deals with consumers is governed by the Act, those businesses that deal with government will not be bound by the Act in their dealings with government. All contracts that were concluded before 25 October 2010 will not be subject to the Act but rather to the common law. The common law is not replaced in its entirety by the Act, and Section 2(10) specifically stipulates that the Act does not preclude a consumer from exercising his common law rights.

4.5 Section 48 of the Act

Part G of the Act deals with the right to fair, just and reasonable terms and conditions. These are contractual terms which prejudice consumers and favour suppliers. In terms of section 48 of the Act:

- (1) A supplier must not—
- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
- (i) at a price that is unfair, unreasonable or unjust; or
- (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
- (ii) assume any obligation; or
- (iii) waive any liability of the supplier,
- on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition
- is purportedly subject, is unfair, unreasonable or unjust if-

¹⁹⁷ Section 5(1) of the Act.

¹⁹⁸ Section 5(2)(a) of the Act; Melville The Consumer Protection Act made easy 8.

¹⁹⁹ Melville The Consumer Protection Act made easy 16.

- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
- (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
- (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
- (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

4.6 The impact of Section 48 of the Act on Contractual Freedom

4.6.1 Introduction

The idea that the Act seeks to advance the establishment of a legal framework for fair and responsible business practices in order to protect consumers is noble. The Act is the first concerted effort to legislate the regulation of apparent unfairness in contracts and contractual terms.²⁰⁰ Under common law a contract will be rendered unfair only in instances of fraud, undue influence or duress. The aim of the Act is to protect consumers from unfair, unreasonable and unjust trade practices. These fair practices include not to subject consumers to deceptive and misleading conduct.²⁰¹ The Act's effect on commercial contracts is problematic, however, in so far as it has failed to take cognisance of the need for contractual freedom.

The incorporation of exemption clauses into standard commercial contracts has become standard practice and the contents of contracts are often drafted prior to signature by the parties.²⁰² Because the content is fixed and determined unilaterally by the person seeking to enforce the contract, the only choice the other party has is to accept or reject the contract on

²⁰⁰ Van Eeden EA A guide to the Consumer Protection Act 169.

²⁰¹ See section 3 for a complete description of its purpose.

²⁰² Sharrock "Judicial Control" 115.

those terms.²⁰³ For this reason the argument is that freedom to contract is only a theoretical freedom containing the sole element of deciding whether to contract or not. It does not include the freedom to include or exclude the exemption clause, as parties will seldom decline to exempt themselves from liability when they have the opportunity to do so.²⁰⁴ Further to that, parties contract in order to achieve their own interests and will be hesitant to conclude a contract without an exemption clause when they have the contractual freedom to do so.²⁰⁵ The Act affords parties legislative assistance when willingly entering into a contract and protection from unfair contractual terms. The Act seeks to abolish the "take it or leave it" approach to contracts containing exemption clauses by protecting parties from unfair contract terms.²⁰⁶ But in practice this seems to be impractical as a contracting party who fails to accept the exemption clause may opt for another supplier, only to be confronted with the same pre-requisite for contracting, namely the acceptance of an exemption clause.²⁰⁷

4.6.2 Section 48(1)(a)(ii) - Terms that are Unfair, Unreasonable or Unjust.

Section 48(1)(a)(ii) of the Act directly prohibits a contractual agreement from containing "terms that are unfair, unreasonable and unjust". The Act does not specifically state that exemption clauses are unreasonable, unfair and unjust or contrary to section 48. However, exemption clauses that are unfair and unreasonable are invalid.²⁰⁸ Section 48 (2)(a) to (d) only sets out qualifying criteria when terms will be construed as unfair, unreasonable and unjust. In terms of Section 48(2)(b) a contractual term will qualify as unreasonable, unfair and unjust when the terms are "excessively one sided in favour of another person other than the consumer"²⁰⁹ or where the

²⁰³ Stoop 2008 South African Mercantile Law Journal 497.

²⁰⁴ Stoop 2008 South African Mercantile Law Journal 497.

²⁰⁵ Hutchison "The Law of Contract in South Africa" 24; Conradie v Rossouw 1919 AD 320

²⁰⁶ Sharrock "Judicial Control" 116.

²⁰⁷ See the shared sentiments in Cornelius *Principles* 96; Hopkins 2003 *TSAR* 150and Lewis 2003 *SALJ* 330.

²⁰⁸ Mupangavanhu 2014 PELJ 1184.

²⁰⁹ Section 48(2)(a) of the Act.

"terms are so adverse to the consumer as to be inequitable". ²¹⁰ In *Tamarillo* (Pty) Ltd v BN Aitken (Pty) Ltd the court held per Miller JA that: ²¹¹

..the agreement containing the terms which are now regarded by Tamarillo as unfair and one-sided. Unfortunately for Tamarillo, the court is not empowered merely because an agreement may be found to operate strongly in favour of one of the contracting parties to the corresponding disadvantage of the other, to modify its terms or to afford the complaining party equitable relief.

This sentiment was shared in *Grinaker Construction v Transvaal Provincial Administration*,²¹² in which the court, *per* Viljoen JA, held that "if the plaintiff has struck a bad bargain, the Court cannot, out of sympathy for him, amend the contract in his favour".

The promulgation of the Act assists consumers by placing an obligation on courts to amend or strike down the exemption clause if it is found to be an unfair, unreasonable and unjust term. The empowerment method at its disposal is the ability to render one-sided contracts unfair in the light of section 48(1)(a)(ii) of the Act. Where a court finds that the contract operates strongly in favour of one party and against another, it will declare the contract void by way of the provision in section 48 of Act. Contracts that are entered into willingly and by consent should be enforced unless they contravene public policy. The converse should then also apply in so far as parties should by virtue of section 48 have an equal right to be released from those terms if the terms are found to be unfair. Not releasing the consumer form the contract would amount to a contradiction of public policy in itself.

²¹⁰ Section 48(2)(b) of the Act.

²¹¹ Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 436.

²¹² Grinaker Construction v Transvaal Provincial Administration 1982 (1) SA 78 (A) 96.

²¹³ Brisley v Drotsky 2002 (4) SA 1 (SCA) 14; Morrison v Angelo Deep Gold Mines Ltd 1905 TS 779

4.6.3 Section 48(1)(c)(i) and (iii) – Waive Any Rights and Waive any Liability of the Supplier.

The exclusion of the recovery of damages in the event of loss may be justified by consent. Where a contracting party is willing to suffer some harm or run the risk thereof, and indicates his consent in express and clear terms, those wishes should be followed. The consent for the justification of damage entails a waiver of rights not to claim for damages. The principle that consent can justify causing harm is expressed in the maxim *volenti non fit iniuria*. This maxim is applied where intentionally causing harm is necessary for the greater good, or consenting to harm negligently caused. In *Waring & Gillow Ltd v Sherborne* the requirements of the *volenti non fit iniuria* maxim were examined. The court held that as a general rule a man cannot complain if he consents to the suffering of harm and inevitably suffers the harm which he consented to. If he knows and understands the consequences and consents thereto he can blame only himself for the consequences that follow.

A party may not in terms of Section 48(1)(c)(iii) waive the suppliers liability on terms that are unfair, unreasonable and unjust. By implication a party should then be able to waive liability on the basis that such a waiver is couched in fair, reasonable and just terms which were sufficiently brought to his attention. It should be clearly established that the person was aware of the liability waived and undertook the risk voluntarily, and that the risk materialised. The harm suffered may be justified if it is reasonable in terms of the objective views of the community. Where parties enter into an agreement effect must be given to the liability it so wishes to absolve. 218

²¹⁴ Loubser et al 196.

²¹⁵ Loubser et al 158.

²¹⁶ Waring & Gillow Ltd v Sherborne 1904 TS 344.

²¹⁷ See Christie *The law of Contract* 19 – 20 for a complete discussion of what constitutes public policy. The objective views of the community are referred to as public policy and are the benchmark used to judge the legality and enforceability of exemption clauses.

²¹⁸ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA) 989G – 989J.

4.6.4 Section 48(2)(d)(ii) – The term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Where a contract aims to limit any rights or liability, such limitations should be brought to the contracting parties' attention in terms of section 49 of the Act. The limitation or waiver of rights should be written in plain language²¹⁹ and the opposing party should be afforded adequate opportunity to comprehend the risk or liability it aims to absolve.²²⁰ Simply put, the contracting party must be able to read the document in clear, unambiguous terms that are easy to understand.²²¹

Melville²²² is of the opinion that the requirement of section 49 is likely to be satisfied if the contracting parties use underlining and bold text as well as arrows and bold colours to highlight the exemption clause and the rights it aims to limit. The requirement of the informed consent of the contracting party will be satisfied where he is made aware of the exemption clause in bold terms as stipulated and informed in advance, before contracting. Where a contracting party wishes for an exemption clause to form part of a contract, the *onus* is on the party to establish with conviction that both parties were aware of the exemption clause in the contract. There must therefore be consensus that it be included in the first place.²²³ When an individual thus consents to loss or indicates the willingness to suffer harm, he will be bound by such consent.²²⁴ A person authorised by another to sign a contract on his behalf will thus be bound by that contract only if he has been given authorisation to enter into such

²¹⁹ Section 49(3).

²²⁰ Section 49(5).

²²¹ For a complete discussion on what "plain language" is and how to establish the requirements, see Melville *The Consumer Protection Act made easy* 157 – 170. Also see the Centre for Plain Language http://www/centreforplainlanguage.org.

²²² Melville The Consumer Protection Act made easy 77.

²²³ See Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D) 166 – 172 where Allen purchased an erf from Sixteen Stirling Investments only to discover at a later stage that the property intended for purchase was not only wrongly described, but the wrong property in total. The court held that this error did not amount to consent and that the contract was thus null and void due to a material mistake.

²²⁴ Loubser et al 159.

a contract. If an exemption clause applies to the contract, the person who gave the authorization will be bound by the contract through the individual or agent who signed on his behalf.²²⁵ Where a party reasonably does not expect an exemption clause to form part of the contract and such a clause was not brought to his attention, it could in all likelihood be challenged on this basis alone.²²⁶ This sentiment prevailed long before the provisions of section 48(2)(d)(ii) of the Act came into effect.²²⁷

Where a signatory to a contract is resolute that he never agreed to a specific clause exempting his opposing contracting party, he carries the *onus* to show that he never had any knowledge of such an exemption clause. He further needs to establish that his *error* was unintentional and excusable. The pertinent question should thus be whether the consumer, having signed the contract, reasonably expected the exemption clause to form part of the contract or whether it was "surprising." With reference to "surprising" or "unexpected" contract terms, the Supreme Court of Appeal held in *Mercurius Motors v Lopez* that such unexpected terms, if proven, are not enforceable as the person signing the contract was not familiar with the content of the contract. Where the exemption clause is therefore brought to the contracting party's attention in advance, and he proceeded to sign nonetheless, it cannot be argued that it contravenes section 49(5) of the Act.

In *Naidoo v Birchwood Hotel*²³⁰ the plaintiff wanted to exit the premises of the defendant. After he waited in his vehicle for some time and the exit gate did not open, he got out of his vehicle to open the gate himself. At that point in time, the wheels of the gate came undone and he suffered serious bodily injuries. The respondent argued that they were not liable as

²²⁵ Loubser et al 196.

²²⁶ Naude and Lubbe 454.

²²⁷ Fouché "Requirements" 52 – 53; George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A); Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers (2001) 2 SA All SA 646 (NC).

²²⁸ See Naude and Lubbe 442 - 443.

^{229 2008 (3)} SA 572 (SCA).

²³⁰ Naidoo v Birchwood Hotel 2012 6 SA 170 (GSJ) 10 – 14. (hereinafter referred to as the Naidoo-case)

there were exemption clauses at the back of the hotel register. Naidoo by his own admission did not dispute that standard contracts contain exemption clauses and that he was bound by such terms. He had failed to read the terms and conditions, and on this basis and in accordance with the principle laid down in *Mercurius Motors v Lopez* the exemption clause should be upheld and he in turn be bound by the terms. The court held, however, that the defendant had been negligent and as a result thereof the plaintiff had sustained bodily injuries. The exemption clause could not be upheld on the respondent's negligence and where the liability to be excluded resulted in serious bodily injury.

Where the liability is of an unusual character or could result in serious injury or death the requirement of section 48(2)(d)(ii) will be more stringent. This is best illustrated by an example. Where a person goes skydiving the risk of loss of life is greater than that of financial loss caused by negligence. In this example, a greater *onus* lies on the party who wants to rely on the exemption clause to ensure that the opposing party is well aware of the exemption clause. This is due to the risky nature of skydiving and the liability that is to be exempted. The provision created by section 48(2)(d)(ii) should not come as a surprise to parties who aim to conclude an agreement containing an exemption clause. This provision, albeit not in its current form, had actually been adopted by the court as far back as in the 19thcentury in *Burger v Central South African Railways*, where it was held that a legal duty rests on a party to disclose the existence of non-standard contractual terms, and that the nondisclosure thereof amounted to a misrepresentation.

4.7 Conclusion

The South African common law currently has measures in place that deal with apparently unfair terms and render them invalid. These measures

²³¹ Naidoo v Birchwood Hotel 2012 6 SA 170 (GSJ) paragraph 38.

^{232 2008 (3)} SA 572 (SCA).

²³³ Mupangavanhu 2014 PELJ 1181.

²³⁴ Burger v Central South African Railways 1903 TS 578.

include interpretation, duress and good faith. In certain instances, although this is not a legal duty, a duty exists to bring an exemption clause to the attention of a contracting party. The failure to do so may render the exemption clause invalid.²³⁵ It is trite that these principles alone are insufficient in the application of modern contracts.²³⁶

Exemption clauses are construed as unreasonable and unfair only due to their nature in limiting and/or waiving liability. A primary example hereof is a hospital contract concluded between the hospital and its patients. Where liability in a hospital contract is excluded, a contracting party has to prove under the Act only that the exemption clause waived the hospital's obligation to perform in terms of the Act. It does not have to prove that the exemption clause in itself was unfair, unreasonable and unjust.²³⁷ The fact that a party is required to waive his rights in favour of another by way of an exemption clause is deemed unfair, unreasonable and unjust in the light of section 48(1) (c) of the Act. The waiving of the right amounts to being in contradiction of the act and not the exemption clause *per se*.

It is clear that the Act will confine both the consumer and the supplier's freedom to contract and the terms they may or may not incorporate into the agreement. It is further evident that in light of the Act enforcing an exemption clause will become an even more complex exercise. The problem of practicality in its application may be overcome by striking a balance between the application of the Act and contractual freedom. This could be done by narrowing the scope of the exemption clause to exempt only those losses incurred where the supplier is not at fault, where there was no death or serious bodily injury, or where loss was not foreseeable when the contract was entered into.²³⁸ This suggestion would inevitably attract criticism, as the purpose of including an exemption clause lies in

²³⁵ See Chapter 2 above on the requirements for a valid contract and the circumstances when it will not be valid and binding on parties due to duress, its having been concluded in bad faith, or its being contrary to public policy.

²³⁶ The sentiment that statutory control over unfair contract terms is necessitated by the stagnation of the common law is shared by academic writers. See Sharrock "Judicial Control" 115; Naude and Lubbe 2005 *SALJ* 442 – 445; Hopkins 2007 *De Rebus* 22.

²³⁷ Letzler 2012 De Rebus 24 - 25.

²³⁸ Letzler 2012 De Rebus 25.

indemnifying a contracting party from the effects of an unforeseeable deleterious event, whether it materializes or not.

If the principles of the *Durban's Water*-case are applied to contracts after the Act, a number of guidelines may be suggested. Firstly, every effort must be made to bring the existence of an exemption clause to the attention of the contracting party. This is achievable by erecting visible signs stating the exemption at reception, wherever members of the public enter the premises, or on an admission document. In the event of a party's signing a document containing the exemption clause, s/he binds themselves to the terms of the agreement and waives the rights set out in the exemption clause. In this way both parties will be in compliance with the requirement as set out in Section48(2)(d)(ii).

The waiving of rights is a tacit implication of the acceptance of an exemption clause. Any party to such an agreement should be made aware of section 48 of the Act, and when consenting thereto waives his rights under the Act, based on the principle of contractual freedom. A waiver would not then, or at least should not be, in contravention of Section 48(1)(c)(i) and (iii). Where parties subject themselves voluntarily to be bound by an exemption clause, it cannot be reasoned that the contract is excessively one sided in favour of the drafting party. This conclusion is based on the presumption that a contracting party that is not willing to adhere to the terms of the contract would not have entered into it in the first place.

No individual has the ability to foresee the future, which is why exemption clauses are used in standards contracts. They are relied upon to guard against liability in the event of an unforeseen future occurrence. It would be negligent for a reasonable person to foresee the possibility of his conduct causing harm to another and yet to fail to take reasonable steps to guard against such harm.²³⁹ It should follow, then, that the fact that a party has incorporated an exemption clause in the first place should indicate that he

²³⁹ In regard to the test for negligence and the 'reasonable man' test in order to establish the criteria for negligence see Kruger *v Coetzee* 1966 (2) SA 428 (A).

is not acting negligently. The reasoning behind this statement is that the party must have foreseen the possibility of damage in order to want to incorporate an exemption clause into the contract, thereby absolving himself from future liability. Where a contracting party fails to take reasonable steps to warn against danger and the danger manifests, the reliance on an exemption clause will not be permissible.²⁴⁰

5 The Law of Contract in English law and The Unfair Contract Terms Act.

5.1 Introduction

The promulgation of the Act is not unique in nature and application. Contracting parties in international jurisdictions are protected by legislation against unfair and unreasonable contract terms. This shows that the developments in South Africa have not taken place in isolation. The existence of this nexus of law is clearly acknowledged in that the Act places an obligation on courts to consider appropriate international foreign law when interpreting the Act. More generally, Section 39(2) of the Constitution places an obligation on courts to consider appropriate international foreign law. The South African legal system is not unfamiliar with foreign law and the obligation to take cognisance thereof. After the Dutch rule in the Cape came to an end, the British continued the application of Roman Dutch law. South African law, as discussed in chapter 1, is jointly founded on British common law, and for these reasons the United Kingdom *Unfair Contract Terms Act* 1977²⁴⁴ should be scrutinised for the purposes of this study.

²⁴⁰ Mupangavanhu 2014 PELJ 1170.

²⁴¹ See the European Community Council Directive on Unfair Terms in Consumer Contract of 1993. Section 309(7) (a) of the German Civil Code BGB has directly prohibited the inclusion of exemption clauses in contracts where the clauses limit or exclude liability in the case of death or personal injury.

²⁴² Section 2(2) of the Act.

²⁴³ Cornelius Principles 7 - 10.

²⁴⁴ Unfair Contract Terms Act 1977 (hereinafter referred to as UCTA).

This chapter briefly considers the law of contract in the United Kingdom and the interpretation thereof. Thereafter, the regulation of unfair contract terms in the United Kingdom will be examined. This will be done with specific reference to section 2 of the UCTA, dealing with the limitation of liability by way of a contractual term.

5.2 English Contract Law and Interpretation

5.2.1 Offer and Acceptance

As with South African contract law, English common law recognises that a contract is an agreement between parties, providing rights and obligations. The contractual agreement should reflect the intentions of the parties, who willingly accept the specific terms associated therewith. 245 An offer is an expression by one party to contract on specific terms and to bind the other party to which the offer is made on the specified terms. An acceptance in turn is an express or tacit acceptance of the offer made. Once the offer is accepted, both parties are bound by the terms of the offer. 246 I t is therefore clear that a formal offer is substantively different from a mere invitation to contract, as the intention to be binding is absent from an invitation.²⁴⁷ Once it has been established that there has been an offer and a counter acceptance, a contractual agreement is present. The acceptance must be of all the terms relating to the offer and clearly communicated to the offeror. Such an acceptance is communicated through the signature of a contract, unless acceptance has been specified to occur in another subscribed manner.²⁴⁸ Once these requirements have been met, the agreement is regarded as a contract and is legally binding on the express or implied terms. The agreement should not have been concluded in bad faith or misrepresentation or it will be declared null and void.

²⁴⁵ Anon http://www.a4id.org.

²⁴⁶ See Stover v Manchester City Council [1974] 1 WLR 1403.

²⁴⁷ Anon http://www.a4id.com.

²⁴⁸ Anon http://www.a4id.com.

5.2.2 Express and Implied Contractual Terms

Where parties conclude a contract and a dispute arises on the interpretation thereto, the point of departure in English law is to examine the express terms of the contract.²⁴⁹ Express terms are those terms that parties have specifically set out in their agreement and an exemption clause is typically one of these express terms. In order to establish the express terms of the contract, the contract itself needs to be examined and the meaning of the words established. It is necessary to examine the ordinary meaning of the words.²⁵⁰ In order to determine the meaning of a word used in a contract, it was held in BCCI v Ali (No1.), 251 that the generally understood meaning of the word between the parties should be established as opposed to the dictionary meaning of the word. The wording used should easily make sense. Courts will not be tasked to establish the true and real intentions of the parties, but will rather adopt an objective approach in ascertaining the contextual meaning of the terms in the contract. The terms of the contract must be read within the circumstances when the parties entered into the contract in the first place.²⁵² In order to properly interpret the contract, the question before the court is whether a reasonable person, with no knowledge of the parties or their intentions, would be able to understand what the parties meant when the contract was concluded.²⁵³

Whenever the meaning of a contract cannot be ascertained from its express terms, the court may resort to the implied terms intended by the parties. Implied terms are those terms not specifically inscribed in the contract but intended by the parties to be included, but parties forgot to incorporate them.²⁵⁴ It should again be stressed, however, that the courts are reluctant to probe the intentions of the parties and to depart from the

²⁴⁹ Anon 2012 http://www.ashurst.com.

²⁵⁰ Cartwright Contract Law 27.

²⁵¹ BCCI v Ali (No1.)[2002] 1 AC 251.

²⁵² ICS Ltd v West Bromwich [1998] 1 WLR 896.

²⁵³ See The Antainos Compania Naviera SA v Salen Rederierna AB [1985] 1 AC 191 and Sirius International Insurance Company (Publ) v FAI General Insurance Limited and others [2004] UKHL 54.

²⁵⁴ Anon http://www.a4id.com.

express terms of the contract. They will examine an implied term only where it "should have been included, but was not". English courts adopt a systematic approach when examining contracts and the denotation of the words of which they consist. They do so by first examining the contract as a whole and the surrounding circumstances. After that, they examine the wording used and the meaning of the words in the relevant context. English courts adopt a systematic approach when examining contracts and the denotation of the words are the contract as a whole and the surrounding circumstances.

5.3 Exemption clauses in English contracts

English law accepts the right of parties to apportion risk by means of an exemption clause. It also recognises the waiver of liability for breach of contract or negligent conduct.²⁵⁷ In order to rely on an exemption clause it must specifically be incorporated into the contract. It must further specifically cover the liability it aims to absolve. Courts are vigilant in the interpretation of these clauses where they limit or exclude liability. ²⁵⁸ An exemption clause that is capable of bearing more than one meaning will be interpreted contra proferentum. The exemption clause should be brought to the other party's attention. By doing so the clause is incorporated into the contract.²⁵⁹ Where a contract thus contains an exemption clause that both parties are aware exists they will be subject to it. In Parker v South Eastern Railway Co.260 Mellish LJ held that a person who is unaware of an exemption clause or did not see it cannot be bound by it. If, however, he knew that an exemption clause existed but failed to read the extent thereof. he would be bound by the exemption clause. Where a party thus signs a contract containing an exemption clause, his signature is effectively an assertion of the existence on the exemption clause and his knowledge

²⁵⁵ See Shirlaw v Southern Foundries [1926] 2 KB 277, where the court per MacKinnon LJ held that implied terms may be considered having regard to the "officious bystander test". The test entails a hypothetical officious bystander asking the parties whether the term should have been included in the contract. If the person had asked and the parties replied "Oh, of course", the term is so obvious that its inclusion goes without saying.

²⁵⁶ Anon 2012 http://www.ashurst.com.

²⁵⁷ Tufal http://www.lawteacher.co.uk.

²⁵⁸ Cartwright Contract Law 201.

²⁵⁹ Andrews Contract Law 420.

²⁶⁰ Parker v South Eastern Railway Co .[1877] 2 CPD 416,423, CA.

thereof.²⁶¹ English courts are reluctant to strike down exemption clauses which exclude or limit liability where parties have agreed to be subject to them. This forms part of their contractual freedom.²⁶² Instead, where parties feel that exemption clauses are unfair, they must seek recourse elsewhere. This recourse is found in the legislative control of unfair contract terms.²⁶³

5.4 Historical Background to United Kingdom Consumer Protection

Consumer protection in the United Kingdom is largely influenced and governed by legislation. ²⁶⁴ The UCTA applies within the commercial as well as the consumer environments and is highly regarded as the most significant statutory control over unfair contract terms. ²⁶⁵ A contract in itself does not automatically fall within the ambit of the UCTA. The terms which define the relationship and obligations between contracting parties can fall outside of UCTA. ²⁶⁶ An exemption clause that excludes common law liability and the duty of care falls within the ambit of the UCTA. The aspirations of the UCTA are to limit the scope of the exemption clause.

The effect is that the UCTA has the power to declare exemption clauses aimed at exempting liability ineffective. The UCTA may also declare exemption clauses invalid and amend the contract.²⁶⁷

5.5 Section 2 of UCTA

Section 2 deals with exemption clauses that exclude or restrict liability and the effectiveness thereof in contracts. In order for a contractor to be able to rely on an exemption clause, the clause must first and foremost be incorporated into the contract. In terms of Section 2(1) of the UCTA, a person cannot exclude or restrict liability for death or personal injury as a

²⁶¹ L'Estrange v F Graucob Ltd [1934] 2 KB 394.

²⁶² Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (HL) 848 – 851.

²⁶³ Cartwright Contract Law 211.

²⁶⁴ Oughton Consumer Law; Text, Cases and Material 11 - 12.

²⁶⁵ Ashurst Quickguides Limitation and Exclusion of Liability 2009 https://www.ashurst.com.

²⁶⁶ Avrora Fine Arts Investment Limited v Christie, Manson & Woods Limited [2012] EWHC 2198 (Ch).

²⁶⁷ Macdonald 1994 JBL 441; Cartwright Contract Law 216 - 217.

result of negligence. Where contracts contain an exemption clause that aims to exclude liability for death or injury in terms of section 2(1) or endeavours to limit liability that cannot be excluded, that clause will always be disregarded as a whole without exception. Courts will not rewrite the clause or sanction parties wishing to rely thereon, they will merely state that the liability aimed to be exempted will not be enforceable and remains uncapped. However, as already stated, Section 2 does not prohibit any and all exemption clauses. In terms of section 2(2) an exemption clause that seeks to limit liability other than that referred to in section 2(1) may be permissible if it satisfies the requirement of reasonableness. This means that any clause excluding or restricting liability must be subjected to the requirement of section 2(2).

5.6 The Requirement of Reasonableness to Exclude Loss

In terms of section 2(3), a contractual term that excludes liability will not automatically be regarded as a voluntary acceptance of risk by a party, even where he is made aware of the agreement or has specifically agreed thereto. Where loss or damage would not result in death or personal injury, a party may be exempted from such loss in terms of section 2(2). However, this will materialise only once the requirement of reasonableness has been met. The requirement of reasonableness applies, irrespective of whether the party aiming to rely on the exemption clause is a business or a consumer. What constitutes reasonableness is defined in section

²⁶⁸ Fouracre 2012 http:bristows.com.

²⁶⁹ Ashurst Quickguides Limitation and Exclusion of Liability 2009 https://www.ashurst.com.

²⁷⁰ Section 2(2) states that "In the case of other loss or damage, a person cannot exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness".

²⁷¹ See Lobster Group Ltd v (1) Heidelberg Graphic Equipment Ltd (2) Close Asset Finance Ltd [2009] EWHC 1919 (TCC), where it was held that the exclusion of loss of profits, anticipated saving, and indirect loss was deemed reasonable.

²⁷² In terms of Section 11(1) of the UCTA a term will be reasonable if it is "a fair and reasonable one to be included having regard to circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".

11(3).²⁷³ The requirement of reasonableness enables the parties to have a defence for the incorporation of an exemption clause into a contract as long as the clause meets the requirement. What constitutes reasonableness is problematic to formulate, and every case is assessed on its own merits and on questions of fact.²⁷⁴ The following guidelines may be used to establish the reasonableness of the exemption clause.²⁷⁵ Firstly, it is necessary to establish the individual bargaining position of each party. Secondly, it is necessary to discover if the opposing party received any incentive to accept the exemption clause. And thirdly, it is necessary to ascertain if the parties knew or should have known that the contract contained an exemption clause. The assertion in terms of the proposed guidelines is that clauses that are brought to the attention of the contracting party and that are not excessively one-sided should be regarded as reasonable.

5.6.1 Bargaining Position

In *Regus (UK) Ltd v Epcot Solutions Ltd*²⁷⁶ an exemption clause was held to be unreasonable in a supplier contract on the ground that it left the customer with no real remedy in the event of a breach of contract. On appeal however, an assessment of the bargaining positions of both parties was undertaken in order to arrive at a different judgement.²⁷⁷ The court, *per* Rix LJ, examined the reasonableness factors in terms of section 2 of the UCTA. He concluded that the position of the chief executive officer of Epcot was that of an "intelligent and experienced" businessman who was aware of the terms and conditions and it could not be held that he was in an unequal bargaining position.²⁷⁸ On this ground, and taking into consideration section 2 of the UCTA, the exemption clause was held to be

²⁷³ Reasonableness as defined in Section 11(3) means that the exemption should be fair and reasonable to allow reliance on the clause, having regard to all the circumstances when the liability arose or would have arisen had it not been for the exemption clause.

²⁷⁴ Lubbock 2009 http://www.ashurst.com; Tufal www.lawteacher.com.

²⁷⁵ Ashurst Quickguides Limitation and Exclusion of Liability 2009 https://www.ashurst.com.

²⁷⁶ Regus (UK) Ltd v Epcot Solutions Ltd [2007] EWHC 938 (Comm).

²⁷⁷ Regus (UK) Ltd v Epcot Solutions Ltd [2008] EWCA Civ 361.

²⁷⁸ See also Lobster Group Ltd v (1) Heidelberg Graphic Equipment Ltd (2) Close Asset Finance Ltd [2009] EWHC 1919 (TCC), where the court examined the experience of both parties in business and their use of standard terms in business.

reasonable. Where parties have previously dealt with one another and such dealings have been consistent, parties may expect an exemption clause to form part of the contract. The bargaining positions of both parties are then regarded as equal.²⁷⁹

5.6.2 Incentives to Accept Unfair Exemption Clauses

Where exemption clauses are subject to restrictive conditions or subject a contracting party to refraining from exercising a remedy, the reliance on an exemption clause will not be possible. What constitutes a constraint in exercising a remedy was examined in *Stewart Gill Ltd v Horatio Myer & Co. Ltd.* Following the purchase of a defective conveyor system from Stewart Gill Ltd, Horatio Myer withheld the final instalment of 10 percent of the purchase price. The reason for withholding the payment was to set off the amount it owed against other payments it intended to make. This was a defence for an application by Stuart Hill Ltd. for summary judgement.

In terms of the contractual agreement concluded between the parties clause, 12.4 read:

the Customer shall not be entitled to withhold payment of any amount due to the Company under the contract by reason of any payment set off counterclaim allegations of incorrect or defective goods or for any other reason whatsoever which the Customer may allege excuses him from performing his obligations hereunder

The Appeal Court *per* Lord Donaldson MR held that the clause in question fell within the scope of the UCTA by way of section 13(1). The clause was unreasonable as it was merely a variation of an exemption clause, but an

²⁷⁹ Spurling v Bradshaw [1956] 2 ALL ER 121.

²⁸⁰ In terms of Section 13(1) "the exclusion or restriction of liability is prevented where (a) making the liability or its enforcement subject to restrictive or onerous conditions;(b) excluding or restricting any right or remedy in respect of the liability, or subjecting any person to any prejudice in consequence of his pursuing any such remedy;(c) excluding or restricting any rules of evidence or procedure. To that extent sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty."

²⁸¹ Stewart Gill Ltd v Horatio Myer & Co. Ltd. (1992) EWCA Civ 6, [1992] 1 QB 600.

exemption clause none the less. The purpose of the clause was to prevent a party from exercising a remedy for a breach of contract.

5.6.3 Parties Who Are Aware of an Exemption Clause

Where a commercial contract contains an exemption clause, the requirement of reasonableness will be met with greater confidence if it can be established that the clause was brought to the attention of an opposing contract party. Schedule 11(2) of the UCTA provides that the reasonableness of an exemption clause is determined on the bargaining positions of both parties as discussed in 5.6.1 above. In order to establish the relative magnitude of bargaining positions it should be established to what extent the contracting parties knew or ought reasonably to have known of the existence of a term and the extent to which liability is to be absolved. Where a contracting party misrepresents the existence of an exemption clause, such misrepresentation is tantamount to fraudulent actions and should not be permissible on public grounds alone. ²⁸³

5.7 Conclusion

Under English law, parties are free to insert contractual clauses that exclude liability for breach of contract or negligence where it does not result in death or personal injury. Where a party signs a contract containing such an exemption clause, he will be held thereto unless he was enticed to contract under misrepresentation or fraud.²⁸⁴ The offer to contract subject to conditions and the acceptance of those conditions constitute a contractual agreement between parties. An offer will fail to take effect where it is met with an acceptance subject to a variance of the offer. In such circumstances, it does not constitute an offer and acceptance, but a

²⁸² Fouracre 2012 http:bristows.com.

²⁸³ Fouracre 2012 http://bristows.com.

²⁸⁴ There is a substantial difference between non-disclosure of information due to a mistake of a party and the deliberate misrepresentation of information by one party to another in order for an exemption clause to form part of a contract. See Cartwright Contract Law 170 – 181 for a complete discussion on the effect of non-disclosure of certain contractual terms, and when such non-disclosure amounts to a mistake or a misrepresentation.

counter offer. Where an offer is thus made on standard terms and conditions, and the offer is accepted subject to a variation in the terms, it does not constitute a valid offer and subsequent contract. The converse then also applies in so far as if a party accepts a contract on the terms offered, and those terms include an exemption clause, the party must be held by those terms. The acceptance is an unqualified expression of approval of the exemption clause and the terms associated therewith. If he does not wish to do so, he would react with a counteroffer. This notion is reaffirmed by English court decisions that parties who are aware of standard contracts containing exemption clauses and proceed to contract nonetheless cannot argue that they are in an unequal bargaining position. ²⁸⁶

6 Comparative legal principles of the Consumer Protection Act of South Africa and the Unfair Contract Terms Act of the United Kingdom.

6.1 Introduction

Both English and South African law recognise party autonomy, which allows parties the freedom to incorporate exemption clauses in contracts. Prior to the promulgation of the Act, South Africa was able to make use only of common law devices for managing unfair exemption clauses. These clauses are viewed as being unfair on the basis that they are deemed excessively one-sided in favour of one party and unfair towards another. Both English law and South African law recognise the need to regulate unfair contract terms and the extent to which liability can be avoided contractually. The English introduced the UCTA and South Africa the Act. The Act contains provisions that directly prohibit the incorporation of specific clauses in commercial contracts, but does not prohibit exemption

²⁸⁵ Hyde v Wrency [1840] 3 Beav 334.

²⁸⁶ Regus (UK) Ltd v Epcot Solutions Ltd [2007] EWHC 938 (Comm) and Lobster Group Ltd v (1) Heidelberg Graphic Equipment Ltd (2) Close Asset Finance Ltd [2009] EWHC 1919 (TCC).

²⁸⁷ Kanamugire and Chimuka 2014 MJSS 164.

clauses specifically.²⁸⁸ The UCTA permits exemption clauses subject to the requirement of reasonableness.

6.2 Application

The Act applies to every commercial transaction within the Republic, except contracts concluded for the supply of goods or services to the state or a juristic person whose asset value or annual turnover equals or exceeds the value determined by the Minister from time to time. 289 A commercial contract includes a solicitation of offers to enter into a franchise agreement as well as the contractual supply of any goods or services to a franchisee. A contract that constitutes a credit agreement under the *National Credit Act* will not be subject to the Act. The UCTA applies to any commercial contract concluded between businesses as well as businesses and consumers. Any term of a contract which is a consumer contract, a standard commercial contract or a contract for hire-purchase is subject to the UTCA. 290

6.3 Commonalities

Both the South African and the English law apply the principle that a party relying on an exemption clause carries the *onus* to establish the reasonableness thereof.²⁹¹ Under both jurisdictions a party that signs a contract is bound by the terms thereto and by inference to the exemption clause. This is the case even if the contracting party neglected to read the contract or understand it.²⁹² An unsigned document such as a notice board

²⁸⁸ See Section 5(1) of the Act and more specifically section 5(1)(b), that directly prohibits a supplier from contracting subject to certain conditions. These include "waiving or depriving a consumer of a right" or "avoiding a supplier's obligations under the act".

²⁸⁹ Section 5 of the Act.

²⁹⁰ Section 6 of the UTCA.

²⁹¹ For the South African position see Marx and Govindjee 2007 Obiter 624. Also see section 11(5) of the UCTA for the English position.

²⁹² For the English position see *L'Estrange v Graucob*[1934] 2 KB 394 and for the South African position the *caveat subscriptor* rule discussed in chapter 2.2 above. Where a party fails to read the contract and the content thereof and nonetheless proceeded to

or ticket also contains a valid and binding exemption clause provided that sufficient notice is given of the existence of the exemption clause. ²⁹³ In the South African context, exemption clauses that are displayed and visible are express undertakings to be bound by such clauses. ²⁹⁴ Where any ambiguity exists over the meaning of the exemption clause or the extent of the liability it intends to absolve, both the English and the South African positions are that the clause will be interpreted of *contra preferentem*. That is, that the clause will be interpreted, if there is any doubt, against the party in whose favour it was drafted. ²⁹⁵

Exemption clauses are still used in the South African and English contract law today. For this reason both English and South African law makers have recognised that more stringent regulation is necessary. Both have taken proactive steps in the regulation thereof by way of placing statutory parameters on the extent to which liability may be absolved. Both the Act and the UCTA are legislative Acts created to regulate unfair contract terms. Both place prominence on the principle of bringing the exemption clause to the attention of the other party. Besides this, there are no further commonalities. The UCTA is more flexible in its regulation and approval of exemption clauses by virtue of Section 2 as it specifically regulates exemption clauses which exclude liability. The flexibility thereof is in the fact that the UCTA directly prohibit the negligent causing of death or personal injury on the one hand and permits the exclusion of loss not resulting in death or injury in another. 296 The Act directly prohibits clauses that exclude liability in terms of Section 48 and has no differentiator between exemption clauses that result in death or injury and those that do not.

sign it, he will be bound by those terms unless the exception to the rule can be proved. This exception would be in the case of duress or fraud.

²⁹³ Tufal www.lawteacher.com.

²⁹⁴ Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982.

²⁹⁵ Baldry v Marshall [1925] 1 KB 260 for the English position on contra proferendum and Stott v Johannesburg County Club2003 4 SA 559 (T)for the South African position where it was held that an ambiguous exemption clause had to be construed against the party who relied on it in order to discharge its liability.

²⁹⁶ Cartwright Contract Law 217.

6.4 Section 2 of the UCTA and Section 48 of the Consumer Protection Act

The UCTA contains a broad definition of an exemption clause and which clauses are regarded as such.²⁹⁷ Section 2 of the UCTA specifically addresses exemption clauses as a means to limit liability and permits them where they do not result in personal injury or death. By defining an exemption clause it allows the UCTA to exercise greater statutory interference, as the definition sets out when a clause will be construed as an exemption clause and when not. Where the exemption clause falls within the ambit of the definition, it resonates under the UCTA, thereby resulting in the exercise of statutory control. It is clear that a clause falling within the definition of an exemption clause is subject to UCTA and creates certainty of interpretation.

In terms of Section 2 of the UCTA exemption clauses are not automatically disqualified in commercial contracts. The technique of interpretation when dealing with exemption clauses under the UCTA is to examine the reasonableness of the exemption clause in order to justify its enforceability. The requirement of reasonableness acts as an effective means of measuring the fairness and legality of an exemption clause before it is directly prohibited. Section 48 of the Act does not specifically define exemption clauses and when these clauses will be construed as such. The result is that it creates greater uncertainty under the Act when a clause will be regarded as an exemption clause and when not. Prior to the promulgation of the Act the definition of an exemption clause had been addressed sufficiently by the courts and it is unclear if the Act will follow court decisions. Section 48 states only that parties are not allowed to conclude terms that are unfair or waive liability that is unfair, unreasonable

²⁹⁷ In terms of Section 13(1) of the UCTA an exemption clause includes making the liability or its enforcement subject to restrictive or onerous conditions; excluding or restricting any right or remedy in respect of the liability or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; excluding or restricting rules of evidence or procedure.

²⁹⁸ Overseas Medical Supplies Ltd v Orient Transport Services Ltd [1999] 2 Lloyd's Rep 273; Regus (UK) Ltd. v Epcot Solutions Ltd [2008] EWCA Civ 361.

or unjust. The Act fails to address the question of reasonableness and the status of exemption clauses if they are to be found reasonable under section 48. Where the waiving of rights is reasonable it should be upheld. The Act is therefore reactive legislation compared with the UCTA in so far as it states only what constitutes unfair, unreasonable and unjust terms and not how to deal with the reasonable waiver of liability.

Although the regulation of unfair contract terms by way of legislation has been introduced, the precise application of the UCTA and the limitation on exemption clauses are still being monitored by English Courts.²⁹⁹ The advantage, however, is that they are in the process of being tested by courts and have been done so with great success. What is also clear is that the impact of the UCTA is that it acts as a legislative measure with which to test the reasonableness of an exemption clause. If the clause does not pass the reasonableness test, it will not succeed. This is in contradiction to the Act, which does not afford parties the opportunity to at least test the reasonableness of an exemption clause against the Act. It merely prohibits the waiver of rights without addressing the status of reasonableness. In order to examine the reasonableness of an exemption clause the UCTA takes cognisance of the bargaining positions of both parties and whether or not they are familiar with each other and their normal contract terms. Where they are familiar with each other they can expect a contract to contain an exemption clause. The UCTA takes further cognisance of the type of liability to be excluded when establishing reasonableness. Where the liability absolved does not result in personal injury or death, it will be allowed. The UCTA does not simply prohibit the inclusion of exemption clauses in contracts. Each case is adjudicated on its own merits. The Act does not adopt a similar approach and merely prohibits the waiver of liability in all cases under section 48.

The UCTA is proactive in that it specifically defines reasonableness, and once the parties prove that the exemption clause was reasonable and

²⁹⁹ Macdonald 1994 JBL 441.

formed part of the contract, it will be upheld. The English UCTA places significant emphasis on the requirement of reasonableness as a qualification for the validity of an exemption clause. Where further remedies are available to a contracting party and the exemption clause does not preclude a contracting party from exercising such remedies, the exemption clause will be upheld under the UCTA.

The fact that the UCTA places emphasis on whether or not the contracting parties knew of the exemption clause highlights the English respect for contractual freedom. The basis for the aforementioned statement is that should parties be made aware of the exemption clause and the liability to be excluded is reasonable, contractual freedom will prevail in so far as the contract will be upheld. The party proceeding to contract notwithstanding the presence of the exemption clause must accept the consequences of having done so. In this way the contractual freedom of parties is guarded and the exemption clause remains valid on the grounds of reasonableness. Thus the English UCTA maintains the common law notion of contractual freedom while maintaining the principle of fair and reasonable contract terms. The Act has failed to maintain a balance between contractual freedom and allowing the exemption of liability on fair and reasonable terms. When examining an exemption clause the Act must regard the leading to the conclusion of the contract. circumstances reasonableness of the liability to be absolved and the fact that the agreement was brought to the contracting parties' attention into consideration, which it does not do.300

6.5 Conclusion

The inference in the Act is that an exemption clause in itself is an unfair and unreasonable term by virtue of section 48(1)(c). The question to ask, then, is what the status of an exemption clause would be if it were found to be reasonable and just. The Act is silent on this issue, which has been

³⁰⁰ Van der Westhuizen v Arnold 2002 4 All SA 331 (SCA) 332

sufficiently dealt with in the UCTA through the requirement of reasonableness. The UCTA is legislation that is commercial contract specific and the principles and techniques of interpretation are better suited and more effective in the regulation of exemption clauses that that of the Act. The purpose of the UCTA is to regulate the extent to which liability may be excluded in some instances and a specific prohibition in others. The exclusion of liability and the waiving of rights are permissible nonetheless, and the legislative position of the UCTA strikes a balance between reasonable contract terms and contractual freedom. The UCTA has been tested within the English judiciary, which is an added advantage, as the South African Act and its impact on contractual freedom has not yet been tested by our courts. The South African position differs substantially from its English counterpart, and only the legal rules may be compared at this point in time. The Act directly prohibits the waiving of rights in Section 48, but the reasonableness thereof is yet to be tested by our courts.

7 Conclusion

Exemption clauses have become the norm rather than the exception in standard commercial contracts, and parties must therefore expect a contract to contain an exemption clause. Exemption clauses may take different forms and have different purposes. They may apportion risk or absolve liability in total. Where an exemption clause does not infringe rights contained in the Bill of Rights, it should in general be upheld, as the freedom to contract is just as important as the rights entrenched in the *Constitution* are, and cannot selectively be overlooked. Contractual autonomy permits the freedom to rely on exemption clauses.

Where a contract contains an exemption clause and it is entered into by competent persons, the contract must be enforced. Public policy dictates that parties who voluntary enter into a contract know what they are signing

³⁰¹ Chadwick 2012 *De Rebus* 34-35; *Afrox Healthcare v Strydom*2002 (6) SA 21 (SCA) 41F – 41I.

³⁰² Andrews Contract Law 419.

and must be bound by the terms of their agreement. Exemption clauses are legally enforceable contract terms and parties have relied on them successfully in the past. When parties have indicated, before signature, the extent of what is to be excluded in clear and unambiguous terms, effect must be given to those exclusions. The application of the *caveat subscriptor* rule demands that both parties will be bound by the exemption clause where they have signed to the effect. Courts should be wary of striking down exemption clauses and should interfere only where the clauses contravene public policy or where the party aiming to rely on the exemption clause committed a procedural unfairness. That is to say, the person obtained consent through misrepresentation, undue influence or fraud. The same contravence of the consent through misrepresentation, undue influence or fraud.

A concession has to be made that the common law devices which control exemption clauses are limited in scope. Prior to the Act there were no legislative criteria setting out when these clauses are unfair, unreasonable and unjust. These concepts remain stagnant to the changing interpretations and application of the law of contract, which the courts have failed to address. The Act seeks to be the legislative measure with which to test the continued enforceability of exemption clauses. The intention of the Act has been most noble, as it seeks to regulate the future application of exemption clauses and unfair contract terms. Future contracts which contravene the Act will be declared null and void in terms of section 51(3) for non-compliance.

According to Melville,³⁰⁸ the main purpose of the promulgation of the Act is to "raise the general levels of ethics and service in the business environment" and to address "horrific customer service". This dissertation

³⁰³ See SA SentraleKo-op Graanmaatskappy Beperk v Shriftenenandere1964 (4) SA 760 (A) 767 where the pacta sunt servanda principle was examine by Steyn HR. This principle entails that the basis of contract law is the freedom to contract and should be enforced, as this principle of contractual freedom is in the public interest.

³⁰⁴ Brisley v Drotsky 2002 (4) SA 1 (SCA) paragraph 94 and 95.

³⁰⁵ Cartwright Contract Law 210.

³⁰⁶ See Melville The Consumer Protection Act made easy 19 - 20.

³⁰⁷ Mupangavanhu 2014 PELJ 1176.

³⁰⁸ Melville The Consumer Protection Act made easy xii.

does not seek to declare that the Act should be abandoned in its entirety and concedes that it serves a meaningful purpose in the protection of consumer rights. These rights are to be protected against unscrupulous business practices, defective products or products that may cause harm. But this should not be done at the peril of contractual freedom, and the Act in its current form does not address the common law freedom to rely on exemption clauses.³⁰⁹

In general, no duty exists to bring an exemption clause to the attention of a contracting party. Section 48 of the Act now creates a duty to bring such a clause to the attention of the party. The question remains then whether or not an exemption clause which is brought to the attention of the party will still be regarded as unfair, unreasonable and unjust. In the light of Section 48(5) of the Act it will not have an impact on the contractual freedom to rely on exemption clauses as long as these clauses are clearly brought to the attention of the opposing party.

In order to establish the reasonableness of an exemption clause, the standard is no more different than the interpretation of any other contractual term. That is, whether upholding the exemption clause will result in extreme unfairness. If the answer is an unequivocal no, then the exemption clauses must be upheld and section 48 will not render the freedom to contract and the subsequent exemption clause invalid. Any contractual agreement may be regarded as null and void if found unreasonable, and this criterion is not reserved for exemption clauses only. The Act is silent on when the waiver of liability is reasonable and when not. The UCTA allows exemption clauses to form part of a contractual agreement. Where the liability waived does not result in death or serious bodily injury, the exemption clause must be upheld where it meets the requirement of reasonableness in terms of section 2.

³⁰⁹ See Section 3(1)(d) of the Consumer Protection Act 68 of 2008...

³¹⁰ Afrox Healthcare Bpk v Strydom2002 (6) SA 21 (SCA).

³¹¹ Afrox Healthcare Bpk v Strydom2002 (6) SA 21 (SCA) 27.

In view of section 48 of the Act, an exemption clause waiving liability for personal injury or death will undoubtedly be construed as an unfair and unreasonable contract term. This is in line with section 2 of the UCTA and the incorporation of such clauses will be legally unenforceable. This dissertation does not lend support to the notion that exemption clauses should be upheld where bodily injury or death occurs, but to the notion that each circumstance should be assessed on its own merit. This conclusion corresponds with that of the UCTA.

In the *Naidoo*³¹²case, Nicholls J refused to uphold an exemption clause not because exemption clauses themselves are no longer enforceable, but because the enforcement would be unfair as a result of the plaintiff's having suffered bodily injuries. On the other hand, should *Naidoo* not have suffered significant bodily injuries but mere financial loss or minor injuries, the exemption clause should have been upheld even if the Act had then been promulgated. This assumption is based on two arguments. Firstly, *Naidoo* had sufficient time to study the exemption clause and, by his own admission, neglected to do so where it was brought to his explicit attention. Secondly, he got out of his vehicle and created the danger himself by approaching a gate which caused his bodily injuries. He was therefore the orchestrator of his own misfortune.

Despite the applicability of the Act to future contracts, exemption clauses should still find resonance in South Africa, albeit in a more controlled regulatory framework. They serve a useful function in the spreading of risk and can be utilized as a tool for excluding liability attached to a contract under normal circumstances. There cannot be a blanket approach or a "one size fits all" approach, and every contract should be constructed on its own merits. Section 2 of the UCTA strikes a fair balance between the freedom to contract and the right to fair and equitable contract terms by examining the reasonableness of the exemption clause on a case by case

³¹² Naidoo v Brichwood Hotel 2012 6 SA 170 (GSJ).

³¹³ Naidoo v Brichwood Hotel 2012 6 SA 170 (GSJ) paragraph 36.

³¹⁴ Kanamugire and Chimuka 2014 MJSS 165.

basis. The requirements of reasonableness and fairness are not currently regarded as free-standing requirements of the South African law of contract. The Caution is to be exercised when advancing such principles as what constitutes reasonableness to one person is not necessarily reasonable to another. The converse also applies in so far as what constitutes unreasonableness in section 48 is not necessarily thought to be unreasonable by another. This illustrates the point that each exemption clause should be assessed on its own merits. South Africa should take greater cognizance of the UCTA as it specifically addresses the issue of reasonableness.

The freedom to contract and the reliance on exemption clauses must remain the fundamental cornerstones of our Constitutional values in this context. When the proper words are chosen to describe the liability to be excluded, those exclusions should be upheld. The Whether or not Section 48 of the Act infringes contractual freedom by placing a legislative limitation on the waiving of rights is yet to be tested by South African Courts. In order for the provisions of section 48 to succeed it has to be established that an exemption clause is unreasonable and prohibited by the Act. Exemption clauses are not specifically prohibited by the Act, and section 48 places no legislative limitation on parties' freedom to rely on them as a condition of contract. The contractual freedom to rely on exemption clauses remains in place until such time as a competent court declares otherwise or section 48 is developed to specifically prohibit them or includes a requirement of reasonableness.

³¹⁵ Mupangavanhu 2014 PELJ 1176.

³¹⁶ Potgieter v Potgieter 2012 1 SA 637 (SCA) paragraph 32.

³¹⁷ Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd 1980 4 SA 517 (Z).

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