

EXEMPTION CLAUSES AND THE *CONSUMER PROTECTION ACT* 68 OF 2008: AN ASSESSMENT OF *NAIDOO V BIRCHWOOD HOTEL* 2012 6 SA 170 (GSJ)

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SUMMARY

Exemption clauses are a rule rather than an exception particularly in standard-form contracts. Consumers are usually forced to accept such terms on a "take-it-or-leave-it" basis. This state of affairs shows that freedom of contract is theoretical and could lead to injustices. In *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) the Court refused to uphold the exemption clauses based on the fact that it would have been unfair and unjust to the plaintiff who had sustained serious bodily injuries during his stay at the hotel. The article discusses this court decision in the light of the provisions of the *Consumer Protection Act* 68 of 2008 (CPA) against the background of the previous jurisprudence regarding exemption clauses, including the position of exemption clauses in a new constitutional dispensation.

KEYWORDS: Exemption clauses, consumer protection, fairness and reasonableness, public policy, constitutional values.

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**EXEMPTION CLAUSES AND THE *CONSUMER PROTECTION ACT* 68 OF 2008:
AN ASSESSMENT OF *NAIDOO V BIRCHWOOD HOTEL* 2012 6 SA 170 (GSJ)****Y Mupangavanhu*****1 Introduction**

The purpose of this article is to analyse the decision in *Naidoo v Birchwood Hotel* against the background of the previous jurisprudence regarding exemption clauses,¹ including the position of exemption clauses in a new constitutional dispensation.² In general, exemption clauses are binding and enforceable where the clause is clear and unambiguous,³ and the court must give effect to the exemption clause even if its consequences are harsh.⁴ In principle, public policy requires courts to give effect to the intention of the parties by enforcing the clause. Exemption clauses are, however, unenforceable if the clause is against public policy or if it is unusual in such an agreement.

When a dispute arises regarding the enforcement of a contract, the *caveat subscriptor* rule is applied first and a party is thus bound by the terms of the agreement by virtue of his signature.⁵ Where the exemption clause is unusual or unexpected and the attention of the other party was not drawn to the clause, the *iustus error* doctrine has been relied upon by litigants in order to escape liability.⁶ This doctrine is invoked in cases where the contract assertor had a legal duty to

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¹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA); *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA); *George v Fairmead* 1958 2 SA 465 (A).

² See also Bhana and Pieters 2005 *SALJ* 876-889; Naude and Lubbe 2005 *SALJ* 458-459; Lubbe 2004 *SALJ* 397-400; Stoop 2008 *SA Merc LJ* 502-503; Hopkins 2007 *De Rebus* 22-25; Marx and Govindjee 2007 *Obiter* 622-635.

³ Christie and Bradfield *Law of Contract* 187; Bhana, Bonthys and Nortje *Student's Guide* 173.

⁴ Hutchison and Pretorius *Law of Contract* 271.

⁵ *George v Fairmead* 1958 2 SA 465 (A). See also Stoop 2008 *SA Merc LJ* 502-503; Kerr *Law of Contract* 102.

⁶ *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA); *Brink v Humphries and Jewell (Pty) Ltd* 2005 2 SA 419 (SCA); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A); Pretorius 2010 *THRHR* 492.

inform the contract denier of the existence of an unusual or unexpected clause in a contract.⁷

This article explores the extent to which a claimant can rely on a delictual claim to hold the other party liable for loss or injuries sustained, irrespective of the existence of a disclaimer or exemption clause absolving the other party from such liability. The reason for focusing on the decision in *Naidoo* is that it brings a new dimension to the problems regarding exemption clauses and disclaimer notices. The Court declined to uphold the exemption clauses or disclaimer notices in the case on the basis that it would have been unfair and unjust to do so. The article examines the decision in *Naidoo* in the light of the provisions of the *Consumer Protection Act* 68 of 2008 (CPA).

The second part of the article provides a summary of the facts leading to the dispute between Naidoo and the Birchwood Hotel. The third part focuses on the decision itself. The fourth part of the article critically analyses the decision. This part begins with a background to the enforcement of exemption clauses and then discusses the principles of fairness, justice and reasonableness. It also examines the potential impact of the CPA provisions on exemption clauses. The fifth part deals with the implications of the decision in *Naidoo*, and the last part contains the conclusion.

2 Facts

On 15 October 2008, Naidoo, the plaintiff, wanted to exit the Birchwood Hotel premises but found that the gate to one of the entrances of the hotel was closed. He waited until a security guard came to open the gate. At that time Naidoo was inside his bus. After realising that the gate was still not open, Naidoo walked towards the gate. The gate had jammed and the wheels had come off the rails. The gate fell on Naidoo as he was approaching the entrance, causing serious bodily injuries.⁸

⁷ This was accepted as good law in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 41. The Court held that the exclusion clause was expected and therefore not surprising. See also Naude and Lubbe 2005 *SALJ* 454.

⁸ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) paras 2, 10-14.

The issue to be determined by the Court was whether Birchwood Hotel, the defendant, was liable for the bodily injuries sustained by Naidoo.⁹ Naidoo pleaded that the hotel was negligent in that it failed to take adequate steps to prevent the incident from occurring by not properly maintaining the gate, by not ensuring that it was safe for public usage, and by failing to warn the public of the potential danger created by the state of repair of the gate.¹⁰ Naidoo's case was consequently founded on the premise that Birchwood Hotel had been negligent and that it could have prevented the harm from occurring.

Birchwood Hotel relied on disclaimers and exemption clauses which were on the back of the hotel register. The question before the Court was whether such disclaimers were displayed at the time, and whether the disclaimer or exemption clauses exempted Birchwood Hotel from liability for any damages that Naidoo suffered. Clause 5 of the registration card stated:

The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his/their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel.¹¹

Naidoo did not refute the fact that he had not read the "Terms and Conditions" even after seeing the instruction: "Please read terms and conditions on reverse!"¹² It was also not disputed that Naidoo was aware that standard contracts contained such clauses and that he was bound by the terms contained therein.¹³

3 Decision

In determining whether or not Birchwood Hotel was liable for damages, the Court referred to the test for negligence, that is, whether the conduct complained of fell short of the standard of care required of a reasonable person.¹⁴ Liability arises if the

⁹ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 3.

¹⁰ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 4.

¹¹ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 37.

¹² *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 36.

¹³ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 38.

¹⁴ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 27.

diligens paterfamilias in the position of Birchwood Hotel would foresee the reasonable possibility of its conduct injuring another person and would take steps to guard against such occurrence, and whether Birchwood Hotel failed to take such steps. The test for negligence was articulated in *Kruger v Coetzee*, where the Court stated that liability arises where a reasonable person in the shoes of the defendant could have foreseen the possibility of his conduct injuring another person and would have taken steps to guard against such an occurrence.¹⁵ The Court found that the security guard had failed to take reasonable steps to prevent the accident by warning Naidoo to keep at a distance. The Court held that reasonable steps on the part of Birchwood Hotel would entail regular checks to ensure that every gate was well maintained and functioning properly at all times. If the gate was not functioning well, Birchwood Hotel should have warned the public of the potential danger posed by the gate.¹⁶

It was contended that replacing the heavy gate with a new lighter gate was a precautionary measure which Birchwood Hotel took. The act of replacing the old gate indicated that reasonable steps could have been taken earlier to prevent the harm.¹⁷ It was further held that Naidoo had discharged his onus of proving that the standard of care of Birchwood Hotel fell short of that required of a reasonable person. The Court also found that Naidoo had played no part in causing the harm and that there was no contributory negligence. Birchwood Hotel was therefore one hundred percent liable for the damages.¹⁸

The Court also had to determine if the exemption clause was binding on Naidoo and if it was not against public policy.¹⁹ Public policy imports notions of fairness, justice and reasonableness, and would prevent enforcement of a term which would potentially result in injustice. The Court applied the second stage of the *Barkhuizen*

¹⁵ *Kruger v Coetzee* 1966 2 SA 428 (A).

¹⁶ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 25.

¹⁷ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 26.

¹⁸ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 26.

¹⁹ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) paras 40-48.

test.²⁰ The question was if enforcing a contractual term that limits a person's right to a judicial remedy would result in an injustice?²¹ The Court found that the enforcement of the exemption clause would have been unfair and unjust. It was held that Naidoo had discharged his onus of proving his delictual claim and that neither the disclaimer notices nor the exemption clauses would have been a good defence.²²

4 Analysis of the decision

4.1 Background to the enforcement of exemption clauses

Turning to exemption clauses, it is necessary to examine first why exemption clauses are problematic and what their legal position is. Exemption clauses are viewed as problematic as they have the effect of excluding or limiting liability on the part of one of the contracting parties.²³ Exemption clauses are as a result equated to clauses that deprive another party of legal redress.²⁴ Such clauses may also negate the purpose of the contract in that they could affect the essence of the agreement.²⁵ Exemption clauses could also lead to exploitation of the party who is in a lesser bargaining position.²⁶ The reason for this is that exemption clauses may be unfair and draconian; and their presence is generally abused, at least from a consumer's perspective.²⁷ In some instances the enforcement of exemption clauses appears to

²⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59: "The inquiry is whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause. This would require the party seeking to avoid the enforcement of the clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances." See also Sutherland 2009 *Stellenbosch LR* 55.

²¹ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 53.

²² *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 54.

²³ Van der Merwe *et al Contract* 258; Hutchison and Pretorius *Law of Contract* 252.

²⁴ See *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA).

²⁵ In *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA) para 33, the court held that an exemption clause that undermines the essence of a contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard instruction form and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.

²⁶ Bhana, Bonthys and Nortje *Student's Guide* 173; Van der Merwe *et al Contract* 258.

²⁷ Pretorius 2010 *THRHR* 499.

produce unfair and disastrous results.²⁸ Unequal bargaining power alone is, however, not a sufficient ground or justification for courts to refuse to enforce such a clause.²⁹

Exemption clauses can be valid and enforceable if the words are clear and unambiguous.³⁰ There seems to be no law that precludes an exemption clause from excluding liability arising as a result of a fundamental breach of a contract.³¹ It should be noted, however, that an exemption clause, just like any other contractual terms, may not be enforced in the following few instances: if it is against public policy or where it is unusual or where the clause was not set out in a conspicuous manner and form that was likely to attract the attention of an ordinarily alert consumer.³²

Although the courts seem to adopt a cautious approach regarding the enforcement of exemption clauses they will not easily set aside a contract where both parties signed the agreement. Innes CJ said in *Wells v SA Alumenite CO*: "No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands."³³ The position regarding some exemption clauses may change in the light of the provisions of the CPA, which will be analysed below.

It should be noted that courts interpret exemption clauses restrictively with a view to mitigating the effects thereof.³⁴ Lewis JA's dictum in *Van der Westhuizen v Arnold*³⁵ stated that courts must consider with great care the meaning of an exemption clause, especially if it is very general in its application. The reason for this is that an

²⁸ See *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 989G-J.

²⁹ Du Bois *South African Law* 811; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

³⁰ Hutchison and Pretorius *Law of Contract* 271. See also Marx and Govindjee 2007 *Obiter* 629, 631; Pike 2009 *Legal Update* 28; Stoop 2008 *SA Merc LJ* 508-509; Brand and Brodie "Good Faith in Contract Law" 108.

³¹ Christie and Bradfield *Law of Contract* 193-194; Du Bois *South African Law* 811.

³² S 49 of the *Consumer Protection Act* 68 of 2008 (CPA). See also *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA).

³³ *Wells v SA Alumenite CO* 1927 AD 73.

³⁴ Christie and Bradfield *Law of Contract* 195. See also *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA); *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA); *Walker v Redhouse* 2007 3 SA 574 (SCA) para 13; Stoop 2008 *SA Merc LJ* 506.

³⁵ *Van Der Westhuizen v Arnold* 2002 4 All SA 331 (SCA).

exemption clause limits or ousts common law rights.³⁶ The clause is thus interpreted as narrowly as possible. Restrictive interpretation is generally applied to clauses that are wide and do not only exclude specific grounds of liability.³⁷ The rationale hereof is to protect a party against more extensive potential liability by confining the clause within reasonable bounds.

If the wording of the clause is ambiguous, the court will interpret it against the party who is favoured by the clause.³⁸ Section 4(4)(a) of the CPA also gives statutory authority to the *contra proferentem* rule of interpretation. Any contract must thus be interpreted to the benefit of the consumer.³⁹ In *Durban's Water Wonderland (Pty) Ltd v Botha*⁴⁰ Scott JA also pointed out that:

If the language of the disclaimer or exemption clause is clear such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the *proferens*...⁴¹

In other words the approach is that if the language is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the

³⁶ *Van Der Westhuizen v Arnold* 2002 4 All SA 331 (SCA) para 21.

³⁷ *Van der Merwe et al Contract* 259-260.

³⁸ Christie and Bradfield *Law of Contract* 196.

³⁹ Naude 2009 *SALJ* 506.

⁴⁰ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA).

⁴¹ The facts in *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) were that the first respondent and her daughter were flung from a jet ride in an amusement park. Subsequent investigation revealed that there had been a failure in the hydraulic system governing the vertical movement of the car in which they had been seated. The first and second respondent alleged negligence on the part of the appellant. The appellant, on the other hand, relied on disclaimer notices which were on the ticket windows. The questions before the Court were the following. First, whether a disclaimer contained in a notice painted on the windows of the ticket offices in the amusement park had been incorporated into the contract governing the use of the park's amenities. Second, whether on a proper construction of the notice the appellant was exempted from liability for negligence. Third, whether the appellant, as operator of the amusement park, had been negligent. The Court held that any reasonable person approaching the office in order to purchase a ticket could hardly have failed to observe the notices with their bold white-painted border on either side of the cashier's window. The existence of the notices containing the terms was not unusual for a reasonable patron. It was further held that the appellant had done whatever was necessary to bring the attention of the respondent to the notices and that the contract was concluded subject to the terms in the notices. Similarly, the respondents had framed their pleadings based on a delict. Although the respondents had attempted to sue based on delict, their claim failed on the basis that the notices were conspicuous. The appeal thus succeeded.

proferens.⁴² The alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be fanciful or remote.⁴³ It is clear from the above approach that the ambiguity may be used to reduce the effect of an exemption clause on the contract denier in terms of the damages suffered. Courts therefore accept an interpretation unfavourable to the *proferens* because he had the opportunity to express himself more clearly.⁴⁴ The wording in an exemption clause, however, should be read with all the other terms of the contract.⁴⁵ The facts in *Naidoo* did not give rise to interpretation issues.

The question of whether or not an exemption clause in which liability for negligently causing bodily injuries and death is excluded will be constitutional was left open in *Naidoo*.⁴⁶ In *Johannesburg Country Club v Stott*⁴⁷ the Court similarly found it unnecessary to decide the question of whether or not an exemption from liability for negligently causing the death of another would be contrary to public policy. In this case Mr Stott (the deceased) was struck by lightning while seeking shelter under a cover on a golf course. He was severely injured and subsequently passed away. Both the deceased and his wife were members of the Johannesburg Country Club. The Club's rules contained an exemption clause which included the following words:

The Club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds.⁴⁸

The approach to the interpretation of the above clause was a matter which the Court had to adjudicate. It had previously been stated that parties to a contract are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary by including

⁴² Hutchison and Pretorius *Law of Contract* 271; Christie and Bradfield *Law of Contract* 196; Naude 2009 *SALJ* 506.

⁴³ Christie and Bradfield *Law of Contract* 196.

⁴⁴ Hutchison and Pretorius *Law of Contract* 271.

⁴⁵ Consideration of the ambit of the contract as a whole often allows one to reconcile provisions which, if read independently, would be irreconcilable. This also applies to exemption clauses. See Kerr *Law of Contract* 429.

⁴⁶ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 53.

⁴⁷ *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA).

⁴⁸ *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) para 4.

an exemption clause.⁴⁹ Where the exemption is clear and unambiguous, effect must be given to that meaning, as spelled out in *Durban's Water Wonderland (Pty) Ltd v Botha*.⁵⁰ The Court nonetheless held that it would not be possible for the deceased to exempt the club from such liability, as one cannot forego the autonomous claims of dependents.⁵¹

On the question of whether exemption clauses are compatible with constitutional values, and whether growth of the common law consistent with the spirit, purport and objects of the Bill of Rights requires its adaptation, the Court stated:

It is arguable that to permit such exclusion would be against public policy because it runs counter to the high value the common law and, now, the Constitution place on the sanctity of life.⁵²

This court in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) left scope for such a conclusion.⁵³

In view of the above statement, it can be argued that an exemption clause may be against public policy and thus inconsistent with the Constitution. As to whether or not the enforcement of such clauses is fair in every circumstance, that is another issue. Whilst it is essential to recognise the doctrine of the sanctity of a contract, such clauses are valid subject to reasonableness and fairness, as pointed out in *Barkhuizen v Napier*.⁵⁴ In essence, some exemption clauses may not be constitutional on the basis that they are unfair and unjust.⁵⁵

⁴⁹ See Marais JA's argument in *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA) para 6.

⁵⁰ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 989 (SCA).

⁵¹ *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) para 6.

⁵² The judge referred to *S v Makwanyane* 1995 3 SA 391 (CC); *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC); *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC).

⁵³ *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) para 12.

⁵⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 70.

⁵⁵ It appears that exemption clauses need to be adequately tested against the *Constitution* on the basis of fairness and reasonableness.

4.2 Principles of justice, reasonableness and fairness

Principles of justice, reasonableness and fairness constitute constitutional standards or values that must be taken into account when enforcing an agreement. These concepts, however, are elusive. The extent to which courts may set aside a contract based on these principles is not clear. Nicholls J refused to uphold the exemption clause in *Naidoo* on the basis that its enforcement would not be just and fair in the circumstances. The issue that arises is whether Nicholls J's reliance on these principles can find support.

Reasonableness and fairness do not at the moment qualify as free-standing requirements of our law of contract.⁵⁶ These principles are still regarded as abstract values and they do not amount to substantive rules that courts can "employ to intervene in contractual matters".⁵⁷ These principles as a result cannot be acted upon by the courts directly. The rationale for this is based on the notion that if judges are allowed to refuse to enforce a contractual provision simply because it offends their personal sense of fairness and justice, it will result in legal and commercial uncertainty. Brand J strongly argues that endorsing the notion that judges may decide cases on the basis of what they regard as reasonable and fair will give rise to "intolerable legal uncertainty".⁵⁸ This is because a sense of what is equitable and fair is so subjective that the outcome in any given case will consequently depend on the personal idiosyncrasies of the individual judge. A clause accordingly cannot be declared invalid merely because it offends the sense of the individual judge.⁵⁹ If judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be law but the judge.⁶⁰

Allowing the criterion to be judge-based would establish an untenable position in our legal system. This may have an impact on the rule of law. There is, therefore, a

⁵⁶ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) para 32.

⁵⁷ *Bredenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA) para 53; *Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 21-24; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27; *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) paras 22-25.

⁵⁸ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) para 34.

⁵⁹ Brand and Brodie "Good Faith in Contract Law" 115.

⁶⁰ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 24; *Bredenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA) para 38.

need to ensure that even though judges are influenced by personal factors when making decisions, the law should still be the guide. In the light of the preceding discussion, the decision to rely on the fact that enforcement of the exemption clause in the circumstances would be unjust and unfair, in the sense that the clause infringes Naidoo's right to have access to court, a fundamental right entrenched in the *Constitution*, may still be open to criticism. The approach that a Court will have to adopt in future is to invoke the provisions of the CPA instead of relying on the limitation of the right to have access to court.⁶¹

Notwithstanding the above general criticisms regarding the principles of fairness and reasonableness, the question that still lingers is if the values that underlie our *Constitution* should not be taken as the benchmark to measure the validity of exemption clauses in contracts.⁶² It remains to be seen if the courts are willing to develop these values.⁶³ Be that as it may, the CPA is important in that it prohibits terms that are unfair and unreasonable. The Court in Naidoo thus could have relied on section 48 of the CPA to support its decision.⁶⁴ Section 48 as well other the relevant provisions of the CPA are examined below.

4.3 The potential impact of the Consumer Protection Act on exemption clauses

The CPA was enacted to protect vulnerable consumers even from exemption clauses.⁶⁵ It became effective on 1 April 2011.⁶⁶ The Court in *Naidoo* could not apply the CPA as it was not yet in effect, the accident having occurred on 15 October

⁶¹ S 34 of the *Constitution* provides that: "Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." It would seem that invoking s 34 would amount to over-reliance on the *Constitution*, especially with the enactment of the CPA. There is also the question of whether or not s 34 of the *Constitution* should always be relied upon as a basis for challenging exemption clauses for being unreasonable and thus against public policy: Marx and Govindjee 2007 *Obiter* 634.

⁶² Lerm *Critical Analysis of Exclusionary Clauses*.

⁶³ S 39(2) of the *Constitution* states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

⁶⁴ It is important to note that the Act was enacted for the purpose of the legislative control of unfair terms such as exemption clauses. See Naude 2006 *Stell LR* 384.

⁶⁵ The Preamble of the CPA. Van Eeden *Guide to the Consumer Protection Act* 37.

⁶⁶ Hutchison and Pretorius *Law of Contract* 32.

2008. The CPA does not have retrospective effect. The parties could neither make reference to the provisions of the CPA nor rely on them. If the accident had occurred after 1 April 2011 and the CPA had been applied, the judge would not have necessarily come to a different conclusion. The courts will in future rely more on the provisions of the CPA to justify their decisions. The fact that Birchwood Hotel was relying on the existence of an exemption clause shows that the Court would have applied the relevant provisions of the CPA. The Court would thus have been required to look at whether or not the exemption clause contained plain and understandable language.⁶⁷ The Court further would have been required to ascertain whether or not Naidoo understood the contents of the clause.

Section 49 of the CPA provides that the consumer's attention must be drawn to clauses that limit the risk or that indemnify the supplier.⁶⁸ The clause or notice must be drawn to the consumer's attention in a "conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances..."⁶⁹ Naude is of the opinion that it is unclear what format would be regarded as sufficiently conspicuous.⁷⁰ The steps taken by the supplier or service provider to bring the notice or exemption clause to the attention of the consumer should be reasonable, implying that any reasonable person should be able to easily observe the notice or provision.⁷¹ A consumer making use of a service will be bound by the terms of the notice if he was in fact aware of it, or if it was so conspicuously displayed that it can be inferred that he must have been aware of it.⁷² Consequently, Birchwood Hotel could have been required to prove that the exemption clause had

⁶⁷ S 49(3) read with s 22 of the CPA. Also see Naude 2009 *SALJ* 508.

⁶⁸ S 49(1) of the CPA: "Any notice to consumers or provision of a consumer agreement that purports to-

- (a) limit in any way the risk or liability of the supplier or any other person;
- (b) constitute an assumption of risk or liability by the consumer;
- (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- (d) be an acknowledgement of any fact by the consumer, *must be drawn to the attention of the consumer* in a manner and form that satisfies the formal requirements of subsections (3) to (5) ... " (my emphasis).

⁶⁹ S 49(4)(A) of the CPA. See also Van Eeden *Guide to the Consumer Protection Act* 178; Naude 2009 *SALJ* 508.

⁷⁰ Naude 2009 *SALJ* 508.

⁷¹ *Durban's Water Wonderland (Pty) Ltd v Botha* 1991 1 SA 982 (SCA) paras 18, 19; *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA) para 33.

⁷² Hutchison and Pretorius *Law of Contract* 240.

been set out in a conspicuous manner and form likely to attract the attention of its clients. The facts of the case, however, show that the Court accepted that Naidoo was indeed aware of the existence of the exemption clause.⁷³ That is why the existence of the clause was not the problem, but the enforcement thereof.

The CPA further provides that the certain notices or provisions must be drawn to the attention of the consumer in a manner and form that satisfies the requirements of section 49(3)-(5). These are notices or provisions that limit in any way the risk or liability of the supplier or any other person,⁷⁴ or any provision that purports to constitute an assumption of risk or liability by the consumer,⁷⁵ or any provision that purports to impose an obligation on the consumer to indemnify the supplier or any other person for any cause,⁷⁶ or any clause that purports to be an acknowledgement of any fact by the consumer.⁷⁷

Section 58 must be read together with section 49 as it requires the supplier of certain intrinsically risky facilities or activities to alert the consumer to the fact, nature and potential effect of the risk in a manner that meets the standards set out in section 49.⁷⁸ Van Eeden argues that the totality of the phrase "fact, nature and potential effect" clearly indicates that the supplier is required to ensure that the consumer has an adequate understanding and appreciation of the risk rather than a superficial awareness of the risk.⁷⁹ Section 49(5) of the CPA provides that the consumer must be given an adequate opportunity "to receive and comprehend the provision or notice".⁸⁰ The purpose is to allow the consumer to make an informed decision. This reinforces the principle that the consumer must read and understand

⁷³ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) paras 38, 42.

⁷⁴ S 49(1)(a) of the CPA.

⁷⁵ S 49(1)(b) of the CPA.

⁷⁶ S 49(1)(c) of the CPA.

⁷⁷ S 49(1)(d). See also Van Eeden *Guide to the Consumer Protection Act* 178.

⁷⁸ S 58 of the CPA provides: "The supplier of any activity or facility that is subject to any-

(a) risk of an unusual character or nature;

(b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or

(c) risk that could result in serious injury or death must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49."

⁷⁹ Van Eeden *Guide to the Consumer Protection Act* 178.

⁸⁰ S 49(5) of the CPA.

exemption clauses since they are binding.⁸¹ The consumer must assent to such provision or notice by signing or initialling the contract.⁸² It has thus been argued that *Afrox Healthcare Bpk v Strydom* could probably have had a different outcome as the CPA would have placed an obligation on the hospital to draw the fact, nature and effect of the exclusion clause to the attention of the respondent before concluding the agreement.⁸³

Whilst it is important to ensure that consumers make an "informed choice", once their attention is drawn to the clause they are bound by the terms of the agreement including the exemption clause. The CPA does not afford consumers much protection as service providers are still able to use exemption clauses, but they should alert the consumers to their existence in a prescribed manner and form.⁸⁴ In the case of standard contracts where the consumer has to sign the contract on a "take-it-or-leave-it" basis, the fact that the CPA requires the consumer to be aware of such clauses is of no help other than to exclude the liability of the service provider or supplier. It is submitted that Pretorius' argument is valid, that viewed from the perspective of contractual mistake, the CPA may in fact have a lesser impact on protecting consumers.⁸⁵

The implication of an "informed decision" is that the contract denier cannot rely on reasonable mistake. Courts have in some instances managed to refuse to enforce exemption clauses on the basis of the contract assessor's failure to draw the attention of the other party to the clause, which translates into a failure of reasonable reliance on the part of the contract assessor.⁸⁶ A consumer may now thus not rely on the *iustus error* doctrine where he was aware of the existence of an exemption clause in the agreement. From the above discussion it is apparent that

⁸¹ Webber Wentzel Dispute Resolution Department 2012 <http://www.sabinetlaw.co.za/economic-affairs/articles/consumer-protection-bill-and-informed-choice>.

⁸² The requirement that the existence of all exemption clauses should be drawn to the attention of the consumer may be a double-edged sword in that the assessor may rely on the fact that the denier assented to the provision and is therefore bound: Naude 2006 *Stell LR* 378. Also see Naude 2009 *SALJ* 510.

⁸³ Naude 2006 *Stell LR* 378; Naude 2009 *SALJ* 510.

⁸⁴ S 49 of the CPA.

⁸⁵ Pretorius 2010 *THRHR* 500.

⁸⁶ *Du Toit v Atkinson's Motors Bpk, Mercurius Motors v Lopez* 2008 3 SA 572 (SCA); *Dlovo v Brain Porter Motors t/a Port Motors Newlands* 1994 4 SA 518 (C).

what the CPA appears to give with one hand it takes away with the other. It is submitted that in the light of the weaknesses in section 49 and the argument by Pretorius, the application of section 49 to either the *Afrox* or the *Naidoo* case would have been unlikely to have resulted in different conclusions. Notwithstanding these weaknesses, it will be sought to demonstrate below that the CPA still remains an effective instrument which a Court can rely on in its decisions.

Section 48(2) provides that unfair, unreasonable or unjust terms include those which are so adverse to the consumer as to be inequitable or where the term is excessively one-sided in favour of any person other than the consumer.⁸⁷ To enforce the exemption clause in *Naidoo* would have been inequitable, because Naidoo had not necessarily involved himself in risky activities. *Naidoo* can be distinguished from *Dutfield v Lilyfontein School*,⁸⁸ where the plaintiff was participating in an activity known as the Kempton Corporate Adventure Race when she fell from a zip-wire affixed to the top of a scaffold platform and sustained injuries. The plaintiff had signed an indemnity form. The issue before the Court was whether the defendants were indemnified from liability by virtue of her having signed the indemnity document, or whether the defendants were indemnified only in the event of its being found that stringent safety measures had in fact been put in place for the adventure race. The Court held that the defendants would be indemnified against any claims provided that stringent safety measures were in place. In the event that the defendants failed to ensure that such safety measures were in place, the indemnity would not be operative. It was held that the indemnity provided by the plaintiff was conditional upon its being established that the defendants had done all things reasonably necessary to ensure the safety of the participants. The Court found that the defendants had failed to do so. The case was thus decided in favour of the plaintiff. Taking part in an adventure race was a risky activity compared to the activity of Naidoo, who had booked a stay at a hotel. There was no obvious inherent risk in what Naidoo did.

⁸⁷ S 48(2)(a) and (b) of the CPA.

⁸⁸ *Dutfield v Lilyfontein School* 2011 ZAECGHC 3.

A hotel is a public place and it has to ensure that its customers are safe, in the same way as a hospital is reasonably expected to provide quality services by ensuring that patients are treated in a professional manner and in accordance with professional standards that do not cause harm.⁸⁹ This view is based on the principle of reasonable expectations. The law should be more willing to protect the reasonable expectations of parties and should give them legal force.⁹⁰ The principle is not foreign to the law of contract as the reasonable expectations of a negotiating party within the context of mistake are protected.⁹¹ A guest at a hotel does not expect any danger and will only assent to a risk which is reasonably foreseen. In a situation where a gate falls on a guest, resulting in serious injuries, the reasonable expectations principle could be used to justify the non-enforcement of an exemption clause.

The question that springs to mind is: what happens in situations where the attention of the consumer was drawn to an unfair term before the conclusion of the contract? It is submitted that in instances where a term that is unfair, unreasonable or unjust was drawn to the consumer's attention in the prescribed manner and form, the court may refuse to enforce it on the basis that it is unfair.⁹² This is so because it is not sufficient for the attention of the consumer to be drawn to the unfair term in order to achieve an informed decision.⁹³ The critical issue is whether or not the term qualifies as unfair and thus is prohibited in terms of the CPA. The fact that the term was drawn to the consumer's attention should not be allowed to prejudice him, as in most cases consumers are left with no option but to sign the document.⁹⁴

Section 48(1)(c) further reinforces the fact that any agreement is prohibited if it requires a consumer to waive any rights, assume any obligations or waive any liability of the supplier on terms that are unfair, unreasonable or unjust. Exemption clauses by their very nature constitute a waiver of rights on the part of the

⁸⁹ Letzler 2012 *De Rebus* 23-25.

⁹⁰ Brand and Brodie "Good Faith in Contract Law" 112.

⁹¹ Van Huysteen, van der Merwe and Maxwell *Contract Law* 105; Hutchison and Pretorius *Law of Contract* 95; Van der Merwe *et al Contract* 34-36.

⁹² Ss 48(2)(b) and 52(3) of the CPA.

⁹³ Naude 2006 *Stell LR* 378.

⁹⁴ The standard term creates an inherent structural inequality between businesses and consumers: Naude 2009 *SALJ* 529. See also Sharrock 2010 *SA Merc LJ* 296.

consumer. The exclusion of liability on the part of the supplier tends to be unfair or unreasonable as regards the consumer. It is highly likely that reliance on section 48 could have enhanced the Judges' decision in *Naidoo*. Exemption clauses that fall into the section 48 category may be declared invalid on the basis that they are unjust and unreasonable.⁹⁵ Section 51 of the CPA also prohibits terms that directly or indirectly waive or deprive a consumer of a right provided in terms of the Act. The prohibition includes some exemption clauses as they deprive consumers of their right to sue the other party for damages.⁹⁶ Courts are given the power to declare agreements unconscionable or unfair in whole or in part in terms of section 52.⁹⁷ Accordingly, a court can strike down an exemption clause on the basis of unfairness.

Regulation 44(3)(a) of the CPA "greylists" clauses excluding liability for bodily injury or death caused negligently. It provides that a term of a consumer agreement is "presumed" to be unfair if it has the purpose or effect of "excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier..." The word "presumed" suggests that the unfairness may be rebutted. This explanation is consistent with "greylisting", which means that such a clause "must at the very least be included in an indicative list of clauses which may be regarded as unfair, whereas the supplier may still persuade a court otherwise".⁹⁸ Whether a clause excluding the liability of the supplier for death or personal injury caused to the consumer is unfair or not depends on the circumstances of each case. In *Naidoo* the clause was regarded as unfair.

The CPA also proscribes agreements, terms or conditions that exclude liability in cases of gross negligence.⁹⁹ This is notable because the question of whether or not exemption clauses exclude liability even in a case of gross negligence was left open in *Afrox Healthcare Bpk v Strydom*. The Court held that the question of whether or not the exclusion of a hospital's liability for damages caused by the gross negligence of its nursing staff was in conflict with the public interest was irrelevant to the

⁹⁵ Lerm *Critical Analysis of Exclusionary Clauses*.

⁹⁶ See s 51(1)(b)(ii) of the CPA.

⁹⁷ S 52(3)(a) of the CPA.

⁹⁸ Naude 2009 *SALJ* 511.

⁹⁹ S 51(1)(c)(i) of the CPA.

matter.¹⁰⁰ The explicit prohibition of agreements, terms or conditions that exclude liability in cases of gross negligence implies that ordinary negligence is not covered.

Thus, the CPA does not ban exemption clauses *per se*. However, exemption clauses which are unfair or unreasonable are invalid. Although the CPA explains the meaning of "unfair, unreasonable or unjust" in section 48(2), phrases such as "so adverse to the consumer as to be inequitable" are not defined. The exact meaning of "inequitable" is thus left to the determination of the court. It is argued that the above provisions must be interpreted in a purposive manner to ensure that consumers are adequately protected.¹⁰¹ It is further argued that section 51(1)(c) of the CPA should be amended to include a ban on exemption clauses that exclude liability for death or personal injury. The rationale for this is that an exclusion of liability for personal injuries or death is contrary to public policy.¹⁰² The unlimited enforcement of an exemption clause excluding liability for death or personal injury cannot be tolerated and should thus be set aside.¹⁰³ It is undesirable to allow hospitals or hotels to become negligent. These are public places and they have a duty to provide a safe environment. It would have been unfair to uphold an exemption clause in the circumstances of *Naidoo*.

¹⁰⁰ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 13. The facts of this case are that the respondent had been admitted to a private hospital owned by the appellant for an operation and post-operative medical treatment. The respondent had signed the admission document without reading it, and the document contained an exclusion of liability and an indemnity clause absolving the hospital and/or its employees or agents from all liability. The appellant sought to rely on this exemption clause and indemnity. The respondent did not dispute the fact that the receptionist had pointed out the space where he was supposed to sign but argued that he had not been directed to the exclusion of liability and indemnity. The respondent further argued that it was a tacit term of the agreement that the appellant's nursing staff would treat him in a professional manner and with reasonable care. After the operation, certain negligent conduct by a nurse led to complications resulting in the respondent suffering damages. The respondent argued that the conduct of the nurse constituted a breach of contract by the appellant and instituted an action against the appellant for the damages suffered. The Court held that the subjective expectations of the respondent were not relevant in determining if there was a legal duty on the appellant to alert respondent to the inclusion of the exclusion of liability and indemnity. The question was whether such clauses were unusual or not. The Court held that exclusions of liability and indemnities were the rule and not the exception in standard form contracts. It was accordingly found that there was no legal duty on the appellant to alert respondent to the terms of the contract and that the clause was not against public policy. There was also no evidence indicating that the respondent had indeed occupied a weaker bargaining position than the appellant during the conclusion of the contract.

¹⁰¹ Christie and Bradfield *Law of Contract* 22.

¹⁰² Brand and Brodie "Good Faith in Contract Law" 115.

¹⁰³ Brand and Brodie "Good Faith in Contract Law" 115.

4.4 *Enforcement of exemption clauses*

The decision in *Naidoo* appears to indicate that there are better chances of holding the other party liable in delict for harm suffered when there is concurrent liability in contract and delict.¹⁰⁴ *Naidoo* involved patrimonial loss which arose as a result of bodily harm.¹⁰⁵ The same set of facts could in principle give rise to both delictual and contractual remedies.¹⁰⁶ A claim in contract would arise based on the fact that the hotel owed its customers a duty of care to maintain its premises in a safe condition.¹⁰⁷ *Naidoo* thus could have alleged a breach of contract following the harm that was suffered as a result of the malfunctioning of the gate. The validity of the contract would have been considered in the light of public policy.¹⁰⁸ Considerations such as good faith and reasonableness would have been taken into account to determine the validity of the exemption clause. The plaintiff elected to sue in delict. It appears that the standard of proof can easily be discharged in proving negligence, as against suing in terms of the law of contract, where *Naidoo* would have been required to prove that the exemption clause was unreasonable and thus against public policy.¹⁰⁹ To avoid the problematic nature of exemption clauses and the onus of proof required in terms of the law of contract, it is argued that plaintiffs should rather frame their pleadings based on delict in cases where there has been bodily harm or death. If the plaintiff sues in delict the onus of proving that the clause is reasonable would be on the supplier.¹¹⁰ It is argued that an exemption clause does not result in one's contracting out of delictual liability. This is so because the gate

¹⁰⁴ Stoop 2008 *SA Merc LJ* 497; Hutchison and Van Heerden 1997 *Acta Juridica* 98.

¹⁰⁵ *Naidoo* had a choice to sue based on an action in delict or in terms of a contract. This is because the concurrence of contractual and delictual actions allows the plaintiff to have a choice of action. See Loubser and Midgley *Law of Delict* 188; Hutchison and Pretorius *Law of Contract* 9.

¹⁰⁶ Christie and Bradfield *Law of Contract* 191. See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) where Grosskopf AJA questioned if the damages being claimed were recoverable in delict. It was ruled that the loss was not delictual in nature. In contrast, the loss in *Naidoo* satisfies the elements of a delict and would therefore give rise to delictual liability.

¹⁰⁷ *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) para 5.

¹⁰⁸ Van der Merwe *et al Contract* 259.

¹⁰⁹ Public policy in the new constitutional dispensation is derived from the fundamental values of the *Constitution*. It is rooted in the *Constitution*. See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28; *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) paras 54-56; *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) para 11.

¹¹⁰ Christie and Bradfield *Law of Contract* 191.

could have fallen on anyone walking past it, and therefore the existence of the contract between *Naidoo* and the *Birchwood Hotel* was incidental.

5 Implications of the decision in *Naidoo*

The decision is a step in the right direction. It seeks to ameliorate the harm caused by exemption clauses which could be viewed as "unfair". It prevents reliance on such clauses. It would have been unfair and unjust to uphold the exemption clause in *Naidoo*. If the CPA had been applicable at the time, the Court would have relied on section 22 and section 49, and more importantly on section 48 and section 51(1) of the Act.

It is significant to note that for a long period, fairness and reasonableness have been taken into consideration when setting aside a contract, but usually only in extreme cases.¹¹¹ Limiting issues of unfairness and unreasonableness to extreme cases of "unconscionability" seems to require change, as this is out of step with reality. There is no doubt that a clause in a contract that offends the values embodied in the *Constitution* may be struck down on the basis that it is against public policy. The majority of the Court in *Sasfin v Beukes*¹¹² held that the provisions in the deed of cession were so unreasonable and unfair that their enforcement would be contrary to public policy. The rationale was that Beukes would have been virtually a slave, working for the benefit of Sasfin. The principle expounded in *Sasfin* could apply and could justify the Court's decision to set aside such a contract.¹¹³ It is noteworthy that the result of the decision in *Sasfin* was hardly controversial since the unfairness was manifest.¹¹⁴

¹¹¹ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

¹¹² *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

¹¹³ Smalberger JA stated in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) para 12 that "the power to declare contracts against public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power..."

¹¹⁴ Brand and Brodie "Good Faith in Contract Law" 97.

Generally courts appear to be wary when deciding whether or not to enforce contractual provisions on the basis that the agreement is unfair or unjust.¹¹⁵ It can be construed that it is this restraint on the part of courts that seems still to favour the freedom of contract and the *pacta sunt servanda* principle over other principles such as fairness and reasonableness.¹¹⁶ This seems to be the position despite the fact that in the new constitutional dispensation these principles must be applied in the light of the spirit, purport and objects of the Bill of Rights in accordance with section 39(2) of the *Constitution*.¹¹⁷

Exemption clauses are a "rule rather than an exception" in standard contracts, but the other party often does not have "real" freedom in relation to the terms of the contract since most of the terms are not subject to negotiation except perhaps as regards price, payment terms, delivery date and warranties.¹¹⁸ The consumer is faced with a "take-it-or-leave-it" situation and is forced to accept the terms in a standard contract.¹¹⁹ There is thus no freedom of contract in reality. The freedom is rather theoretical or formalistic.¹²⁰ Courts must take this factor into consideration where the defendant relies on disclaimer notices or exemption clauses to avoid liability.

Naidoo marks a significant stride towards fairness and equity in contracts. Freedom of contract and *pacta sunt servanda* have usually prevailed over fairness. The importance of developing the law to ensure fairness has been long overdue.¹²¹

¹¹⁵ Cameron JA in *Brisley v Drotosky* submitted that the Constitution did not give courts the power to invalidate contractual provisions because they happen not to coincide with the judges' own notions of fairness or good faith. See *Brisley v Drotosky* 2002 4 SA 1 (SCA) para 93. In cases of negligence, this submission may be fraught with difficulties as it would be unfair to exclude liability.

¹¹⁶ See Hawthorne 2004 *THRHR* 294. Hopkins correctly points out that there appears to be an obvious and apparent unwillingness on the part of the SCA to free the law of contract from the shackles of the sanctity of contract rule, which have for so long held back the progressive development of our law of contract. See Hopkins 2007 *De Rebus* 23.

¹¹⁷ *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) para 43.

¹¹⁸ Sharrock 2010 *SA Merc LJ* 296.

¹¹⁹ Naude 2009 *SALJ* 529.

¹²⁰ See Stoop 2008 *SA Merc LJ* 496-497; Naude 2006 *Stell LR* 366; Bhana and Pieters 2005 *SALJ* 885.

¹²¹ As regards contract, the majority judgment of Ngcobo J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 48, 70 held that a term opposed to the values enshrined in the *Constitution* would be against public policy and therefore unenforceable. This leaves room for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual

Enforcing the exemption clause in *Naidoo* would accordingly not have been consistent with the spirit, purport and object of the Bill of Rights, as public policy is no longer rooted in the notion of contractual certainty.¹²² Public policy also demands some level of fairness in contracts.¹²³ The law needs to embrace normative and constitutional values so as to adapt to the changing needs of the community, especially where there is a need to protect the weaker party to a contract.¹²⁴ This argument was supported by Olivier JA in *Brisley v Drotzky*, where he stated that there is a need to strike a balance between the interests of legal continuity and social realities.¹²⁵

6 Conclusion

The position established in South African contract law by *Afrox Healthcare Bpk v Strydom* regarding exemption clauses is untenable. There is a need to develop the law regarding exemption clauses beyond precedent.¹²⁶ The decision in *Naidoo* is a milestone in the history of exemption clauses, representing a major step towards the realisation of fairness and reasonableness in contracts. If fairness and reasonableness will result in legal and commercial uncertainty, this will be a necessary price to pay in a legal system that values fairness as much as it does

terms that are in conflict with the constitutional values even though the parties may have assented to the inclusion of such clauses. What this means is that courts may decline to enforce a time limitation clause if its implementation would result in unfairness or would be unreasonable for being contrary to public policy. Time limitation clauses were held to be permissible subject to considerations of fairness and reasonableness. The same applies to exemption clauses: courts should not enforce such clauses if it would be unreasonable and unjust to do so.

¹²² Hopkins 2007 *De Rebus* 22.

¹²³ Bhana and Pieters 2005 *SALJ* 868 correctly submit that a contract does not operate in isolation but in a social context. Society should thus exercise some control over a contract, so as to ensure that there is justice and equity.

¹²⁴ The fact that courts should be proactive in protecting parties who are in a comparatively weaker bargaining position was emphasised by Olivier JA in *Brisley v Drotzky* 2002 4 SA 1 (SCA). He further argued that the extent of legal and commercial uncertainty as a result of subjecting the *shifren* principle to the legal convictions of society was a necessary price to pay in a legal system that values fairness as much as it does certainty.

¹²⁵ *Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 63, 69-70, 72, 75-76, 78. The law needs to take into consideration the high levels of illiteracy and poverty and the vulnerability of people in South Africa to justify why some agreements should be struck down on the basis of fairness and reasonableness. See Hawthorne 2004 *THRHR* 301.

¹²⁶ S 39(2) of the *Constitution* provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

certainty.¹²⁷ Naidoo was a legitimate guest at the hotel, which was a public place, and the exclusion of liability for the injuries sustained as a result of negligence on the part of Birchwood Hotel would have been unfair. The enforcement of an exemption clause excluding liability for death or personal injury should not be tolerated and the clause must accordingly be set aside.

Courts, however, must not completely ignore Brand JA's call in *Potgieter v Potgieter* for caution, namely that endorsing the notion that judges may decide cases on the basis of what they regard as reasonable and fair will give rise to "intolerable legal uncertainty".¹²⁸ For this reason, *inter alia*, there is a need to strike a balance between certainty and fairness. Invoking sections 48 and 52(3) of the CPA in consumer-related disputes could help by ensuring that agreements that contain clauses which are unfair and unreasonable are not enforced. As a long-term goal, the CPA may have to be amended so that section 51(1)(c) can expressly prohibit exemption clauses that exclude liability for death or personal injury. Such an amendment will be consistent with the purpose of the CPA, which is to protect and advance the social and economic welfare of consumers in South Africa.

¹²⁷ See Olivier JA's argument in *Brisley v Drotzky* 2002 4 SA 1 (SCA).

¹²⁸ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) para 34.

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LIST OF ABBREVIATIONS

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| CPA | Consumer Protection Act |
| SALJ | South African Law Journal |
| SA Merc LJ | South African Mercantile Law Journal |
| Stell LR | Stellenbosch Law Review |
| THRHR | Tydskrif vir die Hedendaagse Romeins-Hollandse Reg |