THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 172/2001

In the appeal of:

AFROX HEALTHCARE BEPERK **Appellant**

and

CHRISTIAAN GEORGE STRYDOM **Respondent**

CORAM: NIENABER, HARMS, ZULMAN, MPATI and BRAND JJA

Date of hearing: **13 May 2002**

Date of judgment: **31 May 2002**

Private hospital - disclaimer of liability of nursing staff – public policy – s 27 of the Constitution - *stare decisis* in constitutional context – role of the principle of good faith – misrepresentation by silence about contract terms.

JUDGMENT

BRAND JA

[1] Is a contract term that exempts a hospital from liability for the negligence of its nursing staff valid and enforceable? That is the core question in this appeal.

[2] The appellant is the owner of a private hospital in Pretoria. The respondent was admitted to the hospital for an operation and post-operative medical care. Upon admission, the parties apparently came to an agreement. According to the respondent, it was an implied term of this agreement that the appellant's nursing staff would treat him professionally and with reasonable care. After the operation, complications arose that were allegedly caused when a nurse negligently applied a bandage too tightly, thus restricting the blood-supply to a sensitive post-operative area. According to the respondent, this negligent act by the nurse constituted a breach of contract for which the appellant is responsible and which, due to the resulting complications, caused loss of R2 million. Accordingly, the respondent instituted an action against the appellant in the Transvaal High Court in which he sued the appellant for this loss.

[3] Among other defences, the appellant referred to clause 2.2 of the form that the respondent signed upon his admission to the hospital. This clause reads as follows:

> '2. Exclusion of liability
>
> 2.1 ...
>
> 2.2 I exempt the hospital and/or its employees and/or agents of all liability and I hereby indemnify them against any claim brought by any person (including a dependent of the patient) due to damage or loss of any kind whatsoever (including consequential loss or special loss of any kind) that arises directly or indirectly from any injury (including fatal injury) incurred by or damage affecting the patient or any illness (including terminal illnesses) suffered by the patient regardless of the cause/causes, excluding only intentional default by the hospital,

employers or agents.'

[4] The respondent did not deny that he had signed the form when he was admitted. But he offered various reasons why the provisions of the clause were not enforceable against him.

[5] During the pre-trial conference, the respondent admitted that, since his case fell within the scope of clause 2.2, a finding that the clause was enforceable against him would necessarily lead to the dismissal of his claim with costs. In light of this, the parties agreed to request, in terms of Rule 33(4), that the issue of clause 2.2's enforceability be separated from the other issues and determined first. The court *a quo* (Mavundla AJ) complied with this request. In the proceedings that followed, only one witness was called by each party. The respondent testified, after which the appellant called as a witness Mr C Buitendag, who, as a receptionist at the hospital, had handled the respondent's admission. At the end of the proceedings, Mavundla AJ accepted the respondent's argument, namely that clause 2.2 was not enforceable against him. Against this decision the appellant now appeals, with leave of the court *a quo*.

[6] The court *a quo* took as its starting point that the *onus* rests upon the appellant to show that the terms of clause 2.2 are enforceable against the respondent. As authority for this proposition it referred to *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA). However, this decision stands for precisely the opposite. This appears from the following *dictum* of Scott JA at 991C–D:

> 'The respondents' claims were founded in delict. The appellant relied on a contract in terms of which liability for negligence was excluded. It accordingly bore the *onus* of establishing the terms of the contract. (The position would have been otherwise had the respondents sued in contract. See *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 762E–767C)' (my emphasis).

What the trial judge apparently lost sight of is that the respondent in this case in fact

based his action upon contract.

[7] The grounds upon which the respondent argued that clause 2.2 is not enforceable against him can be summarised under the following three headings:

(a) the clause is contrary to public policy.

(b) the clause is contrary to the principle of good faith.

(c) the receptionist had a legal duty to draw the respondent's attention to clause 2.2 at the time of the conclusion of the contract, which he did not do.

Public policy:

[8] A contract term that is so unfair that it is contrary to public policy is unenforceable in law. This principle was recognised and applied by this Court in, among others, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A). In the *Sasfin* case (9B–F), however, Smalberger JA issued the following words of warning:

> 'The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12: ...
>
> > "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" ...
>
> In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.'

These admonitions have been repeated emphatically by this Court in the recent past. (See for example *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 420F; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837C–E; *Brisley v Drotsky* (case number 432/2000, decided on 28 March 2002) joint majority judgment at para 31.)

[9] In relation to exclusion or exemption clauses such as clause 2.2, the general approach in our law is that such clauses, though valid and enforceable, must be construed restrictively. (See for example *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C–806D and *Durban's Water Wonderland (Pty) Ltd v Botha and Another (supra)* at 989G–I.) In standard form contracts, these types of clauses have become the rule rather than the exception. Their limits seem to be determined largely by business considerations, such as the value of saving on insurance premiums, competitiveness and the possibility of deterring potential clients. (See, for example, Christie *The Law of Contract in South Africa* 4th edition 209.)

[10] The fact that exclusion clauses may be enforced in principle does not mean, of course, that a particular exclusion clause cannot be declared by a court to be contrary to public policy and therefore unenforceable. The best-known example of a case in which this in fact happened is perhaps *Wells v South African Alumenite Company* 1927 AD 69 at 72, where a contract term that excluded liability for fraud was declared contrary to public policy and therefore invalid. The criterion that applies to exclusion clauses does not differ, however, from that which applies to other contract terms alleged to be invalid due to considerations of public policy. The question is always whether the enforcement of the relevant exclusion clause or other contractual clause, due to either extreme unfairness or other policy considerations, is contrary to the community's interests.

[11] The three grounds upon which the respondent bases his reliance upon public policy are:

(a) the unequal bargaining position of the parties when entering into the agreement;

(b) the nature and extent of the hospital staff's conduct against which the appellant is indemnified;

(c) the fact that the appellant is a provider of medical services.

[12] As far as the first ground is concerned, it goes without saying that an inequality in the bargaining power of the contracting parties does not in itself justify the conclusion that a term benefiting the 'stronger' party is necessarily contrary to public policy. At the same time, it must be recognised that unequal bargaining power is a factor that, together with others, may play a role in the determination of public policy. But the answer to the respondent's appeal to this factor in the present case is that there is no evidence whatsoever that the respondent, when he concluded the contract, was indeed in a weaker bargaining position than the appellant.

[13] The respondent's second ground of objection, which bears on the potential scope of clause 2.2, relates to some extent to his third ground. His objection is that, although the appellant's duty as a hospital is to provide medical treatment in a professional and caring manner, clause 2.2 goes so far as to indemnify the appellant against even the gross negligence of its nursing staff. This, according to the respondent, is contrary to public policy. Although there is direct support in Strauss, *Doctor, Patient and the Law* 3rd edition 305 for the argument that the indemnification of a hospital against the gross negligence of its nursing staff would be contrary to public policy, it must be borne in mind in assessing the present ground of objection that the respondent did not invoke gross negligence on the part of the appellant's nursing staff in his pleadings. He relied upon negligence *simpliciter*. It is therefore not relevant in this case whether a contractual exclusion of a hospital's liability for its nursing staff's gross negligence would be contrary to public policy. Even assuming that this were so, it would not follow automatically that clause 2.2 is invalid. It is more likely that the scope of the clause would be restricted, by means of interpretation, so as not to include gross negligence. Again, the decision in *Wells v South African Alumenite Company (supra)* provides a striking illustration. After Innes CJ had held that the exemption clause at issue in *Wells* was, on a literal reading, wide enough to exclude liability for fraud, and that a contract term excluding liability for fraud is invalid by

reason of public policy, he expresses himself as follows at 72–73:

> 'Hence contractual conditions by which one of the parties engages to verify all representations for himself, and not to rely upon them as inducing the contract, must be confined to honest mistake or honest representations. However wide the language, the Court will cut down and confine its operations within those limits' (my emphasis).

[14] The third ground upon which the respondent based his appeal to public policy relates to the fact that the appellant is a provider of medical care. He argues that it would in general be impermissible for healthcare providers to include an exemption clause like clause 2.2 in standard form contracts. For this proposition the respondent relies on section 27(1)(a) of the Constitution, 1996, in which every person's right to medical care is enshrined. As I understand the judgment of the court *a quo*, this is the main basis of its decision in the respondent's favour.

[15] The respondent does not claim that clause 2.2 directly infringes the constitutional values enshrined in section 27(1)(a). Such a claim would obviously not succeed. After all, even assuming that section 27(1)(a) has horizontal application in terms of section 8(2) of the Constitution and that it therefore binds private parties – questions which need not be resolved in this case – clause 2.2 does not prevent any person from accessing medical care. And section 27(1)(a), again assuming that it binds private hospitals, does not appear to prevent them from demanding compensation for medical services or from setting legally enforceable conditions for their provision. The question remains, therefore, whether clause 2.2 is such a legally enforceable condition or not.

[16] According to the respondent's argument, section 27(1)(a)'s role in the present matter arises from section 39(2) of the Constitution, according to which every court is obliged, in developing the common law, to promote the spirit, purport and objects of the Bill of Rights. The effect of section 39(2), so it was argued for the respondent, is that, in determining whether a particular contract provision is contrary to public policy, account must be taken of the fundamental rights enshrined in the Constitution. Granting that

clause 2.2 was enforceable *before* the adoption of the Constitution, so the argument continued, the clause is now, after its adoption, contrary to the 'spirit, purport and objects' of section 27(1)(a) and therefore contrary to public policy.

[17] Seeing as the Constitution came into force only on 4 February 1997, and the agreement between the parties had already been concluded on 15 August 1995, the first question that arises in assessing this argument is whether section 39(2) empowers – and obliges – the court to take into account constitutional provisions that were not yet in force when the contractual relationship between the parties came into being. As far as direct infringements are concerned, the Constitution has no retrospective effect. Acts that were valid when they occurred are not, therefore, retrospectively invalidated by the direct effect of the Constitution. (See, for example, *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 14; *Gardener v Whitaker* 1996 (4) SA 337 (CC) para 13.) The question of the Constitution's possible retrospective effect in the indirect manner envisaged in section 39(2), however, has not yet been pertinently decided. That this question is not a simple one is apparent from, for example, *Ryland v Edros* 1997 (2) SA 690 (C) at 709G–710C and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at 1329A–E para 22. I find it unnecessary to attempt a conclusive answer to this question. In light of the opinion I hold on section 27(1)(a)'s effect on the validity of clause 2.2, I am prepared to accept, in favour of the respondent, that the provisions of section 27(1)(a) must be taken into account – albeit that it did not apply when the agreement was entered into on 15 August 1995 and that there was no equivalent provision in the Interim Constitution, 200 of 1993.

[18] In *Carmichele v Minister of Safety and Security and Another (Center for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 35ff it was decided that, in the application of section 39(2) of the Constitution, one cannot determine the convictions of the community for purposes of the law of delict without considering the values enshrined in the Constitution. I have no doubt that the same principle applies to determining whether a particular contractual provision conflicts with the interests of the community. Or, as

Cameron JA put it in *Brisley v Drotsky (supra)* para 4:

> 'Public policy ... nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise "public policy" is now rooted in our Constitution and the fundamental values it enshrines.'

[19] In applying this principle, the only constitutional value relied upon by the respondent is that contained in section 27(1)(a). This immediately leads to the question: why exactly is clause 2.2 in conflict with section 27(1)(a)? After all, the respondent accepts – rightly – that clause 2.2 does not stand in the way of the provision of medical services to any person, and that a hospital's insistence on legally permissible conditions for the provision of medical services is not in conflict with section 27(1)(a).

[20] The respondent's answer to the question posed is based on the premise that, whereas the constitutional values contained in section 27(1)(a) require not merely the provision of medical services as such, but rather the provision of such services in a professional and careful – or non-negligent – manner, clause 2.2 promotes unprofessional conduct and negligence in the provision of these services by removing the sanction against them. As a result, clause 2.2 conflicts with the values in section 27(1)(a) and is therefore contrary to public policy.

[21] The answer to this argument, in my view, is that its entire foundation, namely that clause 2.2 promotes negligent and unprofessional conduct by the appellant's nursing staff, rests upon a *non sequitur*. First, the appellant's nursing staff remain bound by their professional code and subject to the statutory authority of their professional body. Second, negligent conduct by the appellant's nursing staff would hardly further the appellant's reputation and competitiveness as a private hospital. Third, the respondent's argument is, in effect, that the appellant's nursing staff will, because of clause 2.2, be wilfully (or intentionally) negligent – which amounts to a contradiction.

[22] In addition, section 27(1)(a) is not the only constitutional value that applies in the present context. As Cameron JA put it in *Brisley v Drotsky (supra)* para 7:

> ‘[T]he Constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.’

[23] The constitutional values include contractual freedom, which in turn finds expression in the maxim ‘*pacta sunt servanda*’. This principle was described by Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A as:

> ‘the elementary and fundamental general principle that contracts freely and seriously entered into by competent parties will, in the public interest, be enforced.’

[24] In light of these considerations, the respondent’s premise, namely that a contract term exempting a hospital from liability for the negligent conduct of its nursing staff is contrary to public policy, cannot therefore be maintained.

[25] A matter not directly related to the outcome of this case, but which in my view merits some comment, arises from the following statement by the court *a quo*:

> ‘Section 39 [of the Constitution] implicitly enjoins every court to develop common law or customary law. In my mind the tendency of lower courts blindly following the path chartered many years ago until altered by the higher court (stare decisis) is not consonant with the provisions of section 39 of the Constitution.’

[26] If the trial court meant by this that the principles of *stare decisis* do not generally apply in the application of section 39(2), it is, at least in respect of post-constitutional decisions, clearly wrong. This appears from the following *dicta* of Kriegler J in *Ex Parte The Minister of Safety and Security and Others. In Re: The State v Walters and Another* (CCT 28/01, decided on 21 May 2002) (‘the *Walters* case’) para 60:

> ‘[T]he Constitution enjoins all courts to interpret legislation and to develop the

common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.'

And in para 61:

'High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue. It should be made plain, however, that this part of the judgment does not deal with the binding effect of decisions of higher tribunals given before the constitutional era.'

[27] In relation to pre-constitutional decisions of this Court regarding the common law, one must in my view distinguish three situations that might arise in the constitutional context. First, the situation where the High Court is convinced that the relevant rule of the common law is in conflict with a constitutional provision. In this case, the High Court is obliged to depart from the common law. The fact that the rule in question was laid down by this Court pre-constitutionally makes no difference. The Constitution is the supreme law and, where a rule of the common law conflicts with it, the rule must yield.

[28] The second possible situation is where the pre-constitutional decision of this Court was based on considerations such as the *boni mores* or public policy. If the High Court is of the opinion that the decision, taking into account constitutional values, no longer accurately reflects the *boni mores* or public policy, the High Court is obliged to depart from it. Such a departure is not in conflict with the principles of *stare decisis*, since it has been accepted in all cases that the *boni mores* and considerations of public policy do not remain static. Examples of this can be found in *Ryland v Edros (supra), Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening) (supra)* as well as *Carmichele v Minister of Safety and Security and Another (Center for Applied Legal Studies Intervening) (supra).*

[29] The third situation that may arise is the following: the common-law rule, laid down in a pre-constitutional decision of this Court, is not in direct conflict with any specific provision of the Constitution. Nor does it depend on changing values such as the *boni mores* or public policy. Nevertheless, the High Court is convinced that the relevant common-law rule, by application of section 39(2), must be changed in order to promote the spirit, purport and objects of the Constitution. Is the High Court permitted in this case to give effect to its views, or does it remain bound by the principles of *stare decisis* to apply the common law as laid down by this Court pre-constitutionally? The answer is that the principles of *stare decisis* remain valid and that the High Court is not empowered by section 39(2) to depart from decisions of this Court, whether pre- or post-constitutional. Section 39(2) must be read together with section 173 of the Constitution. The latter section recognises the inherent jurisdiction of the High Court – together with the Constitutional Court and this Court – to develop the common law. It is in the exercise of this inherent jurisdiction that the provisions of section 39(2) come into play. Before the enactment of the Constitution, the High Court of course had the inherent jurisdiction, just like this Court, to develop the common law. This inherent power was subject, however, to the rules that find expression in the doctrine of *stare decisis*. In my view, this doctrine has not been displaced by the Constitution – neither expressly nor by necessary implication. In short, underlying the directive contained in section 39(2) is the assumption that the relevant court has the power to amend the common law; but whether the court does indeed have that power is determined, among other things, by the doctrine of *stare decisis*.

[30] Moreover, the values underlying the doctrine of *stare decisis* apply also to this Court's pre-constitutional decisions. These considerations appear from the following discussion in Hahlo and Kahn, *The South African Legal System and its Background*, 214, which was quoted approvingly by Kriegler J in the *Walters* case:

> 'The advantages of a principle of *stare decisis* are many. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the

> dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike … Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*'.

In addition, it should be borne in mind that the provisions of the Constitution are not so much a set of rules as an entire value system. Some of the values of the system are in mutual tension, which then requires careful balancing and reconciliation. In implementing this value system, individual judges will often disagree with one another. In such circumstances, granting each judge the power to depart from decisions of this Court on the basis of his or her individual views about the application of this value system would inevitably lead to a lack of uniformity and certainty.

Good faith.

[31] As an alternative basis for his claim, the respondent argued that, even if clause 2.2 is not contrary to public policy, it is nevertheless unenforceable because it is unreasonable, unfair and in conflict with the principle of *bona fides* or good faith. This argument, which the court *a quo* seems to have endorsed, finds its origin in the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike-Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 318ff and the Cape High Court decisions given as a result of it.

[32] In *Brisley v Drotsky (supra)*, however, this Court, in its majority decision, put the judgment of Olivier JA into perspective. In relation to the place and role of abstract ideas like good faith, reasonableness, fairness and justice, the majority in the *Brisley* case held that, although these considerations underlie our law of contract, they do not provide an independent, or 'free floating', basis for the invalidation or non-enforcement of contract

terms (para 22); put differently, although these abstract values constitute the foundation of, and rationale for, the legal rules, and may lead to the creation and alteration of the legal rules, they are not themselves legal rules. When it comes to the enforcement of contract terms, the court has no discretion and does not proceed on the basis of abstract ideas, but only upon the basis of crystallised and established legal rules. (See, for example, *Brummer v Gorfil Brothers Investments (supra)* 419F–420G.) Hence the alternative basis upon which the respondent relies does not, in truth, provide an independent basis for his case.

Misrepresentation and mistake.

[33] The further alternative upon which the respondent relied ultimately is that he is not bound by clause 2.2 because, when he signed the admission form, he was unaware of its terms. Assessing this alternative argument requires that the background facts be set out in more detail. The respondent's evidence was that he signed the admission form without reading it, at the place Buitendag had indicated with a cross. It also seems that Buitendag did not draw the respondent's attention to the contents of clause 2.2. Consequently, in the absence of any evidence to the contrary, it must be accepted that the respondent was not aware of the contents of clause 2.2 when he entered into the agreement. On the other hand, the respondent admitted that he knew the admission form contained the terms of the proposed contract between him and the appellant. He also did not dispute that he had a full opportunity to read the document.

[34] In these circumstances, the fact that the respondent signed the document without reading it would not, as a rule, mean that he is not bound by the terms contained in it. After all, Innes CJ held almost a century ago, in *Burger v Central SAR* 1903 TS 571 at 578, that a person who signs a written agreement without reading it does so at his own risk and is therefore bound by the terms contained in it, as though he were aware of and had expressly agreed to them. (See too for example *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).)

[35] To this general rule there are certain recognised exceptions (see for example Christie, *The Law of Contract*, 4th edition 202). The exception on which the respondent relies is that Buitendag had a legal duty to inform him of the contents of clause 2.2 and that he failed to do this. The respondent admits that, generally speaking, there is no legal duty upon a contracting party to inform his counterparty of the contents of their proposed agreement. The reason, according to the respondent, why such a legal duty rested upon Buitendag is that he (the respondent) did not expect a term such as clause 2.2 in an agreement with a hospital. Since a hospital is expected precisely to provide medical services professionally and carefully, so the respondent argued, he did not expect that the appellant would try to indemnify itself against the negligence of its own nursing staff.

[36] The answer to this is that the respondent's subjective expectations about what the contract between him and the appellant would contain does not play a role in determining whether Buitendag had a legal duty to inform him about clause 2.2. What is important here is whether a term like clause 2.2 would *reasonably* be expected, or whether it was *objectively* speaking unexpected. As I indicated earlier, exemption clauses like clause 2.2 are nowadays the rule in standard form contracts rather than the exception. Despite the respondent's argument to the contrary, I also see no reason to distinguish private hospitals in this respect from other service providers. It therefore cannot be said that a term like clause 2.2 in the admission form was, objectively speaking, unexpected. Accordingly, there was no legal duty upon Buitendag to bring it pertinently to his attention. Hence the respondent is bound by the clause as though he had read and expressly agreed to it.

Conclusion

[37] For these reasons, the court *a quo* should have ruled that clause 2.2 is enforceable against the respondent. In terms of the agreement reached by the parties at the pre-trial conference, the court should have dismissed the respondent's claim with costs.

[38] The following order is made:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court *a quo* is substituted with the following:

'The plaintiff's claim is dismissed with costs.'

FDJ BRAND

JUDGE OF APPEAL

CONCUR:

NIENABER JA

HARMS JA

ZULMAN JA

MPATI JA