Indemnities, Disclaimers and Constitution

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Overview

- Legal principles
  - Contract; and
  - Delict
- Public policy
- The Constitution
- Cases
- Questions
Legal Principles

• Contractual principles
  – The freedom to contract
  – Pacta Sunt Servanda
  – Carveat Subscriptor

• Delictual principles
  - Wrongfulness
  - Fault
  - Causation
  - Damages

“I understand what it means, I’m just saying ‘LOL’ isn’t really appropriate in a contract.”
Application of the legal principles to disclaimers and indemnities

• Election to instruct action either in contract or in delict
  – Sues in contract
  – Sues in delict
• Two leading cases
  • Durban's Water Wonderland (Pty) Ltd v Botha & Another 1999 1 SA 92 SCA; and
  • Afrox Healthcare v Strydom 2002 6SA 21 SCA
Durban's Water Wonderland (Pty) Ltd v Botha & Another 1999 (1) SA 982 (SCA)

• The facts
  • The disclaimer stated the following:

"The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or users the amenities provided".

• Test
  – Whether disclaimer was to be incorporated into the contract;
  – If so, could it exclude liability; and
  – Was the park negligent

• Lower Courts vs Supreme Court of Appeal
Afrox Healthcare CC v Strydom [2002] 4 All SA 125 SCA

– The facts
– The indemnity clause

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

- Argument made for public policy rejected
  - Abstract
  - No deviation from legal principles
Public Policy: What is it?

• Legal convictions of the community
• No closed list of considerations
• Subjective test
• Eastwood v Shepstone 1902 TS 294

"But this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not be hastily or easily exercised; But once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it is hesitated to declare such an arrangement for it".
Public Policy and the Constitution

- Judge Cameron
  "In its modern guise public policy is now routed in the Constitution and the fundamental values it enshrines"

- Section 2 of the Constitution
  "This Constitution is the Supreme Law of the Republic: Any law or conduct inconsistent with it is invalid..."

- Section 39(2) of the Constitution
  "When interpreting any legislation and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and object for the Bill of Rights".

- Section 173
  "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa has their inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".
Limitation of rights

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

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

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
"Legal convictions of the community as a concept is open to misinterpretation and misapplication – it is better replaced ... by the "appropriate norms of the projective value system embodied in the Constitution".

"The Constitution's values of dignity and equality and freedom require that the Courts approach the task of striking down contracts ... with perceptive restraint..."
Barkhuizen v Napier 2007 (5) SA 323 (CC)

- The majority judgment
  - determine whether or not the clause in dispute is indeed contrary to public policy
  - what factual basis the clause
- Minority judgment
  - critical of your standard form contracts
Recent cases – Comparative study

• **Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)**
  – The facts

  "Disclaimers and indemnity clauses generally would be unfair and unjust"

• **Claassen v Blue Lagoon Hotel & Conference Centre Case No 2154/2011, Eastern Cape Local Division, judgment delivered on 12 September 2014**
  – The facts
  – Quotes on Barkhuizen where Ngcobo J held:

  "In my view the proper approach to the Constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the Constitutional values, in particular those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate but at the same time allows Courts to decline to enforce contractual terms that are in conflict with the Constitutional values even though the parties may have consented to them..."
Conclusion
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