The Consumer Protection Act Contracting out of Liability

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It has become the norm in recent years for almost every contract placed before a consumer to contain onerous clauses purporting to exclude liability on the part of suppliers of goods or services to customers. However, the introduction of the Consumer Protection Act 68 of 2008 ("CPA"), which came into effect 1 April 2011 now restricts the power of a supplier of goods or services to impose conditions or terms which exempt the supplier from common law liability or obligations.

Section 48(1) of the CPA, which deals with unfair, unreasonable or unjust contract terms, provides that a supplier must not: -

a) Offer to supply, supply, or enter into an agreement to supply, any goods or services –

i) At a price that is unfair, unreasonable or unjust; or

ii) On terms that are unfair, unreasonable or unjust.

...

c) Require a consumer, or other person to whom goods or services are supplied at the direction of the consumer -

i) to waive any rights;

ii) assume any obligation; or

iii) Waive any liability of the supplier

on terms that are unfair, unreasonable or unjust or impose any such terms as a condition of entering into a transaction.

These provisions have yet to be interpreted by the courts and as to precisely what will constitute a "unfair, unreasonable or unjust" term remains to be seen. It is also not clear whether the effect of the CPA is to prohibit the exclusion of liability for negligence alone, as opposed to gross negligence. Section 51 which deals with prohibited transactions, agreements, terms or conditions requires suppliers not to make a transaction or agreement subject to any term or condition if it purports to limit or exempt a supplier of goods or services from liability for any loss, directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier. The section does not deal with negligence on its own and by implication the exclusion of liability for negligence on the part of a supplier is not excluded however, any such term would still have to satisfy the requirements of fairness and reasonableness imposed by Section 48(1).

The approach at the common law to the contractual exclusion of liability has not always been consistent and it may well be that in a modern society it would be regarded as being against public policy to allow a party to exempt itself from liability for gross negligence.

In the case of *Rosenthal v Marks 1944 TPD 172* held that "gross negligence... connotes recklessness, and entire failure to give consideration to the consequences of his actions, a total disregard of duty. This approach has been followed and endorsed by the Supreme Court of Appeal (e.g. *Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd 1978 (2)SA 794 (A)*). In the Fibre Spinners case it was concluded that gross negligence amounted to "wanton irresponsibility". In appeal the court dismissed the submission that an exemption clause ought not to be construed as applying to responsibility for loss or damage caused by gross negligence stating: -

"... there is no justification for so restricting the plain meaning of the words of the exemption clause nor is there any reason founded on public policy why it should be held that, insofar as the clause refers to loss or damage caused by Defendant's gross negligence, it is not enforceable."

The court did not follow other earlier cases notably that of *CSAR v Adlington and Co 1906 TS 969* where it was found that a carrier of goods could not exempt itself from malfeasance or gross negligence but it could do so for the consequences of ordinary negligence.

The principles set out in the Fibre Spinners case were again confirmed by the Supreme Court of Appeal in 2009 in the case of *Viv's Tippers (Pty) Ltd v Pha Pharma Staff Services (Pty) Ltd [2010] ZASCA 26.* This case concerned the question of wrongfulness of the conduct of a security guard in allowing the unauthorised removal of a truck from a site where a security provider had contracted with the owner of a site to render security services. The court accepted that the loss of property through theft fell within the ambit of "pure economic loss" that did not arise directly from damage to a Plaintiff's person or property. The court accepted the principle that in matters of contract the parties are taken to having tendered their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary but that it is for the party wishing to absolve itself from any obligation or liability to plainly spell this out. The court found the exclusion clause in question not to be ambiguous and that limitless liability to a multitude of unknown claimants could not be vested upon a party. In essence the court accepted that it was not contrary to public policy to limit liability and not to find the conduct of the security guard wrongful.

Even if it is permissible in terms of the common law to exclude liability for gross negligence, this would not extend to contracting out of liability for fraudulent conduct and any such provision will be regarded as contrary to public policy.

Where does this leave consumers?

The provisions of the CPA do not apply to juristic consumers whose asset value or annual turnover exceed R2 million. Consequently, common law would still apply to companies not falling within the ambit of the exclusion to the act. It is submitted that our courts, on the grounds of public policy should not allow a depositee or carrier to contract out of liability for gross negligence or wilful conduct and that, despite references to the freedom of contract such as that contained in *First National Bank of SA Limited v Rosenblum & another 2001 (4) SA 189 (SCA)* and Viv's Tippers the principles contained in the CPA relating to unfair contract terms should be extended to all contracts.