IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2154/2011
REPORTABLE

Heard: **05/06/2012**
Delivered: **12/09/2014**

In the matter between:

ANDILE ERNEST KLASSEN **Plaintiff**

and

BLUE LAGOON HOTEL AND CONFERENCE CENTRE **Defendant**

JUDGMENT

SANDI J:

[1] Ernest Andile Klassen (the plaintiff) sues the Blue Lagoon Hotel and Conference Centre (the hotel) for damages suffered by him when he slipped and fell in the defendant's bathroom as a result of which he sustained an injury to his ankle.

[2] In his particulars of claim the plaintiff pleaded as follows:

> "3.3 The defendant was under a duty to the public at large and the plaintiff in particular to ensure that:-
>
> 3.3.1 the floor of the premises was clean and dry;

3.3.2 the floor, particularly in the toilets utilised by hotel guests, was not slippery;

3.3.3 the floor of the premises did not pose a danger to members of the public utilising the toilets;

3.3.4 effective barriers were erected at appropriate times to prevent members of the public in general and the plaintiff in particular from traversing any portions of the floor in the vicinity of the toilets were dirty and/or wet and/or slippery;

3.3.5 members of the public in general and the plaintiff in particular were adequately warned in the event of the floor in the vicinity of the toilets being dirty and /or wet and /or slippery;

3.4 it was at all times reasonably foreseeable to the defendant that should it fail to take the aforementioned steps a person or persons utilising the toilets might slip and fall and sustain injuries as a result thereof.

4. Notwithstanding the aforesaid duty the plaintiff failed and /or omitted to take the aforesaid steps."

[3] To the plaintiff's particulars of claim the defendant pleaded inter alia as follows:

"6.2 Defendant pleads at the time of the alleged incident plaintiff was under the influence of alcohol.

6.3 Defendant pleads further that:

6.3.1 At the time of the alleged incident plaintiff was a resident guest at the defendant's hotel;

6.3.2 On defendant's premises the following disclaimer notice was prominently displayed:

'The owner cannot be held responsible for any loss or damages to property and possessions as well as any personal injuries of whatsoever nature,

sustained by a guest, resident or visitor, whether such injuries or loss were sustained by the negligent or wrongful act of anyone in the employment of or acts on behalf of the owner.'

6.3.3 The plaintiff read the said notice, alternatively, saw the notice and was aware of its import.

6.3.4 Furthermore plaintiff upon checking into the hotel signed the registration card, thereby binding himself to the terms and conditions appearing at the foot thereof, including the following exemption clause:

'The guest hereby agrees that the hotel shall not be responsible for any injury to or death of any person or harm caused to them or loss or destruction or damage to property howsoever caused, whether arising from fire, theft or any cause**.'**

6.3.5 In these circumstances, it was an express, alternatively tacit term of the contract between plaintiff and defendant governing plaintiff's stay at the defendant's hotel and plaintiff's use of the hotel facilities, that defendant's liability for damages arising from personal injuries sustained by plaintiff whilst on the hotel premises, and arising inter alia from negligence on the part of defendant or its employees or persons acting on behalf of defendant, was excluded.

6.4 Defendant pleads further that at all times it maintained a reasonable cleaning regime of its facilities.

6.5 Defendant accordingly avers that:

6.5.1 Plaintiff's fall, which is not admitted, was occasioned entirely or in part by his being under the influence of alcohol;

6.5.2 Defendant is indemnified by the plaintiff against the claim now sought to be advanced by him."

[4] The plaintiff replicated as follows to the defendant's plea:

"4.1 Save for admitting that upon checking into the hotel the plaintiff signed a registration card, plaintiff denies each and every allegation contained in this paragraph, as if specifically traversed, and puts to the defendant to the proof thereof.

4.2 In the event of the above Honourable Court finding that the registration card signed by the plaintiff contained the exemption clause, plaintiff denies that the provisions of the said exemption clause forms part of any contract entered into between him and the defendant; alternatively

4.3 In the event of the above Honourable Court finding that the said exemption clause was contained in the aforesaid registration card and that such clause formed part of the terms and conditions of the contract entered into between him and the defendant, then plaintiff denies that the said exemption clause is contractually binding upon plaintiff in that:

4.3.1 the exemption clause purported to deprive plaintiff from judicial redress;

4.3.2 the enforcement of the exemption clause is contrary to public policy in that it is unfair, unreasonable and unjust; alternatively

4.3.3 the exemption clause is unconstitutional as it offends the provisions of clause 34 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996."

[5] At the request of the parties, the issues of liability and quantum have been separated, and this court is called upon to determine the question of liability only, leaving that of quantum to be determined at a later stage.

[6] The plaintiff is an employee of the Department of Justice and Constitutional Development and works at the Graaf-Reinett magistrate's court as an interpreter.

[7] The defendant is a hotel and conference centre situated in East London.

[8] On 16 August 2009 Plaintiff attended a course for interpreters which was arranged by the Department of Justice and Constitutional Development (the department). For that purpose the department arranged that plaintiff be accommodated at the defendant's hotel. The department was responsible for the payment of all expenses incidental thereto. The conference was scheduled to last for a period of one month.

[9] Plaintiff's evidence is that on the date of his first arrival at the hotel a security guard performing duty at the entrance to the hotel indicated to him where he had to park his vehicle. He testified that there was no gate at the entrance of the hotel premises.

[10] According to plaintiff construction work was in progress at the hotel and that there was no signboard at the entrance thereof.

[11] Plaintiff testified that after having parked his vehicle at the place indicated to him by the security guard, he proceeded to the reception area where a lady receptionist gave him a certain document to sign. According to the plaintiff, the contents of the documents was not explained to him before or after he signed it. He

also testified that he did not read the document. He said he laboured under the impression that by signing the said document he was acknowledging receipt of the key. Once he had signed the document he was given a key to his room and an employee of the defendant showed him to his room. He testified that it was the first time that he had visited a hotel.

[12] On Friday of that week the plaintiff travelled home to Graaf-Reinett and returned to the hotel on Sunday, 23 May 2009.

[13] His evidence was that even on 23 May 2009, when he returned to the hotel, there was no gate at the entrance thereto. Neither was there any signboard or notice giving any warning to him.

[14] Plaintiff testified that it was already dark when he arrived at the defendant's premises on that Sunday. He said he did not have to book in again as he had not booked out when he went home on Friday of the previous week.

[15] Plaintiff denied the defendant's allegation that he was drunk at the time of his arrival. In support of this version, he stated that on route to the hotel, and, in the vicinity of King William's Town he came across a traffic road block where his vehicle was examined and his driver's licence inspected. On this aspect of the matter I understood the plaintiff to be conveying to the court that, had he been drunk or had he consumed liquor, the traffic officers in charge of the roadblock would have noticed

that and would have dealt with him according to law. This version was not challenged by the defendant.

[16] The plaintiff further testified that during that week he had on occasion to visit a shop outside of the hotel premises. He testified that even on that occasion there was no gate at the entrance to defendant's premises and no signboards were displayed.

[17] As stated above, on Sunday, 23 May 2009 he reported at the reception that he had arrived and he was told that his supper would be delivered to his room. He then left the reception. On the way to his room he had to walk past toilets situated close to the reception area.

[18] Whilst in that vicinity, he decided to go and urinate in the toilets. He pushed the toilet door open and entered. He then moved forward to the urinal. In the process his foot slipped and he fell to the floor when he was about an arm's length from the urinal. He noticed that the floor of the toilet was made of tiles and that the light was shining inside the toilet. Whilst still lying on the floor he noticed that there was water on the floor in the area close to the urinal. He testified that upon entering the toilets he did not notice the water. As he tried to stand up a gentleman walked in and helped him. According to the plaintiff that gentleman worked there because he made an undertaking to the plaintiff that he would report the incident to the reception. Plaintiff testified that his left ankle became painful and swollen. To get to his room he had to hop on one leg. That night he received medication from a colleague who also

attended the same course with him. The next morning he went to reception to report the incident of the previous night. He was told that the incident had already been reported to the hotel. The defendant arranged that the plaintiff be taken to hospital for medical treatment. Again, on Tuesday the next day the defendant took the plaintiff to hospital for further treatment. On Wednesday, plaintiff's wife took him home to Graaf-Reinet where his ankle was operated on. The diagnosis was that he had sustained a fracture to the ankle.

[19] The plaintiff testified that when he went to the toilet there were no signs indicating that the floor was wet and slippery. Neither was he warned by anyone including the receptionist about the wet floor. He said had he been warned about it he would not have used that toilet; he would have used the one in his room.

[20] Peter Carl Gregorson (Gregorson) the General Manager of the defendant testified on behalf of the defendant as follows. At the time of the incident he was a manager of the defendant for eight years. On Sunday 23 August 2009, the day of the incident, he was not on duty. On 24 August he heard about the incident involving the plaintiff and saw the plaintiff after he returned from hospital. The plaintiff was using crutches and his foot was on a plaster of paris cast. Speaking to the plaintiff, the latter reported to him that he was fine. Thereafter he received summons in 2011, ie about two years after the incident. An incident of this nature would have been recorded in the security incidents report which the hotel kept for a period of nine months. The records were no longer available in the year 2011.

[21] Gregorson confirmed plaintiff's evidence that construction work was in progress at the hotel premises when the plaintiff checked in at the hotel. An additional block of rooms was being built. However, he testified that there was a motor vehicle entrance to the hotel premises and there was an electric gate which ran on rails. When guests checked in at the reception they would be given plastic key tags which they swiped onto the gate reader in order to open the gate. In answer to a question posed to him by Mr *Koekemoer,* counsel for the plaintiff, he stated that the construction workers did not make use of the motor vehicle entrance. They had their own entrance and had no access to the hotel because it was closed off and boarded. He testified that this was done to safeguard the hotel property. According to him, for the same reason the motor vehicle entrance gate was kept closed. The plastic tags were provided to guests to enable them to open the gate and to gain access to the swimming pool and the beach.

[22] Gregorson testified that at the motor vehicle entrance a disclaimer notice was displayed. It was mounted on the fence and in such a manner that it was visible to vehicles entering the premises. In support of his evidence, he referred to photographs handed in by consent. They are exhibits "B", "D" and "G" which show a white rectangular block. He testified that that was the disclaimer notice displayed at the motor vehicle entrance through which the plaintiff entered the hotel premises on 26 August 2009. He testified that the disclaimer was to indicate that one was entering private property.

[23] He also testified that another disclaimer was displayed on the window of a guard house which was situated about 35 metres from the reception. He said that that notice would not be visible to someone who did not go anywhere near the guardhouse.

[24] Gregorson was adamant that disclaimer notices were displayed at the places mentioned by him and as indicated on the photographs.

[25] Even though, according to him, the plaintiff had to follow a certain procedure before driving his vehicle into the premises, he did not dispute the manner in which the plaintiff said he entered the premises. His evidence on this aspect was that the normal procedure, which was not always adhered to, was that a driver would stop his vehicle outside the premises and walk to the reception where he would register and be given keys. Thereafter he would return to his vehicle and drive into the premises.

[26] Referring to the disclaimer notice displayed at the motor vehicle entrance Mr *Koekemoer* put to Gregorson that normally people do not read the notices, to which Gregorson replied positively.

[27] Gregorson confirmed that there was no disclaimer displayed at the reception. The only notice there present stated that the right of admission was reserved.

[28] He testified that the toilets where the incident took place were situated at the reception area. They serviced the restaurant, the bar and the conference room. The

staff also used the said toilets facilities. According to him Red Alert Cleaning Company was responsible for doing cleaning of the hotel and that they had been doing so for a period of 20 years. Among others, they cleaned the rooms, the reception area and the toilets. At the time of the incident Red Alert ran two cleaning shifts. An early shift and a late shift. They commenced from about 7h00 and ended at about 22h00.

[29] At the time of the incident in 2009 the cleaners were required to inspect the toilets twice in the morning, twice in the afternoon and twice in the evening. There was a cleaning roster in place which a cleaner had to sign after performing any work in the toilets. Gregorson himself did spot checks to ascertain whether the toilets were cleaned satisfactorily. In the toilets the cleaners were required to replenish paper and scrap supplies; clean up any other waste; rubbish bins had to be emptied and cleaned. The toilets had to be cleaned as well.

[30] Referring to plaintiff's testimony to the effect that a handyman employed by defendant had told him (the plaintiff) that the reason there was water in the toilet was that there had been a burst pipe. Gregorson testified that he had no knowledge of a burst pipe and that if that had happened he would have been informed within an hour of its happening. He said that in such a case he would have been obliged to shut off the water supply to the hotel. He discounted the story about the burst pipe and stated that if that had happened, there would have been a lot more water in the toilet than had been testified to by the plaintiff. According to him plaintiff's evidence

indicated clearly that there was a small amount of water an arms length from the urinals.

[31] His evidence was that he was satisfied that the defendant had taken reasonable steps to put a cleaning syestem in place at the premises.

[32] He said though he had received a report that the plaintiff had been drinking liquor before the incident, the person who informed him about that was no longer working for the defendant.

[33] On the evidence placed before me I am satisfied that the plaintiff injured his ankle when he slipped and fell in the defendant's toilets. His evidence to this effect has not been gainsaid. The incident was reported to the receptionist and to Gregorson. The next day the defendant transported the plaintiff to hospital where he received treatment. Mr Gregorson said he heard of the incident and saw the plaintiff when he returned from hospital the next day. Plaintiff was on crutches and had a plaster of paris cast on his leg.

[34] I also accept that when the plaintiff checked in at the reception on 16 August 2009 he completed and signed the registration card and that the said card contained the exemption clause quoted in paragraph [3] above.

[35] During argument Mr *Koekemoer* submitted that he could not in the circumstances of this case argue that there were no disclaimer notices displayed on the defendant's premises. He stated clearly that he was not asking the Court to reject the evidence of Gregorson that there were disclaimer notices displayed at the motor vehicle entrance and at the guardhouse. He submitted regarding the disclaimer notice at the guardhouse, that not much reliance should be placed on it because there was no evidence that the plaintiff saw it.

[36] The plaintiff's evidence was that he did not see the disclaimer notices. He did not say that they were not there. Mr Gregorson testified that the notices were there at the time the plaintiff was a guest at the hotel. Photographs were handed in, which according to Gregorson, showed the disclaimer notices at the motor vehicle entrance and at the guardhouse. Moreover, the motor vehicle entrance was used by guests only and not by the construction workers who had their own separate entrance. They were not given the tags in order to use the entrance gate. The evidence of Gregorson to the effect that the motor vehicle entrance gate was always closed and that guests had to use the plastic tags to exit the hotel premises makes sense to me. Gregorson's evidence was convincing that this arrangement was designed to safeguard the property of the hotel. In addition, the hotel was boarded so as not to give the construction workers access to the hotel. This was a safety measure employed by the defendant.

[37] In the light of his evidence I find that the disclaimer notices were displayed at the motor vehicle entrance and the guardhouse.

[38] Plaintiff's evidence that he was not given a tag to operate the gate is not acceptable to me. I also do not accept his evidence that there was no gate at the entrance. On this aspect I prefer the evidence of Gregorson to that of the plaintiff.

[39] Having found that the plaintiff injured his foot when he slipped and fell on a wet floor, the next question for decision is whether or not the defendant was negligent in the circumstances. Mr *Nepgen,* for the defendant conceded that defendant had a legal duty to take steps to guard against harm occurring to the plaintiff when using the toilet facilities. He submitted however that plaintiff bore the onus of proving negligence on the part of the defendant.

[40] The test for negligence is set out in ***Kruger v Coetzee*** **1966 (2) SA 428 (A) at 430E** as follows:

> (a) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the Plaintiff;
>
> (b) Would a reasonable person have taken steps to guard against the possibility;
>
> (c) Did the Defendant fail to take the steps which he or she should reasonably have taken to guard against it?
>
> If all three parts of this test receive an affirmative answer, then the Defendant has failed to measure up to the standard of the reasonable person and will be judged negligent.

[41] In ***Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another*** **2000 (1) SA 827 (SCA) at 839** it was held that "there can be no universally applicable formula which is appropriate in every case (p. 839 H) that in the ultimate analysis, the true criterion for determining the negligence

is whether in the particular circumstances the conduct complained of falls short of the standard of a reasonable man (839 G)."

[42] The general manner of the occurrence of harm will suffice and the precise or exact manner of the occurrence need not be foreseeable. See ***Harvest*** supra at 840B.

[43] Mr *Koekemoer* submitted that on the facts of this case I should find that a wet and slippery floor causing the plaintiff to injure himself was reasonably foreseeable. According to Mr *Koekemoer the* fact that the defendant introduced a cleaning regime in respect of the toilets was an indication that it foresaw the possibility of harm occurring to its guests, including the plaintiff. Counsel submitted that there being no evidence to show that on that particular day steps were taken by the defendant to clean the toilets in order to ensure that someone who entered the toilet facilities did not slip and fall, and injure himself. He submitted further that there was no evidence as to when the toilet facilities were cleaned before the plaintiff injured himself and Gregorson, admitted that it was reasonably foreseeable that a wet and slippery floor could cause a customer to fall and injure himself.

[44] On this issue Mr *Nepgen* referred to the evidence of Gregorson and submitted that it was the best evidence available to defendant. According to Mr *Nepgen* the incident occurred two years before the issue of summons and by that time the roster used by the cleaners in the bathroom was not available because the defendant only kept the roster for nine months. Counsel submitted that I should accept the evidence of Gregorson regarding the cleaning regime which was in place at defendant's hotel

and that if on that particular day, there was a complaint that the cleaning contractor had not performed its cleaning task he would have heard about it.

[45] Mr *Nepgen* referred me to the matter of ***Monteoli v Woolworths (PTY) LTD 2000 (4) SA 735W at 745E–G/H*** where the plaintiff slipped on a bean in a supermarket and injured herself. Defendant adduced evidence that a cleaning system in place at that supermarket was reasonably adequate to detect and eliminate spillage. However, no evidence was adduced to prove that cleaners were on duty and performing their duties in terms of the cleaning system. At 745E-G/H the Court held that :

> "Where a defendant credibly gives evidence to the effect that it cannot take the matter further, then it seems to me that no inference adverse to it can be drawn. There was no evidence remotely to suggest that the cleaning system failed on the day in question. On the contrary, rigorous cross-examination on behalf of the appellant brought forth answers to suggest that it had been working normally. It must be borne in mind that the respondent admitted that it owed its customers a legal duty to take measures designed to prevent accidents of this kind from occurring. The evidence of the cleaning systems in operation at the respondent may well have been led by careful counsel anxious not to expose his client to any unnecessary risks in litigation. Notwithstanding my observations above about the adequacy of the respondent's cleaning systems, it seems to me that the function (whether intended or not) of this evidence was not so much to rebut an inference of negligence (or, more narrowly, fault)."

Moreover the staff of the hotel also used the toilets and would have reported any non-compliance with the terms of the contracts with Red Alert to Gregorson.

[46] It is common cause or it is not disputed that the defendant had a cleaning system in place at its toilet facilities. The evidence of Gregorson satisfies me that

the system was functioning effectively. Plaintiff had, on occasion, before the incident used those facilities and found them to be clean and tidy. Mr Gregorson was not on duty when the incident happened and testified generally about the cleaning system that was in place. A cleaning contractor had been employed to execute cleaning services. There is no evidence before me to suggest that the cleaners were not at work on the day in question. Neither is there evidence to show that the toilets were not cleaned before the plaintiff was injured. I agree with the judgment in the ***Monteoli*** matter and I come to the conclusion that the evidence placed before me shows that the defendant took reasonable precautions in ensuring that the toilet facilities were kept in a clean and dry condition and that they did not pose a danger to its guests, including the plaintiff.

[47] In the circumstances I find that the defendant was not negligent and for that reason alone I would dismiss the claim with costs.

[48] In case the above finding is wrong, there is another reason on the basis of which I would dismiss the plaintiff's claim with costs. It concerns the application of the exemption clause contained in the registration card and the disclaimer notices displayed on the defendant's premises.

[49] ***Christie's The Law of Contract in South Africa, 6th Edition***, says the following about the *caveat subscriptor* rule :

> "It is a matter of common knowledge that a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently –turn out not to be to his liking he has no one to blame but himself. This general principle is, in our law, usually traced back to *Burger v Central South African Railways* 1903 TS 571."

[50] The plaintiff admitted that he signed the registration card when he booked in at the hotel. He supplied the hotel with his personal details as well as the registration number of his vehicle. He said he did not read the registration card and it was not explained to him.

[51] I need not dwell much on this matter because plaintiff's counsel, Mr *Koekemoer*, conceded that the plaintiff was bound by the terms of the registration card on the basis of the *caveat subscriptor* rule. The fact that he did not read it is irrelevant. This concession was properly and correctly made by counsel. The plaintiff is bound by the contract whether he read it or not.

[52] Regarding the disclaimer notices I have already found that there were disclaimer notices displayed on the defendant's property. However, Mr *Koekemo*er submitted that the exemption clause was not enforceable against the plaintiff.

[53] Mr *Koememoer* made the above submission with reference to the matter of **Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)** where the defendant hotel relied on the disclaimer notices that were displayed at various locations on the premises, and on the exemption clause printed on the hotel's registration card, which the plaintiff had signed.

[54] In that matter the Court held as follows:

> (a) that whereas prior to the Constitution, clauses contracting out of liability for negligence causing bodily injury or death, were

permissible, the Constitution has now effectively changed the situation(at para 43);

(b) that the Constitutional Court decision of Barkhuizen v Napirer 2007 (5) SA 323 (CC) at para. 28 – 29 gave a clear indication that a term in a contract that seeks to deprive a party of judicial redress is *prima facie* contrary to public policy and is inimical to the values enshrined in our Constitution, even if freely and voluntarily entered into by consenting parties (at para. 47, para. 50);

(c) that exemption clauses that exclude liability for bodily harm in hotels and other public places have the effect generally, of denying a claimant judicial redress (at para. 52);

(d) that to deny a claimant judicial redress for injuries he suffered as a result of the negligent conduct of the hotel, offends against notions of justice and as such, should not be enforced (para. 52 – 53).

[55] In conclusion, Mr *Koekemoer* submitted that to determine whether the exemption clause offends public policy, the values and the principles that underlie our constitutional democracy must be given expression to and that a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and is, therefore unenforceable. In this regard counsel referred me to ***Barkhuizen v Napier*** **2007 (5) SA 323 (CC)** at paras 29 – 30 and clause 34 of the Constitution. I must confess that this extract has been referred to by counsel in isolation from the rest of the judgment and is not the dictum of the case.

[56] Mr *Koekemoer* submitted that to enforce the exemption clause would have the effect of denying the plaintiff redress for the injuries he suffered and as such, would be unfair, unjust and be contrary to public policy even if entered into freely and voluntarily by consenting parties.

[57] On the other hand, Mr *Nepgen* submitted that the decision in the matter of ***Birchwood Hotel*** supra was clearly wrong and that I should not follow it.

[58] In the light of Mr *Koekemoer*'s concession that the plaintiff was bound by the exemption clause as well as the disclaimer, it was not necessary for Mr *Nepgen* to address me on this aspect. The concession was made properly and correctly. In this regard see ***Durban's Water Wonderland (PTY) LTD v Botha and Another*** **1999 (1) SA 982 (SCA) at 991F-G** where the following was stated:

> ". . . The evidence, however, did not go that far. Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but did not admit to having actually seen any of the notices at the appellant's park on the evening concerned, or for that matter at any other time. In these circumstances, the appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an inquiry whether the appellant was reasonably entitled to assume from Mrs Botha's conduct in going ahead and purchasing a ticket that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them."

[59] In ***Afrox Healthcare BPK v Strydom*** **[2002] 4 All SA 125 SCA** the plaintiff (a patient) sued a private hospital which relied, as its defence, on an indemnity clause contained in the contract entered into between the parties. The plaintiff challenged the validity of the indemnity clause on the basis that it was not in the public interests;

and that the admitting clerk should have brought the clause to the attention of the plaintiff.

[60] The Court held that the indemnity clause was not against public policy. For the purpose of the judgment the Court accepted in favour of the respondent that the provisions of s 27(i)(a) of the Constitution, which provides for the right to have access to healthcare services, applied, even though the section had not been operative at the time of the conclusion of the relevant agreement.

[61] The Court was prepared to accept too that, by virtue of s 39 of the Constitution, the determination of whether a contractual provision was contrary to public policy or not had to be informed by the values of the Constitution.

[62] In ***Barkhuizen v Napier* 2007 (5) SA 323 (CC)** at para 30 Ngcobo CJ, writing for the majority of the Court, said the following:

> "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. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms."

In my view the contract entered into between plaintiff and defendant is not in conflict with the values enshrined in the constitution.

Furthermore in ***Brisley v Drotsky*** **2002 (4) SA 1 (SCA)** at para 91 Cameron JA (as he then was) held that:

> "In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines."

[63] In the ***Afrox*** matter the Supreme Court of Appeal found unequivocally that a clause such as that found in the present case is not contrary to public policy. In the light of this decision the ***Birchwood*** judgment will not be followed. I note that the ***Birchwood*** judgment has not been referred to in any of the judgments that deal with this issue.

[64] Furthermore, in the ***Brisley*** matter at para 94 Cameron JA (as he then was) held that:

> "On the contrary, the Constitution's 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. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity:
>
> > 'If we look at the law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build."

[65] I agree with the above statements. The plaintiff and the defendant, as consenting parties, entered into the agreement freely and voluntarily. In the circumstances, I am unable to come to the assistance of the plaintiff.

[66] Plaintiff's claim is therefore dismissed with costs.

B. SANDI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff : Adv Koekemoer
Instructed by Neville Borman and Botha Attorneys

Counsel for the defendant : Adv Nepgen
Instructed by Netteltons Attorneys