REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 2010/47765

DELETE WHICHEVER IS NOT APPLAINTIFFICABLE

1. REPORTABLE: YES/~~NO~~
2. OF INTEREST TO OTHER JUDGES: YES/~~NO~~
3. REVISED.

3/4/12 ..... C Nicholls .....

DATE SIGNATURE

In the matter between:

NAIDOO, RUBANATHAN POOENTHRAN **Plaintiff**

and

BIRCHWOOD HOTEL **Defendant**

JUDGMENT

NICHOLLS J

Introduction

[1] This is an action against a hotel owner in which damages are sought for bodily injuries. It has raised the question as to the proper approach to be taken to exemption clauses under the new Constitutional dispensation.

[2] The defendant is the Birchwood Hotel ("the hotel") and carries on business as a hotel and conference centre near the OR Tambo International Airport. The plaintiff, Rubanathan Pooenthran Naidoo ("Naidoo") is a fleet manager and coach driver. On the morning of 15 October 2008 the gate to one of the entrances of the hotel fell on top of Naidoo causing him serious bodily injuries. He has sued the hotel for the damages he suffered as a result thereof.

[3] At the commencement of the trial the court, with the consent of the parties, granted an order in terms of rule 33(4) that the merits be separated from the quantification of the plaintiff's damages. Accordingly the only issue for determination at this stage is whether the defendant is liable for the bodily injuries sustained by the plaintiff.

[4] Naidoo pleaded that the hotel had been negligent in that it had failed to take adequate steps to prevent the incident from occurring by not properly maintaining the gate; not ensuring that it was safe for public usage and failing to warn the public of the potential danger created by the state of repair of the gate.

[5] It is not disputed that the hotel owed its customers a duty of care to maintain its premises in a safe condition. The hotel denied that its employees were negligent and pleaded that Naidoo contributed to, or was the cause of, the incident by interfering with the operation of the gate. The crux of the hotel's case is its reliance on disclaimers, which it contends exempt it from liability for any damages that Naidoo may have suffered as

a result of its negligence. The issues to be determined are, firstly whether such disclaimers were displayed at the time, and secondly whether they would exempt the hotel from liability.

[6] The hotel pleaded that the disclaimers were prominently displayed at the entrance where the gate was located and around the premises, which Naidoo took cognisance of, thereby creating a tacit contract between himself and the hotel. Furthermore it is pleaded that by signing the hotel register Naidoo bound himself to the terms and conditions appearing on the reverse thereof which included an exemption clause.

[7] Naidoo, having instituted a delictual claim, has the onus of proving negligence on the part of the defendant. The hotel, insofar as its defence is based on a contract in terms of which liability for negligence is excluded, bears the onus of establishing the terms of the contract and that it did everything reasonably necessary to bring these terms to the attention of Naidoo[1].

The Evidence

[8] The main issue in dispute in respect of the incident is whether Naidoo had merely approached the gate when it fell on him or whether he was pushing the gate at the time. In this regard Naidoo and the security guard, Tobius Mudhluli ("Mudhluli") give differing versions.

[9] Naidoo's evidence was that he had been a coach driver for more than 22 years. His first visit to the Birchwood Hotel was on 14 October 2008 when he was driving a busload of passengers from Durban who were booked in to stay at the hotel for the night. He entered the hotel premises at about 9

[1] *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A); *Durban's Water Wonderland (Pty) Ltd V Botha and Another* 1999 (1) SA 982

pm that evening through the service entrance. Naidoo testified that normally coach drivers would stay in the drivers' quarters but because one of the passengers had not shown up, he approached the reception to see if any accommodation was available for him. He was allocated a room and given a key for which he signed.

[10] Naidoo's evidence regarding the incident was as follows: The following morning at about 8am he went to start the bus. He was unable to exit as the gate was closed. He waited until he saw a security guard walking towards the gate. The security guard then called to Naidoo and requested assistance in opening the gate. At that stage the gate was half open and Naidoo did not know what the security guard required of him. According to Naidoo whilst he was walking towards the gate, it fell on top of him. He screamed as he was pinned under the gate. The security guard was not able to lift the gate on his own and had to be assisted by other men who lifted it off Naidoo's body and managed to drag him out. Thereafter Naidoo was taken to hospital with fractures of the lumbar spine and ankle.

[11] Mudhluli, who was an employee of the defendant from 2007 to 2009, testified that he was operating the gate on the day in question. He said he saw the bus at about 8am waiting to exit the hotel. The bus came to standstill at the stop sign just before the gate, waiting for it to open.

[12] Mudhluli explained that to open the gate, he first pushed half of the gate to the left and then pulled the other half to the right. As he pulled the gate towards the right it jammed and then ran off its rail. He said that he attempted unsuccessfully to open it three times, using maximum force.

[13] According to Mudhluli, after he had made three attempts to open the gate, Naidoo came running from the bus wanting to know what had happened. Mudhuli told him that the gate had got stuck. They then both attempted to

push it open from the middle. Under cross examination Mudhluli said he attempted to push the gate open six times, three times alone and three times with the assistance of Naidoo. Mudhluli explained that whilst he was pushing alone the gate became jammed but had not come off the rails, this occurred only after Naidoo had come to his assistance. Mudhluli said it was on his sixth attempt when he was pushing the gate with Naidoo, that it dislodged and fell on Naidoo.

[14] That the gate came off the rails only after Naidoo had come to assist is in contradiction to two statements Mudhluli made, one 15 minutes after the incident and a further undated statement. In the former he stated that *"...I was trying to open the gate and the wheel of the gate came out of the way. So I tried to push it back and I failed, the driver feel* (sic) *to help and he came and helped me to push the gate but wont drive back, so we decide to push it forward so it can get on its way."* In the latter statement he states *"I tried to open the gate, but I could not, the gate was stuck, I tried again, but realised the gate was off the rail. Mr Naidoo then approached me..."*. From these two statements it is apparent that the wheels of the gate had come off the rails before Naidoo approached.

[15] Much was made by the defendant that on Naidoo's description of events, the gate could never have fallen on him. This may be so, but that the gate did fall on him is not in dispute. How the gate in fact operated is not material in my view. What is clear is that at some stage while Mudhluli was pushing the gate it came off its rails. It is likely that this was the reason for the gate jamming in the first instance. Mudhluli's evidence that it only came off the rails after Naidoo had started pushing it, is improbable in the light of the statements Mudhluli made shortly after the incident. Likewise it is unlikely that Naidoo would leave his bus for no apparent reason and start pushing the gate. On the probabilities Naidoo's version that he was called by Mudhuli and the gate fell on him while approaching is

more plausible. Even if Naidoo was a participant in the attempt to force the gate open the probabilities are that he did so on Mudhluli's invitation, thereby placing Naidoo in a situation of danger.

[16] Naidoo's evidence was that the gate and the layout of the guard house were not as depicted in the photographs allegedly taken on the day of the incident. It is common cause that the gate has since been changed. Naidoo testified that on 15 October 2008 the guardhouse was not in existence and the gate comprised of a single gate sliding from right to left and manually operated. He was supported in this contention by his wife and Mr Rajendran Nanthan ("Nanthan"), a fellow coach driver. Neither of these two persons witnessed the incident but Mrs Naidoo came to the hotel on the same day to observe the scene, after visiting her husband in hospital.

[17] Nanthan testified that he had stayed at the hotel prior to the 15 October 2008 on approximately seven occasions and after the incident on two occasions, the first being two weeks after. His evidence was that there had been a change to the structure of the entrance since Naidoo's accident. Before there was no guardhouse on either side, and the gate was different, consisting of a single gate sliding from right to left. It was much higher. Immediately thereafter it had changed to a much smaller gate.

[18] The evidence of Naidoo's witnesses in this regard is in direct contradiction to the hotel's witnesses who all claimed that the guardhouse existed at the time but agreed that a different gate had subsequently been installed. Renier Erwee ("Erwee"), the risk manager for the defendant at that time, testified that he took the photographs of the gate. He said that they had been taken on the day of the incident, 15 October 2008, despite the date on the photographs being reflected as 14 October 2008. This he attributed

to a fault with the camera. He vehemently denied that the photographs did not depict the structure of the gate at the time of Naidoo's accident.

[19] According to Erwee the gate at the time was a double gate with guide rails at the top and a stopper at the bottom to prevent it from sliding off the rails when it came to a halt. He believed that a stone or other object on the track may have caused the wheels to come off the rails. Erwee said that later a lighter, smaller, motorised gate with a swing arm had been installed.

Negligence

[20] The time-honoured formulation in determining negligence was set out by Holmes JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at p430 as follows:

> "*(a) a diligens paterfamilias in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and(ii)would take reasonable steps against such occurrence; and*
>
> *(b) the defendant failed to take such steps.*

[21] Later cases have emphasized that this formulation should be utilized with flexibility and the test is in fact whether some harm should have been foreseeable to someone in the position of the plaintiff. In other words the true test is whether the conduct complained of falls short of the standard of care required of a reasonable person.[2]

[22] It is common cause that the hotel owed its guests a duty of care. In assessing whether there has been negligence on the part of the hotel,

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[2] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage* 2000(1) SA 827 (SCA)

Naidoo has to show that the harm was reasonably foreseeable and that reasonable steps could have been taken to avert it.

[23] In trying to force the gate open despite it having come off its rails, or attempting to force it back onto the rails, Mudhluli should have foreseen the possibility of the gate falling and injuring someone in the vicinity. Erwee conceded that once the gate had run off the rails then a reasonable person would be aware of the potential hazard created and would be expected to warn others not to come near. In this regard Mudhluli failed to take reasonable steps to avert the accident when he could easily have done so by merely alerting Naidoo of the problem and requesting him to keep his distance.

[24] There is little merit in the argument that it has not been proven that a delict was committed and that Naidoo has failed to show in what way the hotel was negligent. Property-owners are liable to ensure that their property does not present undue hazards for the public who enter and use the premises. This duty is even greater in respect of property such as a hotel which is designed for use by the public. The hotel is obliged to take reasonable steps to ensure that the public is safe.[3]

[25] Reasonable steps should at the very least entail regular checks to ensure that every gate on the hotel premises is well maintained and functioning properly at all times. If it is malfunctioning the public should be warned of the potential hazard, not invited, or even allowed to come and assist. Guests should be prohibited from ever being involved in any operations because of the inherent danger of injuring themselves.

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[3] *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W); *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009(1) SA 265 (SCA)

[26] Although the evidence of both Mudhluli and Erwee was that the gate had never given trouble prior to this incident, it was on all versions an extremely heavy gate with the potential to inflict serious injury should it fall on anyone, (as it indeed did). Erwee in his report on 'precautionary measures' made after the incident, recommended that the heavy gate be replaced with a new lighter gate that should run on gate motors to ensure that it would always be on the track and that no person would have to pull or push the gate. This, he concluded, would make certain that if the gate did fall, no person would be injured. The report is itself an admission that reasonable steps could have been taken to avert the harm.

[27] The plaintiff has accordingly discharged the onus of proving that the standard of care of the defendant fell short of that required of a reasonable person in the position of the defendant. Insofar as the hotel pleads contributory negligence, on the probabilities I find that Naidoo played no part in causing the harm. He neither ignored any warning not to involve himself nor did he act contrary to Mudhluli's instructions. Contributory negligence has therefore not been shown and the defendant should accordingly be held 100% liable for the damages caused.

The presence of disclaimer notices

[28] The hotel relies firstly, on the disclaimer notices it contends were displayed at various locations on the premises and secondly, on the disclaimer printed on its hotel registration card. Naidoo admitted to signing the registration card but denied the existence of disclaimer notices on the guardhouse or in other locations.

[29] Naidoo's denials regarding the existence of disclaimer notices are primarily linked to his version that the guardhouse was not in existence at the time of the incident. He was supported in this by his wife and Nanthan. The

hotel's witnesses, Erwee, Mudhluli and Johannes Makgae all testified that the guardhouse had already been built as at that date. Erwee and Mudhluli have since left the employment of the defendant and had nothing to gain by being untruthful in this regard. Moreover as permanent employees of the defendant their recall of the structures existing at the time are likely to be far more reliable than those of Naidoo and his witnesses whose observations were limited to short periods when they visited the hotel. I therefore conclude that in all probability the guardhouse was in existence on 15 October 2008.

[30] However, whether there were disclaimers signs displayed on the exterior walls of the guardhouse next to the gate, at the main vehicle entrance and on both sides of the pedestrian entrance to the reception area is subject to doubt. Erwee testified that when he commenced his employment with the defendant in April 2008 there were no disclaimers on the premises of the hotel. He was anxious that disclaimers should be printed and erected as soon as possible. After consulting his former employers at Gold Reef City regarding the wording of the disclaimers, he sent them for printing and instructed the receiving clerk to inform him as soon as they arrived.

[31] Benjamin Thabane, the receiving clerk, said that he received the printed disclaimers on 29 August 2008. In his evidence he identified the signature on the delivery note as his. Understandably he had no independent recollection of what he did with the printed disclaimers once he received them but said that normally he would put received items into storage and then inform the relevant persons of the delivery. Erwee could not say when he erected and displayed the disclaimers but thought it would be less than a month after receiving them.

[32] It seems improbable that Erwee would recall this information some three years after the event. Bearing in mind that it took Erwee four months to

order the disclaimer notices and for the receiving clerk to receive them, it is unlikely that he would remember when he erected the signs. One would expect a corporate entity such as the hotel to have accurate records and documentation reflecting when the disclaimers were collected from stores, by whom, as well as when, and by whom they were erected.

[33] In the circumstances I find that the defendant has not discharged the onus of proving that the disclaimer signs were displayed in various locations on the hotel premises as at 15 October 2008. Even if I am wrong in this regard, Naidoo's evidence was that he entered the hotel premises for the first time at night and did not see any disclaimers. That the entrance was poorly lit is undisputed. Neither did he see a disclaimer to the entrance to the reception. It is common cause that none of the disclaimers were brought to his attention.

[34] Naidoo conceded that he was aware that many hotels have such disclaimers but they would usually be displayed on a board above the reception in a manner that would ensure they were clearly visible. He further testified that ever since his company had been involved in a previous incident, it was company policy that drivers would be obliged to contact the company if disclaimers were displayed. In such cases permission to park the bus at the hotel would only be granted if the tour company agreed to take responsibility. This policy was confirmed by Nanthan. There is nothing to suggest that Naidoo's testimony that he always paid particular attention to disclaimers is implausible.

[35] This leaves the question of the hotel registration card. Naidoo's evidence is that because one of the passengers did not arrive there was an extra room at the hotel on the night of 14 October 2008 which was made available to him. When he checked in he was given the hotel registration card to sign.

[36] This document consists of a single sheet with print on both sides. The front page contains a list of names of guests, together with allocated room numbers and their signatures. On the eighth line the name of a guest had been deleted and Naidoo entered his name and signed next to his name. At the bottom of this document, and separated from the list of names but in print of the same size as the names appear the words:

> "Please read terms and conditions on reverse!"

[37] On the back of the document appears a heading "REGISTRATION CARD". Seven clauses appear which relate almost entirely to conditions of payment. Three quarters of the way through the text appears clause 5 which provides as follows:

> *"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."*

[38] Naidoo said he did not read the back of the registration card. He said in most instances the drivers do not read the "fine print" although they are familiar with disclaimers after many years of staying in hotels. In cross-examination he agreed that he was bound by the terms contained therein.

<u>Whether the disclaimers are contractually binding</u>

[39] Generally persons who sign contracts are bound by the ordinary meaning and effect of the words.[4] In some instances the principle of quasi-mutual assent is applicable, where it is assumed that the signatory, by signing the document was signifying his intention to be bound by it.[5] In order to rely on quasi-mutual consent, a party has to demonstrate that it took reasonably sufficient steps to bring these terms to the notice of the other party and was therefore entitled to assume that by his conduct in going ahead notwithstanding the disclaimer, the other party had assented to the terms thereof. This is the doctrine applicable in the so-called ticket cases where terms and conditions are to be found on the tickets. The purchaser is assumed to have assented to the conditions once he or she purchases a ticket.[6]

[40] It is settled law that a party wishing to contract out of liability must do so in clear and unequivocal terms which are clearly visible. In *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) para [6] Marais JA said:

> *"In matters of contract the parties 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. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. "*

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[4] *Burger v Central South African Railways* 1903 TS 571; *Trans-Drakenberg Bank Ltd v Guy* 1964 (1) SA 790 (D); *Stiff v Q Data Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA); *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W).
[5] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Coetzee v Van de Westhuizen* 1958 (3) SA 847 (T); *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ).
[6] *Durban's Water Wonderland* case supra; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A)

[41] Our courts have interpreted any exemption clause contra proferens. That is to say if there is any ambiguity, the language must be interpreted against the proferens.[7] In *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[8] it was expressed thus:

> *"If the language of a disclaimer or exemption clause 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 proferens. (See Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C.) But 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' (cf Canada Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC) at 310C--D)."*

[42] The wording of the exemption clause contained on the reverse of the hotel registration form is straightforward. It absolves the defendant from liability for any injury, even death, arising out of negligence, even gross negligence, of any person in the employ of the hotel. The request that guests read the terms on the reverse of the hotel registration form was clearly visible for all to see. Even if Naidoo did not read the disclaimer, he conceded that he ought reasonably to have expected that it would contain such conditions. That Naidoo was aware of the disclaimer and the contents thereof cannot be denied; he said as much in evidence.

[43] Prior to the new constitutional dispensation clauses contracting out of liability for negligently causing bodily injury or death were permissible. This approach was affirmed by the Supreme Court of Appeal in *Durban's*

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[7] *Government of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *Durban's Water Wonderland* case supra

[8] *Durban's Water Wonderworld v Botha and Another* 1999(1) SA 982 (SCA)

Water Wonderland v Botha and Another[9]. In the case of *Afrox Healthcare Bpk v Strydom*[10] the court held that such clauses were not contrary to public policy and that public interest dictated that contracts entered freely and voluntarily by contracting parties with the necessary contractual capacity be enforced. It noteworthy that the contractual relationship in the *Afrox* case was entered into by the parties when the Constitution was not yet operative. The court appreciated the impact of the Constitution but held that with regard to direct damages, the Constitution had no retrospectivity.

[44] That exemption clauses may run counter to public policy was alluded to in *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) dealing with exclusion of liability for negligently causing the death of another. As pointed out there, the *Afrox* case left scope for such a conclusion as the contract was entered into pre-Constitution. The Supreme Court of Appeal made mention of statutory provisions in England, Wales and Northern Ireland which declared exemption clauses such as those found in the *Afrox* case to be unlawful.[11]

[45] I am unconvinced that such clauses would withstand constitutional scrutiny. Nevertheless the circumstances of the *Durban's Water Wonderland* and the *Afrox* matters are very different to the present case. The activities undertaken by the plaintiffs in those cases by their very nature carried inherent risks. In *Durban's Water Wonderland* the plaintiff and her daughter were injured when they were flung from a ride at an amusement park. In *Afrox* the plaintiff was undergoing an operation. These facts are distinguishable from the facts in this case where the plaintiff was merely a guest exiting a hotel, an activity that could by no stretch of the imagination be considered dangerous.

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[9] *Durban's water Wonderworld v Botha and Another* 1999(1) SA 982 (SCA)
[10] *Afox Healthcare Bpk v Strydom* 2002(6) SA 21 (SCA)
[11] Unfair Contract Provisions Act 1977

[46] While the court in *Afrox* was of the view that the principle of contractual autonomy was paramount and the exemption clause was therefore not contrary to public interest, this finding must now be seen through the lens of the Constitution. In *Brisley v Drotsky* [12] the observation was made that it was not difficult to envisage a case where certain contracts offend against the new social compact that the Constitution embodies. Decisions that proclaim that limits of contractual sanctity lie at the borders of public policy would receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights, so said the court.[13]

[47] This enhanced force and clarity is to be found in the Constitutional Court decision of *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Ngcobo J stated that when challenging a contractual term, the question of public policy inevitably arises. But this was no longer difficult to determine because:

> *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now rooted in the values of our Constitution and the values that underlie it…human dignity, equality and freedom…as given expression by the provisions of the Bill of Rights.. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*[14]

[48] The Constitutional Court in that matter was dealing with the constitutionality of a time-limitation clause in an insurance policy which the

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[12] 2002(4) SA 1 (SCA)
[13] 2002(4) SA 1 (SCA) para 92
[14] *Barkhuizen* supra at para 28 - 29

insurer contended absolved it from liability because the claim had not been instituted within the requisite 90 day period. The court found that time limitations were not per se unreasonable or contrary to public policy. Whether such a clause was enforceable would depend on whether it was fair and reasonable in the circumstances of a particular case. The court's view was that *"if a time limitation clause does not afford a contracting party a reasonable and fair opportunity to approach a court, it will declare it to be contrary to public policy and therefore invalid. To the extent that the Supreme Court of Appeal appears to have held otherwise, that dictum cannot be supported."*[15]

[49] The court went on to consider how to determine fairness in this context and said that two questions must be answered. The first question was whether the clause itself was objectively unreasonable, and second question was, if it were found to be reasonable, then should it be enforced in the circumstances. Because the facts placed before it were so scanty, the court was unable to conclude that the time afforded the applicant did not provide an adequate and fair opportunity to have the dispute resolved by a court of law. Therefore the finding made in terms of the second leg of the enquiry was that the time-limitation clause was enforceable.

[50] The Constitutional Court 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. This is not a new principle. In 1925 in *Schierhout v Minister of Justice*[16], which was cited with approval in *Bafana Finance Mabopane V Makwakwa and Another* 2006 (4) SA 581 (SCA), it was held that:

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[15] Para 72
[16] *Schierhout v Minister of Justice* 1925 AD 417 at 424

> *"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking legal redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land."*

[51] In the *Bafana Finance* case, the Supreme Court of Appeal unanimously found that a clause which had merely a tendency, rather than the result of depriving a party of the right to approach court for redress was inimical to public policy.

[52] According to the two-stage enquiry espoused in the *Barkhuizen* case the court may first examine whether a term in a contract is objectively reasonable. If it finds that it is, the next enquiry is whether it should be enforced in the particular circumstances. In my view exemption clauses that exclude liability for bodily harm in hotels and other public places have the effect, generally, of denying a claimant judicial redress. As this question was not argued before me I make no finding on the first enquiry. This court is however equipped to consider whether in the particular circumstances of this case the exemption clause should be enforced, even if the relevant exemption clause is not contrary to public policy.

[53] I now proceed to deal with the circumstances of this case. Naidoo was a guest in a hotel. To enter and egress is an integral component of his stay. A guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness. As stated by the Constitutional Court, *"Public policy imports the notions of fairness, justice*

and reasonableness and would preclude the enforcement of a contractual term if its enforcement would result in an injustice."[17]

[53] In summary, although I am of the view that the exemption clause in which liability for negligently causing bodily injuries or death is excluded will not pass constitutional muster, this is not the issue before me. In applying the principles enunciated in *Barkhuizen* a further enquiry is necessary where a contractual clause limits a person's right to a judicial remedy. This is whether in the circumstances of a particular case the enforcement of such a contractual term would result in an injustice. I have come to the conclusion that in the circumstances of this particular case to enforce the exemption clause would be unfair and unjust. In the words of the Ngcobo J *"A court will bear in mind the need to recognise freedom of contract, but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts."*[18]

[54] I conclude therefore that Naidoo has discharged his onus of proving his delictual claim against the hotel and that neither the disclaimer notices nor the exemption clauses are a good defence to his claim.

In the result, I make the following order:

The defendant is ordered to pay:

1. plaintiff's damages as agreed or proven;
2. costs of suit

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[17] *Barkhuizen* supra para 73
[18] *Barkhuizen* supra para 55

C.E. HEATON NICHOLLS

JUDGE OF THE SOUTH GAUTENG

HIGH COURT – JOHANNESBURG

Appearances:

Plaintiff's Counsel	:	Adv. Z. Khan
Plaintiff's Attorneys	:	Ronald Bobroff & Partners
Defendant's Counsel	:	Adv. A. Bester
Defendants' Attorneys	:	Roderick and Lowe Attorneys
Date of hearing	:	3 - 7 November 2011
Date of Judgment	:	3 April 2012