

THE STATUS OF EXEMPTION CLAUSES IN SOUTH AFRICAN LAW

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TRADEMARKING A NAME OR A LOGO OR BOTH?

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Exemption clauses are used in contracts to exclude liability that ascribes to a contracting party under normal circumstances. They are often incorporated in the standard form contracts by the service providers to the detriment of the other contracting party. As a general principle, exemption clauses are enforceable as they reflect an agreement between contracting parties. Exemption clauses that are contrary to public policy are invalid and unenforceable. They are often struck down by a court.

Public policy nullifies agreements that are offensive in themselves. Exemption clauses are no longer the prerogative of the contracting parties. Sometimes, the exemption clauses in a contract need to be pointed out to the other party or consumer. The principles of fairness,

reasonableness and constitutional values have to be considered when courts decide on the validity of exemption clauses. The Consumer Protection Act, National Credit Act and the Constitution have altered the use of exemption clauses in the law of contract to ensure fairness between contracting parties.

In *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) the entrance gate of the Birchwood Hotel fell onto Naidoo who sustained injuries as a result and sued the hotel in delict for damages. He argued that the hotel had been negligent in that it had not properly maintained the gate; had not ensured the gate was safe for public use; and had not warned the public of danger created the state of repair of the gate.

The hotel, basing its defence on the law of contract, relied on the disclaimers it had posted at the gate

and around the premises which Naidoo would have seen. It also relied on the fact that he signed the register upon the reverse of which were printed various terms and conditions including and exemption clause.

The Court refused to uphold the exemption clauses based on the fact that it would have been unfair and unjust to the plaintiff who had sustained serious bodily injuries during his stay at the hotel. *Naidoo* marks a significant stride towards fairness and equity in contracts. Freedom of contract and *pacta sunt servanda* have usually prevailed over fairness. The importance of developing the law to ensure fairness has been long overdue. Enforcing the exemption clause in *Naidoo* would accordingly not have been consistent with the spirit, purport and object of the Bill of Rights, as public policy is no longer

rooted in the notion of contractual certainty.

The court referred to the test for negligence formulated by Holmes JA in *Kruger v Coetzee 1966(2) SA 428 (A) at 430*. It noted that 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, said Nicholls J, the true test is whether the conduct complained of falls short of the standard of care required of the reasonable person. The court held that the hotel was obliged to take reasonable steps to ensure that the public was safe. It said that 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 and that guests should be prohibited from ever being involved in any operations because of the inherent danger of injury.

The court found that the hotel had not discharged the onus of proving that there were disclaimers posted in various locations on the hotel premises at the time the incident occurred. It said that even if it was wrong, Naidoo had entered the hotel premises for the first time at night and did not see any disclaimers. None of the disclaimers were brought to his attention.

In support of its decision, the court cited these words of Ngcobo J in *Barkhuizen v Napier 2007 (5) SA 323*:

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.

TRADEMARKING A NAME OR A LOGO OR BOTH?

In establishing a new business, owners often seek legal advice in connection with branding their business by developing and securing their company's intellectual property. Part of this inquiry typically involves the question, "Should we seek trademark registration of the named business brand or the company's design logos, or both?"

The short answer is "both".

Most businesses will not only have a company name brand, but also a design logo identifying the company. In the trademark world, we refer to the company name brand as a standard character mark or "word mark," and the design logo as a "design mark".

On the other hand, when you apply to register your logo or "design mark," you are seeking protection over the very specific shape, orientation, stylization, and/or color in the mark. Your company name may or may not be a part of the logo, but you are seeking protection from third parties using the specific design of your logo, or something similar, without regard to the company name.

Which Type of Mark Should Take Priority?

Since each type of trademark registration provides different protection and rights, it is not surprising that the broadest level of legal protection is achieved by registering both a "word mark" and a "design mark". However, where cost is an issue, you must determine which is the most important. First, look at your company name and ask how unique is it? Is it unique enough to guarantee that it will qualify for trademark registration, or does it contain generic or descriptive terms? If it is unique enough, you should typically apply for registration of the company name, the business "word mark," rather than a logo, a "design mark." The reason for this result is that the applicable laws offer broader protection for word marks than design-marks.

As suggested above, when you register a logo, you are getting protection only over that exact representation of your business brand, and that protection does not typically extend to the actual name of your company, even if the name is included in the logo. In contrast, when you register your company name as a word mark, you can effectively prevent other businesses from using your company name, or anything confusingly similar. Your company name is protected regardless of what kind of styling is added to it or how it is presented to consumers—the words themselves are protected—which is often how customers identify a company.