Standard Form Contracts and Exemption Clauses for Medical Procedures in South Africa: A Consumer's Narrative

by

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Declaration of Originality

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Summary

This dissertation considers the use of exemption clauses in standard form contracts within the medical profession. The need for research of this genre stems from the inherent disparate bargaining positions the parties to a medical contract tend to find themselves in. In this regard, the emerging trend is one of exploitation and abuse, whereby the patient is often prejudiced at the hands of the stronger contracting party (the medical professional or the hospital). The common law position tends to favour principles aligned with freedom of contract and sanctity of contract. This dissertation will, however, investigate the extent to which these principles can be harmonised within the new legislative framework of the Consumer Protection Act 68 of 2008 ('CPA'). The CPA has established itself as the kairotic moment for consumers seeking asylum from the adverse effects of exemption clauses and other standard form clauses, buried beneath the guise of medical formalities.

This dissertation departs from a number of fundamental cases as decided by our courts. From this premise, the interpretation and application of exemption clauses before the introduction of the CPA will be considered. Within this discussion, the notion of an exemption clause and their role in standard form contracts will be examined generally. Their role as it pertains to the medical profession will thereafter be explored. The trend which is then analysed is the abuse of power exercised by those wielding such clauses when contracting with patients, resultantly calling into question certain legal principles and doctrines (in particular, the principles and doctrines referred to include those which have persisted through our common law; those which have been handed down by our courts; as well as those premised in both ethics and statute). The influence of the CPA is then examined and in particular, the sections (that of section 22 and section 49 being of emphasis) which have a bearing on the use of exclusionary clauses in medical contracts. Thereafter, this dissertation will critically discuss whether or not the CPA has afforded greater protection to the medical consumer. Within this discussion, the medical consumer's path to redress, and the relative institutions involved thereto, is examined and criticized. The institutions which form the subject of this analysis include those pre-existing within the medical profession, as well as those established by the CPA. Finally thereafter, this dissertation reaches its conclusion based on the research so

conducted and offers recommendations as to how exemption clauses in standard form medical contracts can be harmonised within CPA's dispensation.

The research conducted herein illustrates that the use of exemption clauses in standard form medical contracts is contentious, yet is strikingly present in South African consumer law. The CPA has introduced a number of regulatory hurdles to protect the consumer from the use of these clauses in the contracting process. Although the Act's formulation is tainted by a number of ambiguities which has potentially lessened its influence, it has nonetheless paved the way for a *fairer* (own emphasis) contractual model.

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1 Introduction

1.1) Introduction

In the case of *Afrox Healthcare Bpk v Strydom ('Afrox'),*[1] the appellant admitted the respondent for an operation. Subsequent to the operation, the respondent suffered complications due to the negligent conduct of a nurse acting under the employ of the appellant. As a result of the damages suffered by the respondent, the appellant was sued. It was the respondent's contention that a tacit term was concluded within the contract that the nursing staff would treat him in a professional manner and with reasonable care, and thus a breach of this tacit term had occurred.[2]

The focal point of this dispute was an admission document signed by the respondent which contained an exemption clause absolving the hospital and its employees from all liability, except for intentional acts or omissions.[3] The respondent argued that the clause was contrary to public interest and the notion of good faith and further, that a legal duty existed on the part of the appellant and its employees to draw the respondent's attention to such a clause.[4] The respondent relied on section 39(2) of the Constitution which obliges every court, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. As per the respondent's argument, a clause of this nature was contrary to this principle and denied the respondent access to medical care. In the alternative, it was argued that the clause was unenforceable due to it being unreasonable and contrary to good faith.

The court held that exclusionary clauses should be interpreted restrictively.[5] The court, however, reversed the decision of the High Court and held that persons who do not read contracts before signing them do so at their own risk and are bound to its terms.[6] The court highlighted that the only exception to this principle is where a clear legal duty exists on a relevant party to draw the others attention to a specific provision.[7] It is this perverse notion that forms a substantial component of this

1 *Afrox* 2002 (6) SA 21 (SCA).
2 See *Afrox* at para 2 for the facts of the matter.
3 *Afrox* at para 3.
4 *Afrox* at para 7.
5 *Afrox* at para 9.
6 *Afrox* at para 34.
7 *Afrox* at para 36.

dissertation whereby a court took it upon itself to protect the principle that a contract freely entered into should be enforced, no matter the societal costs.

This case shows that our courts recognise the possibility that a hospital's liability can be limited with the inclusion of an exemption clause, provided that the negligence is not gross in nature. This is highly problematic and reflects a somewhat sinister modus operandi behind the inclusion of such clauses in standard form contracts. This conclusion finds support in the case of *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom*,[8] which illustrates how exemption clauses can be used as traps aimed at concealing questionable contractual terms.

Exemption clauses are frequently found in standard form contracts regarding medical procedures which tend to operate unfairly towards patients seeking medical attention, as they are often misapplied.[9] In this regard, our courts tend to approach exemption clauses from the bases of consensus, public policy and limiting legislation, rather than observing free standing values of fairness, dignity and equality.[10] Stoop suggests that this conservative judicial approach has been exacerbated by a lack of uniformity in judicial decision making and interpretation.[11] In line with the views of Slabbert *et al*, however, the introduction of patient sensitive statutes such as the Consumer Protection Act 68 of 2008 ('CPA') will forever change the dynamics of the medical profession.[12] The sensitivity the CPA directs towards patients is easily identifiable when considering its aim to protect the social and economic welfare of consumers in particular,[13] as well as the eight fundamental rights bestowed unto them.[14] Bradfield and Christie provide that the common law is responsible for evolving a number of techniques related to the inherent inequality of

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8 2003 3 All SA 496, 2003 (5) SA 180 (SCA) 188.

9 PN Stoop "The current status of the enforceability of contractual exemption clauses for the exclusion of liability in the South African law of contract" (2008) 20 *SA Merc LJ* 496–509 at 496.

10 Stoop (2008) *SA Merc LJ* 496. See also the judgements of *Afrox, Johannesburg Country Club v Stott & Another* 2004 (5) 11 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

11 Stoop (2008) *SA Merc LJ* 497.

12 See M Slabbert, B Maister, M Botes and MS Pepper ('Slabbert *et al*') "The application of the Consumer Protection Act in the South African health care context: concerns and recommendations" (2011) 44 *CILSA* 168-203 175 where it lists and describes the effects of the CPA on medical practice.

13 See s3(1) of the CPA.

14 See ss8-67 of the CPA.

bargaining power, which includes the enforcement of exemption clauses.[15] In order to better understand the effects that these clauses have on consumers, a lesson can be learned regarding the bearing that the CPA has had on other realms of the law specifically with regards to the potential unfairness in contractual settings.[16]

Although the principle of *pacta sunt servanda*[17] consistently promotes constitutional values of dignity and autonomy, and thereby apparently passes constitutional muster, Bradfield and Christie correctly question the adherence to this principle when the contract or its terms are seemingly unfair.[18] One would hope that the balance has tipped in favour of patient awareness instead of the rigorous safeguarding of sanctity of contract, improved through the doctrine of informed consent.[19] In this regard, the dictates of public policy, now supplemented by the CPA, are to be observed as it forms the basis upon which courts *should* (own emphasis) decide on the permissibility of a relevant clause.[20] Viewed in this light, the trend of abusing the weakened bargaining position of a party to a contract should accordingly be judged more harshly.

It is submitted that many of the difficulties associated with the use of standard form contracts can be linked to a lethargic law of contract, which has fallen behind in its pursuit of substantive justice.[21] As a result, we find that a constant battle exists between a contractual model underpinned by notions of freedom and sanctity of contract (the so called 'classical' model) juxtaposed against one which is

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15 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 14.

16 See generally Y Mupangavanhu "Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* (2012) 6 SA 170 (GSJ)" (2014) 17 *PELJ* 1167-1194; M Tait & S Newman "Exemption provisions and the Consumer Protection Act, 2008: Some preliminary comments" 2014 *Obiter* 629-643 and GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 23.

17 A common law principle which in lay terms means that agreements must be honoured between the parties.

18 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 13.

19 See generally W Moore & M Slabbert "Medical information theory and medical malpractice litigation in South Africa" (2013) 6 *SAJBL* 60-63; P van den Heever "The patient's right to know: Informed consent in South African medical Law" 1995 *De Rebus* 53-56; M de Roubaix "Dare we rethink informed consent?" (2017) 10 *SAJBL* 25-28; SAMA note on informed consent available online at https://www.samedical.org/images/attachments/guideline-on-informed-consent-jul012.pdf (accessed on 2018/04/23) and P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (2007) ch10.

20 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 16-23.

21 L Hawthorne "Public governance: Unpacking the Consumer Protection Act 68 of 2008" (2012) 75 *THRHR* 345-370 at 345.

underpinned by notions of fairness (the so called 'neo-liberal' model).[22] In this regard, consumer protection law finds homage in the latter mentioned model. What remains to be considered is whether our very own CPA has within it, the ability to protect medical consumers who suffer at the hands of exemption clauses contained within the standard form contracts produced by dubious healthcare establishments.

1.2) Research Problem

This dissertation seeks to determine whether the use of exemption clauses in standard form contracts in medical procedures can be harmonised within the new legislative framework of the CPA, whilst taking into account the development of such clauses under the common law and their new standing under South Africa's Constitutional dispensation. The following fundamental questions guide this investigation, namely:

(i) How were exemption clauses interpreted and applied prior to the implementation of the CPA in general?
(ii) How were exemption clauses contained within standard form medical contracts interpreted and applied prior to the implementation of the CPA?
(iii) What influence has the CPA had on these types of clauses and in particular, the influences of section 22 and section 49?
(iv) Does the CPA provide better protection to medical consumers with regards to its means of enforcement and avenues of redress?

1.3) Approach and Methodology

This dissertation will address the questions mentioned above, traversing over certain paradigms of the law to which this study bears significance. The legal paradigms considered cover aspects pertinent to our common law, judicial precedent, legislative instruments and to some extent, constitutional law and medical ethics. The analysis herein is focussed on the South African narrative. Even so, this author acknowledges the fact that a large portion of South Africa's laws on consumer protection have been informed by foreign jurisdictions.

[22] Ibid.

1.3.1) Chapter Two: The Interpretation and Application of Exemption Clauses Prior to the Consumer Protection Act 68 of 2008

Chapter two covers the interpretation and application of exemption clauses prior to the CPA. This chapter considers the role of these clauses in standard form contracts generally though an analysis of the common law, pre-CPA case law as well as the insight offered by various legal writers. Thereafter, the role of exemption clauses within the medical profession is explored through the scrutiny of influential cases in this regard.

1.3.2) Chapter Three: The Influence of the Consumer Protection Act 68 of 2008

Chapter three considers the potential influence which the CPA may have on the use of exemption clauses in standard form medical contracts. This chapter places its focus upon the preliminary requirements for the incorporation of such clauses in the contracting process. In particular, section 22 and section 49 constitute the bulk of this discussion and both their influence as well as their potential influence is analysed and critiqued. Additionally, a number of other sections which are interlinked to the aforementioned are considered, albeit on a peripheral level. These sections are then contextualised within the doctrine of informed consent in order to assess the value which they add towards the achievement of a fair, accessible and sustainable marketplace for consumers.

1.3.3) Chapter Four: An Analysis of the Medical Consumer's Route to Redress

Chapter four analyses the medical consumer's proposed path of redress in their quest to enforce their rights under the CPA. This chapter considers both the pre-existing institutions found within the medical profession itself that provide redress as well as the institutions established by the CPA. The emphasis of this chapter falls on the theoretical and practical difficulties associated with a medical consumer's route to redress in terms of section 69 of the CPA. Before reaching a conclusion, this chapter hosts an important discussion of two recent cases of crucial importance upon considering a consumer's right to redress under the CPA.

1.3.4) Chapter Five: Conclusion and Recommendations

Finally, chapter five offers a conclusion based on the research so conducted in this dissertation, and provides a number of recommendations, supported by the insight of the author.

1.4) Limitations and Delineations

Before considering the research contained within this dissertation, the reader's attention must be drawn to a number of limitations and delineations listed below in no particular order of importance:

(i) Although the research contained herein is premised on the umbrella right to fair, just and reasonable terms and conditions in Part G of the CPA, the focus of this dissertation is placed on sections 22 and 49 respectively.

(ii) Although both the pre-existing statutes and institutions within the medical profession are of importance regarding redress and enforcement, the focus of this dissertation falls on the provisions of the CPA.

(iii) This author recognises the existence of different types of medical professionals and specialists within the industry but in *casu* it is the medical profession in general that is considered.

(iv) The focus of this dissertation is centred solely on the South African experience and accordingly, a comparative analysis of other jurisdictions falls outside the scope of this paper.

2 The Interpretation and Application of Exemption Clauses Prior to the Consumer Protection Act 68 of 2008

2.1) Exemption Clauses and their Role in Standard Form Contracts Generally

2.1.1) Exemption Clauses Explained

The term 'exemption clause' is somewhat of a nuance as clauses having a similar affect have been referred to as 'disclaimers', 'waivers' as well as 'exculpatory clauses'.[23] These terms, however, connote differing meanings when considered in context. The notion of exemption clauses and the relevant aspects thereof, will therefore be discussed exclusively.

At its very core, an exemption clause is a contractual term which serves to exclude, alter or limit liability which normally flows from contractual relations.[24] Claassen defines it as "one [which is] inserted expressly or by implication in a contract with the object of exempting a party from liability in certain circumstances".[25] As a general principle, these clauses are used by persons who run the risk of incurring liability for others.[26] Given the aforementioned effect of such clauses, their use is considered highly contentious especially since they can be found in most standard form contracts.[27] This is problematic as the contents of standardised contacts are

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23 Stoop (2008) *SA Merc LJ* 496.

24 Stoop (2008) *SA Merc LJ* 496; see also S van der Merwe, LF van Huysteen, MFB Reinecke & GF Lubbe ('Van der Merwe *et* al') *Contract: General Principles* (3 ed2007) 297 where it provides that such terms normally limit or exclude liability of a contractant which are routinely imposed by the naturalia of a contract.

25 RD Claassen *Dictionary of Legal Words and Phrases* vol.2 (2003).

26 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (6 ed 2011) 190; see also Tait & Newman (2014) *Obiter* 629 where it provides that it is suppliers in particular who tend to make use of such provisions; see also E van Eeden & J Barnard *Consumer Protection Law in South Africa* (2 ed 2018) 278 where it provides that the seller is more likely than the consumer to have an appreciation of the risks that may attach themselves to the supply of particular goods and services.

27 C van Loggerenberg "Onbillike Uitsluitingsbedinge in Kontrakte? 'n Pleidooi vir Regshervorming" 1988 *TSAR* 407 at 407-8; see also H Lerm *A Critical Analysis of Exemption Clauses in Medical Contracts* (2008) LLD Thesis University of Pretoria 8; see also GC Cheshire & CHS Fifoot *Cheshire and Fifoot's Law of Contract* (9 ed 1976) 20 where it describes a standardised contract as a standard template intended for general and repeated

determined unilaterally, leaving one of the contractants with a single option of accepting the fixed terms in order to facilitate a contract.[28] Even more worryingly, exemption clauses may still form part of an agreement without the consumer having signed and entered into a formal contract. This is often the case with publicly displayed notices.[29] It can therefore be said that these clauses take on various forms and exclude different types of liability.[30] Stoop goes as far as to say that the concept of freedom of contract in this regard becomes a meagre theoretical ideal rather than a living aspect of the law of contract.[31] The ability which these clauses have to oust one's common law rights shows their potential to operate unfairly and thus calls for acute judicial and/or legislative control.[32]

Although these clauses have been widely criticized based on their ability to exploit weaker contracting parties,[33] their use can also prove fruitful upon spreading the risk among contracting parties.[34] A number of circumstances call for their inclusion in the contracting process. In this regard, McGrath mentions the importance of procedural exclusion clauses which can prove to be of paramount importance in the running of a

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use; see also S Sewsunker *Contractual Exemption Clauses under the South African Constitution: An Examination of the Potential Impact of Public Policy and Ubuntu on such Provisions* (2012) LLM Dissertation University of KwaZulu-Natal 15 where it mentions different types of standardised contracts including gym memberships contracts, cell phone contracts, insurance contracts, motor vehicle service agreements and rental agreements.

28 See Stoop (2008) *SA Merc LJ* 496; see also Lerm (2008) LLD Thesis University of Pretoria 10 where the author raises a problem associated with standardised contracts, namely that transactions would often be concluded without a give-and-take between the bargaining parties. Furthermore, Lerm raises another critique in that such clauses often allowed business enterprises to absolve themselves from liability in any circumstances whatsoever; see also *Barkhuizen v Napier* (2007) (7) BCLR 691 (CC) ('*Barkhuizen*') par 135 where Sachs J describes standard form contracts as "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a 'take-it-or-leave-it' basis".

29 T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010*) Obiter* 217-231 and Tait & Newman (2014) *Obiter* 629.

30 JC Kanamugire & TV Chimuka "The current status of exemption clauses in the South African law of contract" (2014) 5 *Mediterranean Journal of Social Sciences* 164-176 at 165; 166 where a variety of exemption clauses are listed, namely; those aimed at exempting a person against liability for breach of contract, those aimed at exempting a person against liability for latent defects, those aimed at exempting a person against liability for negligence as well as those aimed at exempting a person against acts of fraud or dishonesty.

31 Stoop (2008) *SA Merc LJ* 496.

32 CJ Pretorius "Exemption clauses and mistake: *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)" (2010) 73 *THRHR* 491-502 at 491.

33 Stoop (2008) *SA Merc LJ* 497; see also Lerm (2008) LLD Thesis University of Pretoria 9 where he states that businessmen often used exclusionary clauses in business contracts as a means of exploiting their economic power.

34 Stoop (2008) *SA Merc LJ* 497; RH Christie *The Law of Contract in South Africa* (5 ed 2006) 183.

business or providing a service.[35] In light of these potential dangers and prospective benefits, an obligation is placed on the law to strike a balance in giving effect to the use and application of such clauses. The manner in which this equilibrium has been sought, however, has developed significantly over time which will now be considered.

2.1.2) Common Law and Legal Writings

The use of exemption clauses in the contracting process is not a contemporary practice and its roots can be traced back to Roman-Dutch law.[36] In this regard, the principles of freedom of contract[37] and *pacta sunt servanda* have had a profound effect on the South African law of contract.[38] Although these principles serve important Constitutional aims, they should not be understood so as to oblige courts to enforce unfair contracts.[39] The use of these principles is, nonetheless, commonly justified with reference to their Constitutional underpinning.[40] Hawthorne contends that these principles form the very foundation of the classical contract doctrine.[41]

It is submitted that at the centre of most seemingly unfair contracts lies the inherent unequal bargaining power between the parties.[42] Hawthorne would argue that this illustrates the failings of formal equality purported by the classical model of contracting, whereby the weaker members of society are inevitably left subject to exploitation.[43] In an effort to curb the effects associated with the inherently unequal bargaining positions of the parties, the common law provides a number of techniques in order to level the playing field.[44] History has, however, shown us that our courts

35 J McGrath "Excluding exclusions in contract law: Judicial reluctance to enforce exclusion clauses" (2006) 13 *Cork Online Law Review* 137-148 at 137.

36 Kanamugire & Chimuka (2014) *Mediterranean Journal of Social Sciences* 164; see generally Lerm (2008) LLD Thesis University of Pretoria 729-734.

37 Here means the principle of allowing parties to freely negotiate the terms of their agreement.

38 Tait & Newman (2014) *Obiter* 630.

39 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 13.

40 Hawthorne (2012) *THRHR* 347.

41 See Hawthorne (2012) *THRHR* 348 where the author provides that these principles represent both self-autonomy as well as human dignity.

42 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 14.

43 See Hawthorne (2012) *THRHR* 348.

44 See GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 14 where the authors name a number of these techniques, including that of relaxing the caveat subscriptor rule, placing limitations on the enforcement of exemption clauses, the contra proferentem construction, duress, undue influence as well as public policy.

tend to uphold the enforceability of exemption clauses based on the perceived importance of protecting contractual freedom.[45]

The common law provides certain rules and limitations when incorporating an exemption clause into a contract.[46] First and foremost, the document housing the exemption clause should take the form of a document which a reasonable person would anticipate to contain *contractual* (own emphasis) terms.[47] Other common law rules of incorporation require that the exemption clause be brought to the attention of the party signing the relevant document and, that the exemption clause should be written clearly and precisely.[48] Flowing from this, exemption clauses must be agreed upon and where there is a potential misapprehension, an obligation is placed on the party who is aware of the supposed misapprehension to rectify it.[49]

Traditionally, the interpretation of exemption clauses has taken place restrictively[50] and through the lens of public policy. Limitation through interpretation speaks to the wording of the relevant clause or document. It is theoretically accepted that exemption clauses are legal but when their enforcement leads to consequences so unfair as to be considered contrary to public policy, their permissibility becomes all the more unlikely.[51] Furthermore, where exemption clauses are drafted ambiguously, courts tend to follow a narrow interpretation of the relevant clause and often employ the *contra preferentum*[52] rule.[53] With regards to this method of confining the use and abuse of exemption clauses, courts are required to first examine the nature of the contract in order to decide what grounds of liability would exist in the absence of such a clause. The clause should thereafter be interpreted to exempt the party only from the ground of liability for which it would otherwise be liable (in essence requiring the least degree of blameworthiness).[54] Flowing from this, the *contra proferentem* rule can be pivotal in order to prefer an interpretation that favours the consumer

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45 M Letzler "The law of contract, the Consumer Protection Act and medical malpractice law" 2012 *De Rebus* 22-25.

46 See T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 49-6.

47 See D McQuoid-Mason *Consumer law in South Africa* (1997) 40.

48 Ibid.

49 Kanamugire & Chimuka (2014) *Mediterranean Journal of Social Sciences* 170.

50 Stoop (2008) *SA Merc LJ* 503.

51 Kanamugire & Chimuka (2014) *Mediterranean Journal of Social Sciences* 167.

52 This is where the document is interpreted in favour of the party who was not responsible for the drafting of the agreement.

53 Kanamugire & Chimuka (2014) *Mediterranean Journal of Social Sciences* 167; 168.

54 GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 221.

where more than one interpretation of the relevant exemption clause exists.[55] It, however, remains clear that our courts will not expeditiously declare the enforcement of a contract contrary to public policy and seem to place higher value on the freedom of contract principle.[56]

It has also been submitted that the value laden principles of justice, reasonableness and in particular, fairness, should be considered upon enforcing an agreement between two parties.[57] These principles on their own, however, cannot be used as a ground warranting intervention given their abstract nature and subjective meanings.[58]

Upon determining whether a legitimate agreement has been reached between the parties, the requirements of consensus or reasonable reliance must be fulfilled.[59] Additionally, the common law recognises a number of other factors which may cause an exemption clause to be deemed undesirable. An example of this would be where consent is obtained improperly or where there is a lack of certainty within the clause itself.[60] A trend which has persisted through standardised contracting, however, is the act of hiding crucial terms under the veil of legalese or through their inclusion within the fine print of a relevant contract. The repercussion of this is that a consumer accepts the terms of a contract without being cognisant of the presence of an exemption clause.[61] The conundrum which presents itself is that the *caveat subscriptor*[62] rule will then apply. Although this rule may bolster contractual legal certainty, it is not absolute. The party who signed the contract may escape liability by relying on the *iustus error* defence.[63] The common law, nonetheless, demands that

55 Tait & Newman (2014) *Obiter* 631.

56 See generally the judgements of *Afrox* and *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C).

57 Mupangavanhu (2014) *PELJ* 1176.

58 Ibid; see also PN Stoop "The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts" (2015) 18 *PELJ* 1190-1123 for a full discussion regarding the role of fairness in this regard.

59 Tait & Newman (2014) *Obiter* 630.

60 Lerm (2008) LLD Thesis University of Pretoria 736.

61 Tait & Newman (2014) *Obiter* 630.

62 This means that the party who signs the contract will be bound to its terms, even without having properly read or understood its terms and conditions.

63 See Tait & Newman (2014) *Obiter* 630 where an example is given as to when this defence may apply, such as where the contract contains an unusual term that a reasonable person would not expect to find in such a contract or where an act of misrepresentation has taken place.

the party wishing to enforce an exemption clause must, at the very least, prove its injunction within the contract itself.[64]

Where an exemption clause or a provision to that effect is displayed in a notice, the common law holds a consumer bound to the terms of the exemption on condition that the consumer was in fact aware of the notice. Alternatively, where the supplier has taken reasonable steps to bring the notice to the attention of the consumer, a consumer will also be bound.[65] The use of such clauses, generally speaking, is therefore permitted.

Although the abovementioned is sound in law and reason, Tait and Newman contend that a final emphasis must be placed upon the dictations of public policy before giving effect to exemption clauses.[66] This illustrates the importance attached to this consideration and elevates it to a level of paramountcy, placed above the open concept of good faith. In this regard, if one is to accept that public policy condones the use of exemption clauses, then one must also be appreciative of the limits imposed by it. It must therefore be understood that a party cannot limit or exclude liability for fraudulent conduct.[67] Contrastingly, the inequality of bargaining power between contractants has not been afforded much persuasive weight.[68] The more assured adherence to freedom of contract would seem to govern the dictates of public policy in this regard.

Although these common law methods of curtailing the bounds of exemption provisions are of noble intent and hold to their name a degree of success, Naudé and Lubbe opine that they are too few in number and bear a limited scope.[69] This

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64 C Kok *The Effect of the Consumer Protection Act on Exemption Clauses in Standardised Contracts* (2010) LLM Dissertation University of Pretoria 21-22.

65 Tait & Newman (2014) *Obiter* 630.

66 Tait & Newman (2014) *Obiter* 631; see also GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* (7 ed 2016) 18 where it states that the courts have reaffirmed the concept of public policy as the appropriate instrument for dealing with contractual unfairness that cannot otherwise be handled by existing rules; see also F Marx & A Governdjee "Revisiting the interpretation of exemption clauses: *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA)" 2007 *Obiter* 630-633 for a discussion regarding the dangers of contravening public policy.

67 Marx & Governdjee 2007 *Obiter* 630-633.

68 See *Afrox* para 12 where the judge reaches the surprising conclusion that there was a lack of evidence to prove the inequality of bargaining power distributed between the parties.

69 T Naudé & G Lubbe "Exemption clauses – A rethink occasioned by *Afrox Healthcare Bpk v Strydom*" (2005) 122 *SALJ* 441-463 443. See also RD Sharrock "Judicial control of unfair contract terms: The implications of the Consumer Protection Act" (2010) 22 *SA Merc LJ* 295-

critique holds merit and one may argue that it is this line of reasoning which led to the birth of consumer intense legislation, aimed at minimizing the abuse associated with unfair contractual terms.

2.1.3) Case Law

The judiciary has played a pivotal role in gradually developing the theory behind the scope and application of exemption clauses within the contracting process. Accordingly, the approach adopted by South African courts must be considered *generally* (own emphasis), before their handling of contractual exemption clauses is scrutinised.

Generally considered, South African courts have often been criticized for applying principles premised under the classical contractual doctrine.[70] An example of this can be found in *Brisley v Drotsky*[71] where the court enforced the sanctity of contract principle and rejected the notion that a court should have the ability to refuse a valid contractual term. Departing from this premise, it is unsurprising that exemption clauses have also traditionally been considered through similar classical lenses.

Upon considering the triteness of a particular exemption clause, courts are often required to scrutinise the meaning of the words in the document as a whole.[72] Stoop provides that where courts are compelled to consider the enforceability of an exemption clause, a number of common factors are generally tabled for consideration which include; a lack of consensus between the parties or consensus improperly obtained, the notion of public of policy, rules pertaining to the interpretation of contracts as well as legislative restrictions.[73]

In the case of *Allen v Sixteen Stirling Investments (Pty) Ltd* (*'Allen'*)[74], an erf purchased was incorrectly described which the court found to be a material and reasonable mistake thereby deeming the contract void.[75] Due to the lack of

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325 at 297 where the author states that the common law principles could not provide the necessary level of control.

70 Hawthorne (2012) *THRHR* 346.

71 (2002) 4 SA 1 (SCA).

72 Marx & Governdjee 2007 *Obiter* 624; see also *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 371; *Herman's Supermarket (Pty) Ltd v Mona Road Invesments (Pty) Ltd* 1975 4 SA 391; *Chubb Fire Security (Pty) Ltd v Greaves* 1993 4 SA 358 (W); *Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd* 1980 4 SA 517 (Z).

73 Stoop (2008) *SA Merc LJ* 497.

74 *Allen* 1974 (4) SA 164 (D).

75 *Allen* at 166-72.

consensus, the entire contract was made void, including the enforcement of any attempted exemption from liability. In *Du Toit v Atkinson's Motors Bpk* ('*Du Toit*'),[76] the terms of an agreement regarding the purchase of a motor vehicle were contained in a document which also housed an exemption clause. This clause had the effect of exempting the dealership from liability regarding misrepresentations as to the year in which the car was manufactured. Although this document was duly signed, the court held that the dealership's silence regarding the inclusion of the exemption clause caused the other party to be misled and therefore, precluded the dealership from escaping liability.[77] A stark contrast to this decision was seen in an earlier case[78] whereby the *caveat subscriptor* rule was applied, binding a party to the terms of a contract without having read and understood its terms before signing it. Judicial inconsistency of this kind poses great concern.

As previously mentioned, public policy[79] may also have a potent impact on the validity of an exemption clause.[80] As powerfully influential as public policy is, to recognise it as the only common law means to limit the efficacy of exclusionary clauses is legally problematic.[81] In *Napier v Barkhuizen,*[82] the court stated that public policy has since been influenced by the Constitution. Accordingly, it is accepted that a contracting party is free to waive any of his rights but the law will not recognise any such waiver that contravenes public policy.[83] The case of *Wells v South African Alumenite Company*[84] held that an exemption clause which seeks to limit the liability for intentional or fraudulent misrepresentations would be contrary to public policy and therefore, will not be enforced. The *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*[85] case, however, held that clauses which exclude liability for a breach of contract will not be contrary to public policy. The courts assistance in determining what may and what may not be contrary to public policy has proved useful. It is unfortunate, however, that some cases seemingly fell by the

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76 *Du Toit* 1985 (2) SA 893 (A).
77 *Du Toit* at 903.
78 *George v Fairmead (Pty)* Ltd 1958 (2) SA 465 (A).
79 See Stoop (2008) *SA Merc LJ* at 502 where it provides that public policy is interpreted in light of society's interests and the interests of the contracting party and is further derived from the fundamental values of the Constitution.
80 See *Afrox* par 8.
81 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
82 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).
83 See *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775 779.
84 1927 AD 69 at 72.
85 1993 (3) SA 424 (A).

way side, establishing a 'missed opportunity' by the courts to pronounce on matters which one would think to be *prima facie* in contradiction to the values which underpin public policy.[86] That is not to say that all hope is lost, as more recent cases such as *Jordan v Faber*,[87] have found that the unequal bargaining position of contractants may constitute sufficient grounds to void a contract on the grounds of public policy. Problematically, however, attempting to exempt oneself from the mishaps of ordinary and gross negligence does not appear to contravene public policy.[88] In *Mercurius Motors v Lopez* ('*Mercurius Motors*'), the court held that an exemption clause which seeks to undermine the essence of a contract (including those which are hidden) should be brought to the attention of the party who signs the relevant contract.[89] It is also worth noting that although the notion of good faith is not given much persuasive weight,[90] it has still been regarded as an overriding concept of public policy which courts are expected to apply to all contracts.[91] The judgement of *Barkhuizen v Napier* is perhaps, the most significant upon attempting to understand the bearing which public policy has on contractual terms.[92] Accordingly, the court in this case paralleled public policy to what is considered reasonable and fair.[93]

There are a number of cases which support the view that exemption clauses can be limited by pursuing a restrictive mode of interpretation.[94] This practice has gained momentum which has seen the Supreme Court of Appeal calling for a generally

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86 It is contended that such a 'missed opportunity' can be found in the case of *Johannesburg Country Club v Stott & Another* 2004 (5) SA 511 (SCA) where the court left open the question as to whether liability for damages for negligently causing the death of a person can be excluded by an exemption clause. Surely a clause which infringes upon one's sanctity of life will not pass constitutional muster.

87 2010 JOL 24810 (NCB).

88 See *Rosenthal v Marks* 1944 TPD 172 and *First National Bank v Rosenblum* 2001 4 SA 189 (A).

89 *Mercurius Motors* 2008 (3) SA 572 (SCA) at par 33; see also L Hawthorne "Mercurius Motors v Lopez 2008 3 SA 572 (SCA): The transposition of mandatory information obligations into the common law of contract" (2009) *De Jure* 352-360.

90 See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) which provided that good faith was not a self-standing norm but rather a factor to be considered in the fairness determination of contractual terms; see also the judgement of *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 347 G-H where the court supports the aforementioned in reaching the conclusion that good faith is not a self-standing rule but rather an underlying value; see also *Mort NO v Henry Shields-Chiat* 2000 1 SA 464 (C) paras 475G-J and 476F-J where it was opined that the concept of *bona fides* had not received enough support from the community in order to trump sanctity of contract.

91 *Eerste Nationale Bank v Saayman* 2004 5 SA 511 (SCA).

92 See Hawthorne (2012) *THRHR* 350-351.

93 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 48; 51 and 52.

94 See *Afrox* at par 10; *Cape Group* at 186; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty)* 2008 JDR 1140 (SCA) at par 7.

restrictive approach when faced with indemnity provisions.[95] Such an approach, however, is plagued with interpretative difficulties and ascertaining the correct meaning of terms used by the parties remains a challenge for our courts.[96]

2.2) Exemption Clauses and their role within the Medical Profession

2.2.1) Introduction

> "I, the undersigned, hereby consent to the administration of a general anaesthetic and to the performance of an operation upon ..... (The patient) for Haemorrhoidectomy and excision of polyps.
>
> Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi-Clinic Group of Companies, as well as their employees, officials and agents against all liability to such patient and to the person"[97]

Within the medical profession, exemption clauses are most commonly incorporated in admission forms which a prospective patient is obliged to sign upon being admitted to a hospital or similar institution providing healthcare services.[98] These clauses seek to limit or completely exclude the potential liability of either the medical practitioner him or herself, or any other member of staff who may be under the employ of the relevant healthcare establishment. This is problematic as the patient is placed in a particularly precarious position given the lack of recourse available to them, should they wish to claim for damages suffered at the hands of the hospital. From the very outset, the patient is disadvantaged even before a contract is concluded with the healthcare establishment. Upon being referred to a healthcare establishment, a patient is already in a vulnerable physical and psychological state.[99] The vulnerability of the patient is enhanced due to the health service provider being

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95 *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) at 87E and further, where this court confirmed that where indemnity clauses are ambiguous, they should be interpreted *contra proferens* and that an exemption clause should not be read in isolation but with reference to the contract as a whole; see also *Afrox* at par 9.

96 See generally *Chubb Fire Security (Pty) Ltd v Greaves* 1993 4 SA 358 (W) and *Minister of Education v Stuttaford & Co (Rhodesia) (Pty) Ltd* 1980 4 SA 517 (Z).

97 Admission form used at Sandston Medic-Clinic, 1996.

98 In some instances, it may be required that the parent, guardian or immediate family member sign the document on the behalf of the patient.

99 Moore & Slabbert (2013) *S Afr J BL* 63.

more knowledgeable with regards to the technicalities of the medical intervention and its associated risks.[100]

It appears as if the common law recognises the ability of a healthcare establishment to exclude liability for medical malpractice, yet denies these establishments the right to exempt themselves from acts of gross negligence.[101] As will be discussed in the following chapter, it is submitted that such an approach will fall foul of the Consumer Protection Act 68 of 2008 ('CPA'). For purposes of the current discussion, it is contended that the adjudication of disputes stemming from the inclusion of exclusionary clauses in medical contracts has proven to be insufficient. The insufficiency mentioned refers to the trend of safeguarding sanctity of contract at the cost of what is thought to be reasonable and fair. It is when the stronger contracting party (in this case, the healthcare establishment) traverses from the mere use of indoctrinated legal principles to their subsequent *abuse* (own emphasis) that a call extends to the judiciary to deny the enforcement of what will surely be a contract painted in unfair terms.

2.2.2) Legal Writings

Hospitals and other healthcare establishments have evolved significantly as institutions. At their earliest age, they were most commonly run by the Church and received protection from the law by virtue of their charitable business conduct.[102] In modern times, however, the essence of a hospital is to provide its patients with the highest quality of care and where this expectation is not realised; patients do not hesitate to litigate.[103] Despite this, when litigation commences, the patient finds him or herself in a precarious position after signing a contract or admission form which contains an exemption clause. Traditionally, courts have tried to interpret these provisions restrictively or nullify contracts on the basis of public policy in order to prohibit the healthcare establishment from exempting itself from acts of gross

100 Ibid.

101 D McQuoid-Mason "Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?" (2012) 5 *South African Journal of Bioethics and Law* 65-68 at 65.

102 RM Jansen & BS Smith "Hospital disclaimers: Afrox Health Care v Strydom" (2003) 28 *Journal for Juridical Science* 210.

103 Ibid.

negligence. In instances where these clauses are drafted clearly however, the patients are left stranded without recourse.[104]

Generally speaking, a contract between a healthcare provider and a patient involves an undertaking to examine, diagnose and treat the patient in return for compensation.[105] The healthcare provider undertakes to act with a certain level of care and skill which is measured according to what can reasonably be expected from a practitioner in the profession. In cases where the healthcare provider fails to adhere to this undertaking, he or she may be held liable in delict for damages as well as in contract for breaching the agreement.[106] It is correct to argue that the level of care and skill expected of the health care provider constitutes an essential undertaking by him or her and thus, a clause which attempts to exempt the healthcare provider from liability for a lack of care and/or skill is contrary to the essence of the agreement.[107] Although Naudé and Lubbe recognise the problem that lies herein, they also appreciate the relevance of broader policy considerations and the need to adopt a differentiated approach which takes into account the type of contract in which an exemption clause occurs as well as its context.[108] It is submitted that such a holistic approach should see policy considerations favouring the vulnerable patient in this setting.

In essence, exemption clauses found in hospital contracts or admission forms have a number of common traits. These common traits include an acknowledgement on the part of the patient that the doctor who is going to perform the relevant procedure is in fact an independent contractor; a further acknowledgement that the hospital is not to be held in any way responsible for the doctor's possible wrongdoing and finally, the hospital often contracts out of liability flowing from the consequences of any negligent conduct committed by its nursing staff.[109] The far reaching consequences

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104 Jansen & Smith (2003) *Journal for Juridical Science* 215; see also *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) which proves a lack of consensus in this regard as it was held in this case that excluding liability for gross negligence is permissible.

105 Naudé & Lubbe (2005) *SALJ* 455.

106 Naudé & Lubbe (2005) *SALJ* 456.

107 Naudé & Lubbe (2005) *SALJ* 456-457.

108 Naudé & Lubbe (2005) *SALJ* 458.

109 P Carstens & A Kok "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, foreign law and medic-legal considerations" (2003) 18 *SA Public Law* 430-455 at 430.

of these exemptions is concerning, especially given the increase in medical malpractice litigation in South Africa.[110]

Carstens and Kok argue that the use of disclaimers in medical contracts should not only be considered from a strictly contractual law perspective, and that an assessment of "medico-legal" considerations warrants analysis.[111] Accordingly, they provide that the majority of medical ethical codes would be opposed to the use of disclaimers.[112] This conclusion is supported by the fact that upon treating a patient, a medical practitioner undertakes to do no harm to said patient and further act in his or her best interests.[113] Given this understanding, it would be unreasonable and unfair to expect a patient to contract, and thereby consent, to the possibility of harm by a medical practitioner who is obliged, at least on an ethical level, to do no harm.[114] A medical practitioner in this instance would surely be in breach of his or her Hippocratic Oath.[115] As such, Carstens and Kok contend that the development of medical ethics has seen the patient-hospital relationship being governed by contract.[116] Although this development may be seen as a welcomed change from medical paternalism[117] within the profession, these authors elude to the fact that the promise of a healthy process of exchanging information and negotiation between the contracting parties may not in all instances materialise due to a number of shortcomings that underlie the contractual model.[118]

Another author finds it unacceptable that large institutions (which would reasonably include public and possibly private hospitals) with exorbitant financial resources can ignore their responsibilities by so easily exempting themselves from liability.[119] This author is of the belief that exemption clauses could be considered *contra bones*

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110 Moore & Slabbert (2013) *S Afr J BL* 60.

111 Carstens & Kok (2003) *SA Public Law* 449.

112 Carstens & Kok (2003) *SA Public Law* 450.

113 Ibid; see also R Veatch *Medical Ethics* (1989) 2.

114 Carstens & Kok (2003) *SA Public Law* 450.

115 Although there are different variations of a doctor's Hippocratic Oath, a basic understanding of this undertaking requires doctor's to treat the ill to the best of their abilities.

116 Carstens & Kok (2003) *SA Public Law* 450.

117 See Stoop (2008) *SA Merc LJ* 507-508 for a full discussion on the topic of paternalism.

118 See Carstens & Kok (2003) *SA Public Law* 451 where examples of the possible shortcomings of the contractual model are listed, including the fact that it is factually incorrect to assume that the contracting parties begin their relationship by explicitly negotiating a certain contract; the fact that the model focuses narrowly on rights at the expense of moral concepts as well the model's narrow focus on patient autonomy.

119 M Cronje-Retief *The legal liability of hospitals* (1997) LLD Thesis University of the Free State 474.

mores or against public policy, requiring judicial or legislative intervention.[120] Van den Heever would agree with this author as he argues that hospitals should take responsibility for delivering sub-standard services and other failures and also calls for either judicial or legislative intervention.[121] Additionally, this author believes that exemption clauses in commercial contracts are incomparable to those found in hospital contracts due to the individual's livelihood and health being at stake,[122] with the consequences of the latter being abundantly more devastating.

Burchell and Schaffer contend that clauses of this nature make the use of liability insurance a thing of the past.[123] This is not hard to believe as an exemption clause which excludes the potential liability of medical professionals would make paying insurance premiums superfluous.

Strauss focusses on the patient's perspective and supports the view that the patient is in a disadvantageous position and that from a public policy perspective; the validity of exemption clauses is an undesirable feature.[124] In line with this opinion is the argument made by other authors who question the use of exemption clauses when the contractants stand in an unequal bargaining position,[125] which would invariably include the situation where a patient contracts with a hospital. Perhaps this disparity in bargaining power merits deeper consideration by the judiciary. The often dire circumstances under which a patient is admitted to hospital often leaves him or her incapable of negotiating the terms of their admittance, rendering their bargaining position inferior to that of the relevant hospital.[126] Would a hospital truly consider amending its terms at this stage? This is unlikely. The patient, on the other hand, *needs* (own emphasis) the respective treatment which will invariably cause him or her to sign a document which will result in the patient receiving such treatment. Surely one cannot conclude that the patient's freedom to contract was true and without hindrance? Tladi's call for development of the common law to at least require

120 Cronje-Retief (1997) LLD Thesis University of the Free State 474; 475.
121 Van den Heever (2003) *De Rebus* 48.
122 Ibid.
123 JM Burchell & RP Schaffer "Liability of hospitals for negligence" (1977) *Businessman's Law* 109 at 109.
124 SA Strauss *Doctor, Patient and the Law: A Selection of Practical Issues* (3 ed 1991) 305.
125 Lerm (2008) LLD Thesis University of Pretoria 1093.
126 Lerm (2008) LLD Thesis University of Pretoria 1094; see also Jansen & Smith (2003) *Journal for Juridical Science* 218; see also van den Heever (2003) *De Rebus* 47-48; see also D Pearmain *A Critical analysis of the Law or Health Service delivery in South Africa* (2004) LLD Thesis University of Pretoria 492ff.

the hospital to inform and adequately explain to the patient upon their admittance the expected consequences brought about by such a clause, therefore, holds substantial merit.[127] Other authors have submitted that based on public policy, an exemption clause is effectively a *pactum de non petendo in anticipando* in terms of which the parties foresee the commission of an unlawful act and agree that the aggrieved party will not institute action which he otherwise would have enjoyed should such an act be committed.[128]

Another viewpoint is that a duty to act reasonably and carefully ensues after the conclusion of an agreement between a hospital and a patient and that the trust established between the parties may not be breached without incurring liability.[129] This would add to the moral ill of a medical practitioner breaching his or her Hippocratic Oath.

The critiques raised above constitute valuable contributions, but it is the judiciary's application of these principles which must now be scrutinised.

2.2.3) Case Law

2.2.3.1) Burger v Medi-Clinic Ltd unreported case decided in the WLD 1999 Case No 97/25429

The South African judiciary was called upon to consider the validity and enforceability of exemption clauses contained in a number of general contracts, but it was not until the case of *Burger v Medi-Clinic ('Burger')*[130] that the use of these clauses within the medical profession was brought under contention. In this case, the patient was admitted by and underwent an operation at the hospital. The following day, he suffered from a number of alarming symptoms.[131] He was nonetheless discharged from the hospital and subsequently suffered a serious injury when he attempted to go to the bathroom unattended and suddenly lost consciousness. As a result, the patient fell on his head and suffered a concussion and became

127 D Tladi "One step forward, two steps back for Constitutionalizing the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473-478 at 473; 477.

128 See Cronje-Retief (1997) LLD Thesis University of the Free State 474 and Van den Heever (2003) *De Rebus* 47.

129 Lerm (2008) LLD Thesis University of Pretoria 1095; see also Naudé & Lubbe (2005) *SALJ* 444; 456 where it provides that to recognise exemption clauses in admission forms under such circumstances would constitute an erosion of the patient's trust in the medical service provider.

130 *Burger* Unreported case decided in the WLD 1999 Case No 97/25429.

131 Some of the symptoms included nausea, vomiting, dizziness and sweating.

permanently disfigured which led to him suffering from depression. The patient contended that the nursing staff failed to take reasonable steps to prevent him from harm when they discharged him from the hospital, while being aware of several symptoms that the patient was experiencing at the time of his discharge and accordingly sued the owner of the hospital for damages. The hospital, however, denied liability by relying on an indemnity clause contained within a "Consent to Operation" form duly signed by the patient.[132] This particular clause was wide and encompassing, and excluded the hospital from *any* (own emphasis) liability whatsoever, including the consequences of grossly negligent acts.

Upon assessing the relevant clause, the principles as laid down in the *Cardboard Packing Utilities v Edblo Transvaal Ltd*[133] case were considered and applied which led the court to the conclusion that the clause was wide enough to include the negligence and gross negligence of the defendant and its employees. Furthermore, the court held that the provision was not contrary to public policy. This decision showed a complete disregard for the patients' rights and showed limited concern for the broader principles and ethics at play.[134]

On appeal,[135] focus was placed on the interpretation of the "Consent to Operation" form and the court subsequently upheld the appeal. It is unfortunate that the court did not take a clear stance as to whether such a disclaimer will be deemed null and void when used by a hospital. The chance to provide a degree of legal certainty, therefore, went begging.

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132 The content of the Consent to Operation form was as follows: "*I, the undersigned, hereby consent to the administration of a General/Local anaesthetic and to the performance of an operation upon Mr DD Burger (the patient) for Haemorrhoidectomy and excision of polyps by Surgeon Dr D Grolman. Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient indemnify the Medi-Clinic Group of Companies, as well as their former employees, officials and agents against all liability to such patient and to the person who signs this form on behalf of such patient, for any loss or damage which originates from any cause whatsoever".*

133 1960 (3) SA 178 at 179 F-H for a summary of the relevant principles.

134 See Carstens & Kok (2003) *SA Public Law* 431 where the authors contend that the judgement did not adequately consider the patients right of access to health, nor did the court sufficiently consider the argument from a public policy perspective.

135 *Burger, Douglas Desmond v Medi-Clinic Limited* 2000 (WLD) unreported Appeal under case no. A5034/99.

2.2.3.2) Strydom v Afrox Health Care Limited 2001 4 ALL SA 618 (T)

The *Strydom v Afrox Health Care Limited* case (*'Strydom')*[136] required the court to make a finding regarding the validity of an exemption clause contained in a hospital contract. In this case, the patient wished to sue the owner of the hospital for damages suffered as a result of negligence on the part of the employees of the hospital. The contract signed by the patient, however, contained a clause which absolved the hospital of any potential liability.[137] The signing of the document containing the exemption clause became contentious as the patient believed he was merely committing to pay the hospital when signing, especially since the presence of the clause was not pointed out to him.

The court found that the disclaimer was in fact *contra bonos mores* and therefore, invalid. Held further, the fact that the content and effect of the clause was not drawn to the patients attention resulted in the disclaimer being unenforceable on account of *bona fides* considerations. In reaching its decision, the court relied on public policy considerations, a number of sections from the Constitution, the legitimate expectations of the patient as well as the notion of good faith in contractual dealings. Although the judgement is subject to criticism,[138] it is the decision of the Supreme Court of Appeal which bears the most significance.

2.2.3.3) Afrox Health Care Bpk v Strydom 2002 (6) SA 21 (SCA)

The decision made by the Supreme Court of Appeal to uphold the appeal is considered highly contentious by many due to the manner in which the court dealt with the arguments raised by the respondent.[139] It is submitted that much of the

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136 2001 4 ALL SA 618 (T).

137 The exemption clause was formulated in the following manner: *"…I acknowledge and agree that any medical practitioner or any medical professional who treats the patient is not an employee or agent of the hospital but an independent practitioner and the hospital is not in any way responsible or liable for any acts or omissions of breach of contract of the medical practitioner. I absolve the hospital of all liability for any loss and/or damage of whatever nature arising in delict or for breach of contract, including but not limited to consequential loss or damage, arising directly or indirectly out of any act of omission and/or breach and/or injury (including fatal injury) sustained by and/or harm caused to the patient or any disease (including a terminal disease) contracted by patient whatever the cause may be excluding only wilful default on the part of the hospital, his employees or agents. I hereby indemnify the hospital against any claim, award, judgement, cost and expenses which may be made or awarded suffered by the hospital resulting from or connected with the treatment of the patient".*

138 See Carstens & Kok (2003) *SA Public Law* 435-442 for a discussion on some of the critiques of the High Court judgement offered by these authors.

139 The respondent argued that the exemption clause was not enforceable based on three grounds. Firstly it was argued that the clause was contrary to public policy. Secondly, the

criticism directed towards this judgement can be traced back to its use of classic contractual principles employed in reaching its decision.[140] In a similar fashion to the case of *Brisley v Drotsky*, the notion of good faith was trumped by the alleged importance attached to the rule of law.[141]

The judgement was rather confusing as it offered a glimmer of hope which was quickly overshadowed by its ultimate decision. It is commendable that the court brought to the table of consideration, the relative situations of the parties.[142] It is unfortunate that this value-based consideration ended here. The court, thereafter, did not attach much weight to the unequal bargaining positions of the parties and found that even if they were contractually unequal, it did not mean that the clause would be contrary to Constitutional principles.[143] In any event, the court stated that there was no evidence to prove that the respondent was in a weaker bargaining position.[144] A clause can still, however, be invalidated where a party abuses the other party's circumstances to such an extent that consensus is obtained improperly.[145] In this regard, it is submitted that given the vulnerable condition in which patients find themselves upon being admitted to health care establishments,[146] true consensus is unobtainable which would require an order of invalidation. Furthermore, it is unreasonable and illogical to expect a patient of ill health to adequately negotiate the terms of the agreement with a health care establishment at a meaningful level for the reasons indicated above. To conclude otherwise would lose the connect to reality.[147]

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respondent argued that it stood in conflict with principles of good faith. Finally, the respondent contended that the admission clerk failed to honour the legal duty to inform the respondent of the clause in question.

140 See Hawthorne (2012) *THRHR* 346.

141 See Hawthorne (2012) *THRHR* 347 where the author refers to the part of the judgement which alludes to the fact that courts should not be given the discretion to refuse to enforce a valid term of a contract.

142 See Hawthorne (2012) *THRHR* 351 where the author refers to *Afrox* para 12 in terms of which the court considered how unequal society was as well as the harsh realities of the country.

143 *Afrox* para 72.

144 *Afrox* 35 B-C. This leaves the question as to what evidence the aimed to find.

145 Jansen & Smith (2003) *Journal for Juridical Science* 217.

146 See Van den Heever (2003) *De Rebus* 47-48 and Moore & Slabbert (2013) *S Afr J BL* 63 for a description of the condition these patients find themselves in.

147 See McQuoid-Mason (2012) *South African Journal of Bioethics and Law* 66 where the author lists other reasons as to why the judgement is out of touch with reality. This author states that professional bodies do not adequately protect the public from failing members, nor do patients shop around for the best terms and conditions. Advertising campaigns also depict excellent health services which makes it unlikely for patients to expect clauses excluding liability in their

The court also found that even when an exemption clause that excludes liability for gross negligence is considered to be contrary to public policy, it will not automatically be invalid as the clause will be interpreted restrictively in order to exclude gross negligence.[148]

Upon considering whether the hospital was allowed to exclude its liability by means of an exemption clause, the court found that the clause did not offend the underpinning values of the Constitution and that the hospital was entitled to insist on legally enforceable conditions for providing its services. Furthermore, the court did not believe that the clause would promote negligent conduct by the hospital's staff due to them being bound to their respective professional codes and relevant statutes.[149]

The principle of good faith was deemed to be but an abstract value that could not be considered a legal rule which, in the opinion of the court, made it impossible to operate on.[150] Carstens and Kok, however, submit that the court left open the opportunity to construct an argument premised on good faith.[151]

Finally, and perhaps most contentiously, the court found that there was no legal duty on the admission clerk to draw the respondent's attention to the clause in advance.[152] The court reasoned this finding by stating that such clauses can generally be expected when entering into contracts of this nature as their inclusion is considered a rule rather than an exception. The consequences of failing to properly read the document, therefore, rests solely on the person who so fails to read it. This strict adherence to contractual autonomy must give way to improve access to health care services.[153] Jansen and Smith, however, raise a worthy concern in that a large proportion of the South African population is seldom exposed to commercial contracts which mean that the expectation to find such a clause would be non-existent.[154] If this is to be accepted, then it is submitted that a hospital should at the

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admission forms. Finally, this author states that putting a patient's health at risk and thereafter denying said patient a form of redress goes against their right of access to healthcare.

148 *Afrox* para 35G.

149 *Afrox* para 38A.

150 *Afrox* paras 40 G-J, 41 A-B.

151 Carstens & Kok (2003) *SA Public Law* 443.

152 *Afrox* para 42 A-D.

153 Carstens & Kok (2003) *SA Public Law* 444.

154 Jansen & Smith (2003) *Journal for Juridical Science* 218.

very least be given a legal duty to bring the existence of the clause to the patient's attention.

This landmark decision has sparked much debate as to whether clauses of this kind should be enforced.[155]

2.3) Conclusions

The interpretation and application of exemption clauses found in standard form contracts has proven to be problematic. This is unsurprising when taking into account the potentially devastating consequences which may be brought about by their exploitation. The need to control their use has become all the more pressing with the passing of time, as they continue to grow in popularity. The common law methods of control have proven to be useful on a number of occasions but still bear shortfalls that cannot go unchecked. The common law, in its current form, cannot therefore effectively deal with contractual exemption clauses and should accordingly be developed in order to better support the values underpinning the Constitution.

It is not, however, only the inadequacy of the common law which has brought about these difficulties. Although our courts have contributed immensely to the law surrounding the use of exemption clauses, their contribution to the ambiguity attached to these clauses and their application should be considered equally as immense. The judiciary must take responsibility for the apparent lack of consistency when dealing with these clauses generally. The questions left unanswered and doors left ajar are too many in number which has diminished the much needed certainty in this area of the law. Consistency aside, the strict adherence to the principle of freedom of contract and disregard for basic notions of fairness has caused the judiciary to walk a path of unjust formalism.

The effects of these clauses within the medical profession are even more profound and require much greater introspection and a posterior re-evaluation. Although the *Afrox* case may show a significant development in the jurisprudence surrounding the use of these clauses in medical contracts, the judgement remains unsatisfactory as they advocate for the use of exemption clauses in medical contracts. It is submitted that, perhaps, a step in the right direction would be to recognise the disparate

[155] See 2.2.2 above.

bargaining positions of the contractants in order to promote fairness over formalism. Alternatively, and better yet, additionally, the dictates of medical ethics must enlighten our courts to the realisation that hospital exemption clauses – and those of a similar kind – run contrary to a health practitioner's Hippocratic Oath which should never be lightly accepted nor condoned. What is made abundantly clear, however, is the desperate need for legislative intervention. This call was duly answered in the form of the CPA.

3 The Influence of the Consumer Protection Act 68 of 2008

3.1) Introduction

Prior to the introduction of the Consumer Protection Act 68 of 2008 ('CPA'), a number of other statutes, together with the aid of the common law, had a bearing on the use and application of exemption clauses. These common law techniques include the notion of contractual form,[156] the requirement of prior notice,[157] adopting restrictive interpretation techniques,[158] the dictates of public policy,[159] and finally, the principle of bona fides.[160]

Certain statutes and legislative interventions have also been recognised for their ability to minimise the abuse of unfair contractual terms arising out of non-negotiated contracts.[161] South African contract law does not possess a general statute regulating the use of exemption clauses.[162] A number of statutory provisions, however, prohibit the inclusion of certain terms and thereby control the use of exemption clauses in specific instances.[163] An important development in the

156 See *Olley v Marlborough Court Ltd* 1949 1 ALL ER 127 (CA) for an understanding of what this principle entails.

157 See *Fourie v Hansen* 2000 1 All SA 510 (W) where the court refused to recognise the validity of an exemption clause where it had not been pointed out to the signatory before signing the contract. See also *Mercurius Motors* where it provides that a clause which seeks to undermine the essence of the contract should be clearly brought to the attention of the customer.

158 See *Hotels, Inns and Resorts SA v Underwriters at Lloyds* 1998 4 SA 466 (C); see also *Durban's Water Wonderland (Pty) Ltd v Botha* 2002 6 SA 453 (SCA).

159 See *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775. Note further that public policy requires consideration into the bargaining power between the parties as well as potential fraud or negligence.

160 See *Eerste Nationale Bank v Saayman* 2004 5 SA 511 (SCA) where the principle was used by the learned judge.

161 T Naudé "Unfair contract terms legislation: the implications of why we need it for its formulation and application" (2006) 17 *Stell Law Review* 361-385 at 361.

162 Stoop (2008) *SA Merc LJ* 506.

163 See for example the Alienation of Land Act 68 of 1981 section 15(1)(b) and (c) where it provides that an agreement whereby a purchaser forfeits any claim in respect of (i) necessary expenditure he has incurred with or without the authority of the owner or seller of the land concerned, in regard to the preservation of the land or any improvement thereon or (ii) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or seller; the liability of a seller to indemnify the purchaser against eviction is restricted or excluded. See also the National Credit Act 34 of 2005 section 90(2)(g) and (h) where it prohibits clauses in terms of which the credit supplier exempts any person who acts on his behalf from liability for any act, omission or representation made by a person acting on behalf of the credit or any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement or

legislative control of exemption clauses was the report made by the South African Law Commission ('SALC').[164] Within this report, the Commission diagnosed exemption clauses as provisions being worthy of receiving critical attention by the legislature.[165] The Commission found that such clauses did in fact have a legitimate place in contractual law, but that they should not be enforced where their implementation would lead to harsh and unfair results.[166] This development paved the path for the enactment of the CPA, codifying a number of principles pertaining to consumer protection. Not only was this codification long overdue, but the movement away from legal rules substantiated by formal reasoning towards a more discretionary form of reasoning, is a welcomed change to the law of contract brought about by the CPA.[167] The CPA distinctly triggers this movement in its desire to address the socio-economic inequalities faced by consumers and in particular, those consumers who have historically been disadvantaged.[168]

The CPA came into effect on 31 March 2011, followed by the effect of its Regulations on 1 April 2011. The Act has fundamentally changed the consumer's position in almost every environment and its general influence is a topic of too big a scope for the purposes of this dissertation.[169] However, the CPA's impact on the medical profession and the manner in which it regulates the use of exemption clauses, however, falls squarely within the auspices of this paper. In this regard, the CPA offers a number of ways in which exemption clauses can be controlled.[170]

Firstly, the Act's scope of application is wide and encompassing, requiring a degree of interpretative control.[171] Accordingly, should the CPA be in conflict with existing

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that expresses an acknowledgment by the consumer that before the agreement was made, no representations or warranties were made in connection with the credit provider or someone acting on his behalf; see also Stoop (2008) *SA Merc LJ* 506.

164 South African Law Commission Project 47 Discussion Paper 65 'Unreasonable Stipulations of Contracts and the Rectification of Contracts' (1998).

165 SALC Project 47 Discussion Paper 65 (1998) at 11.

166 Ibid.

167 Hawthorne (2012) *THRHR* 353.

168 See generally the Preamble of the CPA.

169 See generally E van Eeden & J Barnard *Consumer Protection Law in South Africa* (2 ed 2018) for a general understanding of the Consumer Protection Act and the context within which it operates.

170 See Tait & Newman (2014) *Obiter* 632.

171 See s5(1)(a) of the CPA where it provides that the Act applies to every transaction occurring in South Africa unless specifically exempted. See further ss(b) and (c) which states that the Act applies to the sale of goods and services as well as the promotion of such goods and services.

health care legislation such as the Health Professions Act[172] or the Medical Schemes Act,[173] then the Act which offers greater protection to the consumer will apply.[174] The understanding of what constitutes a 'service' in the Act will include; a consultation with a medical practitioner, advice provided by a medical practitioner as well as operations performed by a medical practitioner.[175] When applied to the medical profession, patients can be regarded as consumers, and medical practitioners can be regarded as suppliers as well as consumers.[176] It, therefore, appears as if almost all of the interactions between patients and healthcare providers will qualify as transactions in terms of the CPA.[177]

Secondly, while the Act bestows a number of different rights onto the consumer,[178] exemption clauses are most commonly dealt with under the umbrella right to fair, just and reasonable terms and conditions.[179] In this regard, the CPA introduces a number of provisions regarding the incorporation[180] and subsequent content control[181]of these clauses. There are a number of provisions in the CPA that have a bearing on the use of exemption clauses in the contracting process which makes an in-depth analysis of all the relevant sections impossible to fit within the confines of this paper. As such, the emphasis of this discussion is placed on the incorporation prerequisites prescribed by the Act and the potential influence these requirements may have on exemption clauses contained in standardised medical contracts. That being said, a number of subsidiary provisions of Part G of the CPA will be considered on account of their interrelated importance to the incorporation prerequisites.

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172 56 of 1974.

173 131 of 1998.

174 S4(4) of the CPA. See also Slabbert *et al* (2011) *CILSA* 170 where it provides that this specific provision encapsulates the common law *contra proferentem* rule.

175 Slabbert *et al* (2011) *CILSA* 170.

176 E Van Den Berg "The Consumer Protection Act: Implications for Medical Practice" (2003) 53 *South African Family Practice* 597-600 at 597.

177 Slabbert *et al* (2011) *CILSA* 171.

178 Including the right to equality in the consumer market; the right to privacy; the right of choice; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing and the right to fair value, good quality and safety; see also Hawthorne (2012) *THRHR* 356 where the author states that these fundamental rights establish a framework for procedural fairness.

179 Kanamugire & Chimuka (2014) 5 *Mediterranean Journal of Social Science* 170; see also T Naudé "The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in a comparative perspective" (2009) *SALJ* 505-536 at 519.

180 See generally s49 of the CPA.

181 See generally s48 and s51 of the CPA.

3.2) Preliminary Requirements for Incorporation

3.2.1) Introduction

Under the classical contract model, a sharp distinction was drawn between liabilities arising before and after a contract is entered concluded. The CPA has since eroded this distinction with its encompassing influence over all stages of the contracting dynamic.[182]

The earlier discussions dealt with in this paper adequately portray the uncertainty surrounding the validity and status of contractual clauses which exclude liability, particularly within the medical profession. Judges and learned authors alike have expressed contrasting views on the topic which has, thus far, created much uncertainty. Aside from a number of pre-contractual considerations imposed by the Act,[183] the CPA has recently introduced a port of first entry when considering the validity of these clauses by codifying the common law rules of incorporation.

It is submitted that the decisions to be discussed below are influential contributions to the enhancement of procedural fairness[184] in a contractual setting. In this context, the CPA contributes to procedural fairness by establishing imperative information obligations and further regulates the use of false, misleading and deceptive representations.[185] These information obligations have the potential to protect the medical consumer by creating a more transparent market and better allow such a consumer to make a rational decision when contracting with a healthcare establishment.[186]

3.2.2) Section 22: The Right to Information in Plain and Understandable Language

Although section 22 does not strictly constitute a requirement for incorporation, an exemption clause which fails to comply with its standards will not meet the formal incorporation prerequisites.[187] Upon assessing the validity of an exemption clause

182 Hawthorne (2012) *THRHR* 355.

183 See Hawthorne (2012) *THRHR* 355 where the author makes reference to s40(1)(c) and s52(3)(b)(i) and (ii) of the CPA which allows a court to establish that there was a breakdown of negotiations between the parties as a result of unconscionable conduct and thereafter make an appropriate order.

184 See Stoop (2015) *PELJ* 1092-2093 where the author states that procedural fairness relates to the contracting process itself and that a contract will be procedurally fair where a contract has been voluntarily concluded which houses transparent terms.

185 Hawthorne (2012) *THRHR* 356.

186 Hawthorne (2012) *THRHR* 359.

187 See s49(3) of the CPA.

contained within a medical contract, one should first ascertain whether or not its inclusion offends the patient's rights under section 22. This section requires that any document, notice or visual representation placed before the consumer should be produced or displayed in a form as prescribed by the Act. Where the Act is silent on the form it should take, the relevant document should still be formulated in plain language.[188] The language of the document or notice will be considered "plain" only where it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document or notice is intended (bearing average literacy skills and minimal experience as a consumer of the relevant goods or services) could be expected to comprehend its contents without undue effort, taking into account a number of factors.[189]

In order to comply with the Act, the wording used implies that a healthcare provider should draft the document to be understood by first-time patients.[190] This is critical as a patient who is being admitted to a hospital for the first time may not be aware of how frequently exemption clauses are included or even how they appear in form within a medical contract. Additionally, the mere knowledge of what the document dictates is insufficient as its consequences and underlying meanings should be made clear to the patient.[191] It would seem as if merely alerting the patient of the existence of an exemption clause is, therefore, insufficient and that further explanation is required. Another important measure introduced by this section is the necessity to take into account the time and manner in which the document is used.[192] This consideration may be influential given the deplorable condition many patients may find themselves in upon entering a health care establishment. Viewed contextually, it is difficult to believe that a patient in dire need of care will place much consideration into the technicalities of, say, an admittance form. Finally, it is submitted that this section prohibits the practice of hiding exemption clauses within

188 See s22(1)(a) and (b) of the CPA.

189 See s22(2); see further s22(2)(a)-(d) of the CPA for a list of the relevant factors taken into account.

190 T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 22-5.

191 See s22(2) of the CPA where reference is made to the content, significance and import of the document. See also T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 22-5.

192 See s22(2)(a) of the CPA where 'context' is mentioned as a relevant factor.

the fine print of a relevant document or constructing it in impossibly ambiguous terms.[193]

Although this provision illustrates a worthy attempt at ensuring a level of procedural fairness[194] for prospective patients, its formulation renders it subject to a number of interpretative and practical difficulties. Over and above the complexities associated with the average literacy skills required of the patient,[195] language in and of itself poses a serious obstacle for healthcare establishments. A census revealed the lack of uniformity in South African languages as spoken by its populace.[196] Ramkaran raises a worthy question as to what extent a healthcare establishment can be expected to ensure that they are adequately equipped and employ staff who can communicate effectively in a plethora of languages in order to cater for the linguistic disparities.[197] This may prove costly and unpractical. Nonetheless, this section should still be regarded as a *proactive* (own emphasis) fairness measure which may protect a patient who is functionally illiterate or otherwise unable to surpass the language barrier persisting.[198]

The challenges associated with the substance of section 22 are worsened by the uncertainties surrounding the repercussions when its terms are not met. Stoop and Chürr offer two possible arguments in this regard. Firstly, where an agreement is not written in plain and understandable language as so required by section 50(2)(b)(i), the agreement or relevant term may be void in terms of section 51(3). The section allows the court to sever or alter the problematic aspect of the agreement or

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193 See s22(2)(b) and (c) of the CPA where the 'organisation, form and style' of a document is listed as a factor, as well as its 'vocabulary, usage and sentence structure'.

194 See T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) at 22-3 where it describes procedural fairness measures as those which enhance transparency and allow consumers to protect their own interests.

195 See s22(2) of the CPA; see also T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 22-5 where it provides that even with an average skill of literacy, a consumer might not be able to understand the legalities of the document.

196 See Statistics SA and Census 2001, 2021 available online at http://www.southafrica.info/about/people/language.htm#.Ug-nnB8aLIU#ixzz2cFHHmcP9 (accessed on 2018/08/16) where it provides that isiZulu is the mother tongue of 22.7% of the population; followed by isiXhosa at 16%; Afrikaans at 13.5%; English at 9.6%; Setswana at 8% and Sesotho at 7.6% and that 5% of the population hold one of the other official languages as their mother tongue.

197 T Ramkaram *A Critical Analysis of Exclusionary Clauses in Medical Contracts* (2013) LLM Dissertation University of KwaZulu-Natal at 40.

198 Stoop (2015) *PELJ* 1103.

otherwise make a further reasonable order.[199] Secondly, one may also argue that the plain and understandable language requirement is but a consideration when determining whether an agreement or its terms are unfair in terms of section 48. The implication of this being that, failure to meet the requirements of this provision will not automatically make the relevant term or agreement void.[200] It is submitted that the former mentioned argument is to be preferred in order to adequately protect a medical consumer who has been hoodwinked by a convoluted contract issued by a healthcare establishment.

Despite these challenges, it is submitted that this section has the potential to safeguard a patient from falling prey to cloaked exemption clauses contained in medical contracts. It may also enhance the bargaining power of the patient by allowing him or her to make an informed choice, having knowledge of the presence and effect of such a clause. Another advantage of complying with this section is that unnecessary litigation will be less prevalent.[201] It is submitted that a patient who has suffered from both ill health and the expenses associated therewith will enjoy such a measure that deters costly litigation proceedings. Ultimately, this section increases the likelihood of *true consensus* (own emphasis) being reached between a healthcare establishment and the medical consumer.[202] One only needs to look as far as the *Afrox* decision to consider the potential impact of this provision. The enforcement of the exemption clause in this case would fall foul of section 22 as no consideration was given to any of the above factors listed under this section upon presenting the patient with the document containing the exemption clause.

The recent case of *Standard Bank of South Africa Ltd v Dlamini* ("*Dlamini*")[203] is considered to be a landmark injunction for the purposes of section 22. In this case, Dlamini had purchased a second-hand motor vehicle from the bank in question by means of a standard form credit agreement contained in a contract to which both parties had signed. Dlamini immediately experienced problems with the vehicle when

199 PN Stoop & C Chürr "Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008" (2013) 16 *PELJ* 515-553 at 541.
200 Stoop & Chürr (2013) *PELJ* 541.
201 Stoop & Chürr (2013) *PELJ* 544.
202 See Stoop (2015) *PELJ* 1103 where the author states that true consensus can only exist where the consumer actually understands the terms of a contract.
203 *Dlamini* 2013 (1) SA 219 (KZD).

he began driving it.[204] As a result, he had it towed back to the dealership and demanded that his deposit be refunded. The issue at hand fell back on the agreement which Dlamini had signed with the bank and the car dealership. This complex and convoluted agreement housed a clause regarding the terms of its termination, which Dlamini (allegedly) failed to comply with.[205] Of importance, is the fact that Dlamini was described as a fifty-two year old, functionally illiterate labourer who could not understand English with his standard one level of education.[206] Additionally, nobody at the dealership had explained the terms of the contract to Dlamini.[207] In her judgement, Pillay J equated the National Credit Act ('NCA') [208] to the CPA with regards to their endeavour of achieving equality as well as the requirements which demand documents to be written plainly and in an understandable manner.[209] Accordingly, the learned judge rightly (in the opinion of this author) set aside the entire agreement having found the agreement to be deceptive.[210] This decision adequately portrays the importance of drafting agreements in plain and understandable language, especially with regards to consumers who are insufficiently literate. The consumer in the abovementioned case was fortunate in that he was not left out of pocket as fairness prevailed. It is submitted, however, that a medical consumer's potential consequences should a court or similar body *not* (own emphasis) follow a similar line of reasoning are much more significant, potentially permeating the balance between life or death.

3.2.3) Section 49: Notice Required for Certain Terms and Conditions

The pertinence of this section is trite within the medical profession as the CPA will, unfailingly seek to protect the life and bodily integrity of a consumer.[211] This section requires that specific types of terms and notices comply with a number of formal requirements. At its core, this section prevents a consumer from entering into an agreement or contract that contains certain provisions which could affect his or her

204 *Dlamini* para 6.
205 *Dlamini* para 3.
206 *Dlamini* para 23.
207 *Dlamini* para 7.
208 34 of 2005.
209 *Dlamini* paras 31-5; 46-7 where s63 and s64 of the NCA are specifically referred to in this regard.
210 *Dlamini* para 64-7.
211 H Tembe *Problems regarding exemption clauses in consumer contracts: The search for equitable jurisprudence in the South African Constitutional realm* (2017) LLD Thesis University of Pretoria 189.

rights or that which could otherwise be unexpected.[212] The terms to which this section applies includes; exemption clauses (own emphasis), clauses whereby the consumer assumes risk or liability, indemnity clauses as well as an acknowledgment of any fact by the consumer.[213] This section sets out three broad requirements which exemption clauses should comply with.[214] The first requires that the clause be written in plain language.[215] Secondly, the existence, nature and effect of the clause must be drawn to the attention of the consumer in a conspicuous manner,[216] which is to be done either before the consumer enters the transaction or before the consumer is expected to offer consideration – whichever comes first.[217] Finally, the consumer must also be given an adequate opportunity to receive and comprehend the clause.[218]

The intricacies and difficulties associated with the plain language requirement have already been dealt with in this paper.[219]

An important requirement demanded by this section would require the medical practitioner to firstly make the patient aware of the existence of the exemption clause and thereafter, explain to him or her the type of clause being dealt with and then finally, to then explain its consequences.[220] This is apparent as the clause will inevitably constitute an assumption of risk and/or liability by the patient. Additionally, where any risks of the intervention were not adequately pointed out, the patient will have a claim for redress.[221]

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212 W Jacobs, PN Stoop & R van Niekerk ('Jacobs *et al*') "Fundamental consumer rights under the Consumer Protection Act 58 of 2008: A critical overview and analysis" (2010) 13 *PELJ* 302-406 at 357.

213 See s49(1)(a)-(d) of the CPA.

214 See Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 49-2; see also Kanamugire & Chimuka (2014) 5 *Mediterranean Journal of Social Science* 170-171 where these broad requirements are referred to as "incorporation rules".

215 S49(3) read with s22 of the CPA; See above for a discussion of the plain language requirement.

216 S49(1) read with S49(4)(a) of the CPA; see generally the facts and subsequent judgement of *Dlamini* in order to understand the importance of provisions of this kind in a practical scenario.

217 S49(1) read with s49(4)(b)(i)-(ii) of the CPA.

218 S49(5) of the CPA; see also Mupangavanhu (2014) *PELJ* 1179 where it provides that the purpose of this provision is to allow the consumer to make an informed decision.

219 See 3.2.2 above.

220 See s49(4) of the CPA; see also Tait & Newman (2014) *Obiter* 633.

221 Tait & Newman (2014) *Obiter* 636. See also McQuoid-Mason 2012 *SALJ* 66.

It is not clear as to what is to be expected on the part of the medical practitioner,[222] when attempting to attract the attention of the patient, in a format that will be sufficiently conspicuous.[223] Tait and Newman suggest that this requirement speaks to whether or not the supplier took reasonable steps to bring the clause to the consumer's attention.[224] Naudé contends that printing the exemption clause on the reverse side of the document will not be conspicuous enough.[225] Should the healthcare establishment, however, place the clause in bold writing on the very first page, it may be reasonable to conclude that it was sufficiently conspicuous.[226] This is trite as the ordinary meaning of 'conspicuous' when used as an adjective means 'clearly visible'.[227] It is submitted that requiring the patient to sign or initial next to the exemption clause will also be sufficiently conspicuous.[228] This provides medical practitioners with a plethora of ways in which to make the exemption clauses clearly visible to patients. Without clarity, however, it is suspected that arguments will inevitably arise in litigation as to whether the efforts of the medical practitioner were sufficiently conspicuous, especially when the surrounding circumstances may play a part in determining what is adequately conspicuous which may differ from time to time. This section, however, clearly prohibits the medical practitioner from alerting the patient to the exemption clause after the agreement has been entered into or after payment is required. In the case of an admission form, the medical practitioner should draw the patient's attention to the clause before they sign the form.

Section 49(5) attempts to prevent the situation where a patient is pressured into agreeing to an exemption provision and therefore, provides the patient with adequate time to consider whether or not he or she will accept its terms.[229] In this way, true consensus becomes all the more likely. It is, however, questionable as to whether a patient in desperate need of medical attention will be able to utilize this this time to consider the terms of the contract effectively given their ill mental or physical health.

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222 Note that for brevity's sake, reference will be made to 'medical practitioner's' in this section, but it must be borne in mind that the responsibilities outlined this section may fall on any other member of staff under the employ of the health care establishment or any other relevant person associated therewith.

223 Naudé (2009) *SALJ* 508.

224 Tait & Newman (2014) *Obiter* 634.

225 Naudé (2009) *SALJ* 508.

226 Tait & Newman (2014) *Obiter* 634.

227 See definition of 'conspicuous' in the Oxford Dictionary available online at https://en.oxforddictionaries.com/definition/conspicuous (accessed on 2018/08/23).

228 See Mcquoid-Mason (2012) *SALJ* 67 and Slabbert *et al* (2011) *CILSA* 177.

229 Tait & Newman (2014) *Obiter* 635.

As such, the practical impact of this section may be of a lesser degree in the realm of the medical profession. This section's inclusion is, nonetheless, of paramount importance in order to deter healthcare professionals from applying undue pressure on the patient to enter the contract.

Furthermore, additional requirements exist where certain risks are involved.[230] It is submitted that almost every medical intervention will constitute sufficient risk to bring about the need to fulfil these requirements. This is because the risks which commonly flow from medical interventions have a strong bearing on either the mental or physical well-being of a patient. It is submitted that risks of this kind should not be left unattended. Section 49(2) firstly requires that the patient be informed of the actual or physical risk and thereafter, the patient should also be informed of the risks brought about by agreeing to the exemption clause which denies said patient access to redress.[231] Westraat is correct in stating that such risks would include those that a reasonable patient would attach significance to, as well as those risks which ought to have reasonably been known by the medical professional responsible for dealing with or otherwise taking care of the patient.[232]

If the abovementioned requirements are complied with, a healthcare establishment can successfully minimise its liability despite having placed unfair contractual terms in its agreements with its patients.[233] Even where the provisions of section 49 are complied with, a patient may still, however, rely on section 48[234] as a measure of last resort in the hope that the clause will be struck out on account of it being deemed unfair.

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230 See s49(2)(a)-(c) of the CPA where such risks include those of an unusual character or nature; the presence of which the consumer could not reasonably be expected to be aware or notice; or that could result in serious injury or death. Furthermore, this section requires that such risks must also be signed or initialled by the consumer, unless the consumer had otherwise assented; see also Kanamugire & Chimuka (2014) *Mediterranean Journal of Social Science* 171 where these authors contend that these additional requirements go much further than the common law which merely required a signature in order to found liability.

231 Tait & Newman (2014) *Obiter* 636.

232 A Westraat *The influence and interpretation of the Consumer Protection Act 68 of 2008 on hospital exemption clauses* (2015) LLM Dissertation University of Pretoria 41.

233 Westraat (2015) LLM Dissertation University of Pretoria 43 where the author lists ways in which a health care establishment can limit their liability associated with exemption clauses, namely by listing the types of loss for which a party will not be liable for; stating that the contract contains the whole of the parties' agreement; setting a limit for the amount of damages a party can be liable for and excluding certain remedies available to the non-breaching party.

234 See 3.2.4 below.

It is unfortunate that this section does adequately spell out consequences for non-compliance and as such, one must turn to the provisions of section 52 to seek closure in this regard.[235] It has been submitted that a worthwhile addition to this section would be a provision which provides that a supplier who fails to comply, is barred from relying on the relevant term.[236] This would surely encourage healthcare establishments to tread more carefully when they attempt to exclude their liability by means of an exemption clause.

Flowing from what has already been alluded to above; this section may significantly improve the transparency in dealings between a patient and a healthcare establishment and should eliminate any obscurities surrounding the incorporation of exemption clauses within a medical contract. This section promotes procedural fairness by ensuring that detrimental terms – in the shape of exemption clauses specifically – are adequately disclosed to medical consumers. Building on the opinions of Stoop, it is submitted that a standardised approach in the presentation of these clauses may assist a patient in identifying and understanding their significance.[237] If such an approach is to be adopted, medical professionals stand to benefit. The obligation to adequately inform the patient of the relevant clause will be streamlined, reducing the potential for error on their behalf. The standardised approach should hold the same for both private and public healthcare establishments and it should apply to all healthcare establishments, subject to necessary adaptations when so required. It is submitted that the implementation of an appropriate standardised approach should be led by guidelines,[238] established by the different medical councils and other relevant bodies of importance in the medical profession after a lengthy process of consultation.

3.2.4) Other Relevant Sections

As a point of clarity, it must be noted that although a number of provisions of the CPA may have a bearing on the use of exemption clauses in medical contracts, the additional sections which will be discussed under this heading have been selected

235 See 3.2.4 below.

236 Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 49-4.

237 Stoop (2015) *PELJ* 1101.

238 This may include other supplementary codes of practice apart from guidelines specifically.

for analysis on account of their interconnectedness with the sections discussed above.

A number of sections in the CPA compliment the measures aimed at procedural fairness by offering different mechanisms aimed substantive control.[239] Sections 48, 51 and 52, either generally or specifically, prohibit certain contractual terms and further provides the courts with powers to ensure the fairness of contractual terms.[240] In order to contextualise the relevance of these sections and their bearing with regards to the focal topic of this paper, the following question must be considered: How would the CPA evaluate and address the *fairness* (own emphasis) of an exemption clause contained within a medical contract between a healthcare establishment and a prospective patient? The answer to this question is of fundamental importance given the fact that a failure to comply with the incorporation prerequisites of section 49 does not appear to render the term or agreement void. Even further, a consumer who was aware of the inclusion of a certain term at the time of contracting may still require protection against its unfair content.[241]

Section 48 provides a list of terms and situations which the Act deems to be unfair. A patient who has suffered at the hands of an exemption clause within a medical contract, which has not been appropriately incorporated or pointed out, may bring its fairness into question by virtue of section 48(2)(d)(i) and or (ii). This section provides that an agreement or a term attached thereto is unfair if the agreement (such as an admission form provided by a healthcare establishment) was subject to a term provided for in section 49(1), such as an exemption clause.[242] An allegation of this kind compels[243] a court to consider a number of different factors listed under section 52(2) of the Act. The factors which may have a persuasive influence in the case of

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239 See Stoop (2015) *PELJ* 1092; 1093 where the author states that substantive fairness is concerned with the outcome of the contracting process and further, that a contract will be considered substantively unfair where its terms are objectionable.

240 See Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 48-7 where it states that upon dealing with these sections, effect must be given to the purposes of the Act provided for in s3, which includes the achievement of a fair consumer market and the protection of vulnerable groups of consumers, to name but a few.

241 See Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 48-11 where it specifically uses the example of a standardised hospital admission form to illustrate this point.

242 Other such terms include assumption of risk clauses, indemnity clauses or acknowledgements of certain facts.

243 This duty to consider the factors mentioned under this section appears to be non-negotiable given the legislatures use of the word 'must' in s52(2) of the CPA.

an exemption clause within a medical contract include; the duty to consider the nature of the relevant parties and their respective conduct,[244] the circumstances that existed or that were foreseeable at the time of contracting,[245] the extent of negotiation between the contractants,[246] the extent to which section 22 was complied with,[247] and finally, a court should consider whether a consumer knew or ought reasonably to have of the existence and extent of the relevant provision.[248] It is submitted that these factors in particular have the potential to lead any court to the conclusion that an agreement of this nature found in the medical profession is wholly or partly unfair. Should a court reach this conclusion, it has the power to sever or alter any part of the agreement to make the agreement lawful once more or otherwise declare the entire agreement void.[249]

Should this argument above fail, a patient may also question the fairness of an exemption clause by relying on other protection measures established in terms of section 48. In particular, a patient may argue that the clause is unfair as it effectively requires the patient to waive their rights or otherwise waive the liability of the healthcare establishment.[250] Finally, it is submitted that the inclusion of such a clause has the potential to render unfair results in that it could make the medical contract exclusively one-sided in favour of the relative healthcare establishment, as said establishment would then rid itself of potential consequences which may arise due to its own fault.[251]

While section 48 offers a list of *potentially* (own emphasis) unfair terms, section 51 absolutely prohibits certain contractual terms and deems them void to the extent of their contravention under this section.[252] With regards to the current discussion, it is submitted that a medical exemption clause found within a contract between a healthcare establishment and a patient has the potential to contravene section 51(1)(a) or (b) as such a clause will result in the patient waiving or at the very least

244 S52(2)(b) and (d) of the CPA.
245 S52(2)(c) of the CPA.
246 S52(2)(e) of the CPA.
247 S52(2)(g) of the CPA.
248 S52(2)(h) of the CPA.
249 S52(4)(a)(i)(aa) and (bb) of the CPA; see also s52(4)(b) of the CPA which allows the court to make any other order it deems reasonable given the particular circumstances of a given matter.
250 S48(1)(c) of the CPA.
251 S48(2)(a) of the CPA.
252 S51(3) of the CPA.

restricting, his or her rights under the Act.[253] Furthermore, a healthcare establishment which seeks to exempt itself from liability stemming from acts of gross negligence by means of an exemption clause is *per se* prohibited.[254]

Furthermore Regulation 44 of the CPA offers a list of terms presumed to be unfair. Regulation 44(3) is of particular importance as it deals with terms found in standard form contracts which have the effect of; limiting the liability of the supplier or the remedies available to a consumer, matters pertaining to prescription, accessibility to the courts, changing the distribution of risk, allowing for unilateral amendments of the contractual terms as well as those which permit beyond reasonable damages.[255] It is submitted that the consequences attached to an exemption clause within a medical contract will indefinitely fall within the abovementioned list and thus, it would be reasonable to conclude that such a clause is *presumed* (own emphasis) to be unfair in terms of the Act.

Taking into account the relevance of these additional provisions discussed above, there remains but one final section of related importance. When the Tribunal or relevant court is faced with a questionable exemption clause, due consideration must be given to section 4(4) of the CPA. In such an instance, these bodies are required to interpret any standard form contract or other document which has been prepared by the supplier to the benefit of the consumer. Following this mode of interpretation allows the court to follow the interpretation which favours the consumer in the event of ambiguities.[256] In addition to this, any limitation or exclusion of the medical consumer's rights caused by the inclusion of an exemption clause in a contract with a healthcare establishment is to be limited by having regard to the content of the document, the manner in which it was presented as well as the surrounding circumstances under which the agreement was entered into.[257] Therefore, in the event that an exclusion clause manages to surpass the thresholds of sections 22, 49, 48, 51 and Regulation 44 (however unlikely), section 4(4) offers a safety net for the medical consumer whereby the clause will, at the very least, be interpreted in his or her favour.

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253 Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 51-3.

254 S51(1)(c)(i) and (ii) of the CPA.

255 Regulation 44(3) of the CPA read with Hawthorne (2012) *THRHR* 367.

256 S4(4)(a) of the CPA.

257 S4(4)(b) of the CPA.

3.3) Informed Consent

Within the medical context, informed consent[258] is the product of parting appropriate information and acquiring the knowledge and appreciation of material risks of complications, which will put the patient in a position to make an informed decision.[259] The emphasis, which has now been placed on obtaining informed consent stems from the focus of medical ethics shifting to a model of autonomy, which closely aligns itself with foundational rights enshrined in the Constitution.[260] Allegations based on a lack of informed consent generally allege that a medical practitioner failed to fulfil the duty to supply the patient with all the material information about the risks of the proposed treatment.[261] One such risk may be the exclusion of liability on the part of the medical practitioner.

The *Castell v De Greef*[262] case established a test for disclosure whereby it is required that a doctor should disclose all information and risks to which a reasonable person in the position of the patient, if warned of these risks, would be likely to attach significance.[263] It is submitted that where a hospital attempts to absolve itself from any form of liability contractually, any reasonable patient will place significant weight upon the potential consequences should the medical intervention fail to go as planned. Therefore, based on this disclosure test alone one would expect the medical practitioner to duly inform the patient of the presence and repercussions of the exemption clause when incorporated into the relevant contract or admittance form.

This doctrine has since been codified in the National Health Act 61 of 2003 ('National Health Act').[264] Moore and Slabbert, however, criticise the manner in which informed

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258 For a discussion on the background and intricacies regarding the doctrine of informed consent, see the sources mentioned in fn19 above; see also S Naidoo "Obtaining informed consent for surgery" (2014) 27 *Current Allergy & Clinical Immunology* 112-114 and L Pienaar "Investigating the Reasons behind the Increase in Medical Negligence Claims" (2016) *PELJ* 1-22.

259 Lerm (2008) LLD Thesis University of Pretoria 169.

260 See Moore & Slabbert (2013) *SAJBL* 61 where it links autonomy to a number of Constitutional rights, including the right to bodily and psychological integrity in s12; the right to privacy in s14; the right to life in s11 as well as the right to dignity in s10.

261 Ibid.

262 1994 (4) SA 408 (C).

263 See Moore & Slabbert (2013) *SAJBL* 62.

264 Ibid; see also s6 through to s9 of the National Health Act which lists the scope and nature of information to be disclosed, the language to be used when making a disclosure and the patients' rights of participation in decision making.

consent is obtained today, being inconsistent, formalistic and superficial.[265] This critique holds merit when considering the use of exemption clauses in standard form medical contracts which are often incorporated inconsistently and covered with convoluted formalities without a sense of authenticity. The difficulties in obtaining informed consent are exacerbated by a number of factors.[266] Perhaps the most problematic of these difficulties lies in the inability to obtain informed consent at a contractual level between the patient and medical practitioner. Moore and Slabbert contend that this is because the law of contract is not a suitable vehicle for regulating relationships involving health service delivery and further attribute the law of contracts failure to allow for informed consent to the patients diminished bargaining power.[267] These authors make specific reference to the *Afrox* case to illustrate how a health service provider can contract out of liability by means of an exemption clause in the contract signed by the patient, effectively authorising the health care establishment to act in an unconstitutional manner.[268] It is submitted that this inequitable position should see fundamental change given the enactment of the CPA. The medical practitioner's duty of disclosure has become significantly more onerous by virtue of its mechanisms aimed at controlling unfair, unreasonable and unjust terms. In particular, the provisions of section 49 read with section 22 should surely bolster the achievement of informed consent in contractual dealings between health care providers and their patients. These provisions require more than benign notification responsibilities and promote a process of acknowledgement and understanding between the contracting parties.[269] It is submitted that section 49(5) in particular is aimed at allowing a consumer (or patient) to make an informed decision as it provides that the consumer must be given an adequate opportunity to receive

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265 Moore & Slabbert (2013) *SAJBL* 62; see also E van Eeden *A Guide to the Consumer Protection Act* (2009) 178 where the author contends that the totality of the phrase 'fact, nature and potential effect' clearly indicates that the supplier is required to ensure that the consumer has an adequate understanding and appreciation of the risk rather than a superficial awareness of the risk.

266 See Moore & Slabbert (2013) *SAJBL* 62 where a number of these factors are mentioned. These include the perception that the practitioners duty to heal is more important than their duty to inform; the fact that the duty to obtain informed consent is delegated to ill-equipped nursing staff; the lack of infrastructure and resources in South Africa as well as the literacy levels of the relevant patient.

267 Moore & Slabbert (2013) *SAJBL* 63.

268 Ibid.

269 Ibid. This sentiment runs contrary to the argument made by Moore & Slabbert who believe that the doctrine of informed consent in its current form is insufficient due to a lack of process aimed at acknowledgement, deliberation and understanding instead of the mere act of notification.

and comprehend the provision. One may then conclude that the CPA represents another codification of the doctrine of informed consent.

However, and rather ironically, being informed may also work against a consumer. Given the accepted validity of the operation of exemption clauses in medical contracts, a medical service provider who complies with the incorporation prerequisites and duly draws the patient's attention to the relevant clause results in the patient being bound to the terms of the agreement. The CPA's protection in this regard will cease to cover the patient.[270] Flowing from this, the contract denier will not be able to rely on the *iustus error* doctrine where he or she was aware of the existence of an exemption clause in the agreement.[271] A consumer may, however, seek refuge in other sections of the CPA if the clause was in any event unfair.[272] Despite this it hardly seems fair that a patient is at risk of being prejudiced by virtue of being informed.

3.4) Conclusion

The information obligations prescribed by the CPA are to be welcomed in the case of a medical consumer. Sections 22 and 49 have significantly enhanced procedural fairness within the contractual relationship between a patient and a healthcare establishment. These sections, however, are not without their share of interpretative difficulties. Their relatively broad formulation gives litigants space to argue the extent to which they have complied with these sections which courts will have to adjudicate carefully. The challenge which then follows is what ruling is to be considered appropriate given the uncertainties surrounding the consequences of failing to comply with these sections. The Act, should thus, be commended for its more stringent requirements to incorporate exemption clauses as well as the support given to these provisions by other sections of the CPA. One would hope that the precedent set in *Dlamini* will persist into disputes in the medical profession, encouraging our courts to place more consideration into a contract's overall fairness. On an ethical level, however, the use of exemption clauses in standard form medical contracts is to be frowned upon in the opinions of this author.

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270 Mupangavanhu (2014) *PELJ* 1180.

271 Ibid.

272 See generally s48 of the CPA.

The question which then presses is, have these provisions in fact contributed to a more informed basis of consent? Or rather, do they even have the capacity to bring about the desired level of consent? It may be too soon to answer the former of these questions with certainty, but it is submitted that the latter question can be answered positively and with confidence. The incorporation prerequisites have significantly increased the burden now placed on health care establishments to draw a patient's attention to clauses exempting these establishments from liability within their respective contracts and forms. It is contended that being so informed does not necessarily result in an improved bargaining position on the part of the patient. It is unlikely that a health care establishment will amend its terms at the request of a patient or even engage in a negotiation regarding the nature of the exclusion from liability. The benefits of being so informed should rather be seen as giving the patient the gift of choice. It may be a small victory for the medical consumer, but a victory nonetheless.

It goes without saying that one can expect patients to be adequately informed upon making the decision to enter these agreements. As has been eluded to above, however, being so informed also poses a significant danger for patients which they should be cognisant of. The benefits of being better informed, however, by virtue of the provisions of the CPA outweigh the potential dangers of being *too* (own emphasis) informed.

4 An Analysis of the Medical Consumer's Route to Redress

4.1) Introduction

It is submitted that the Consumer Protection Act 68 of 2008 ("CPA") has potentially bettered the bargaining position of the patient upon entering a contract with a healthcare establishment. Its provisions aimed at adequately informing the patient of potential risks in a medical intervention are testament to this conclusion. The question which must now be answered, however, is whether this improved bargaining position has or at least has the potential to effectively realise the patient's rights. One must therefore turn to the institutions responsible for the redress and enforcement of rights pertaining to the medical profession. Not only must the institutions themselves be considered, but the *route* (own emphasis) thereto has sparked much legal debate. The problem at hand can best be explained with the following scenario: Where a patient signs a contract with a healthcare establishment without being duly notified of the presence and consequences of a particular exemption clause which excludes the healthcare establishment from all forms of liability, what avenues of redress are available to the patient? How does the patient access these avenues of redress? What follows is a brief discussion of some of the primary institutions for relief within the medical profession itself. Thereafter, the mechanisms for redress offered in the CPA are analysed as well as the means by which a consumer may access these avenues of redress.

4.2) Pre-Existing Institutions of Relief

4.2.1) The Health Professions Council of South Africa ('HPCSA')

This institution was established by the Health Professions Act 56 of 1974 and is frequently used to lodge complaints against doctors. It is aimed at maintaining the highest standards of ethical behaviour for a number of healthcare professionals.[273] This is achieved through a process of coordination across professional boards within

[273] Examples of these professionals include audiologists, dentists, dieticians, emergency care personal, medical practitioners as well as physiotherapists to name a few.

the health sector.[274] It should be noted that nurses are not registered with HPCSA which is of significance given that they are often responsible for ensuring that an incoming patient signs the relevant forms which may contain exemption clauses. In this case, the South African Nursing Council ('SANC') can be approached in order to investigate the complaint.

A patient is entitled to lodge a complaint with the HPCSA where it is alleged that a health care practitioner has acted negligently or unethically. Within 7 days of receiving the complaint, the Registrar passes the complaint on to the healthcare practitioner concerned and requests a written explanation from him or her. Thereafter, both the complaint and the explanation are sent to the Professional Board concerned for consideration. If the Board decides that there are grounds for the complaint, a Professional Conduct Committee will hold a professional conduct enquiry within which evidence will be led. Should the healthcare practitioner be found guilty of professional misconduct, he or she may be subject to; the imposition of a caution or reprimand, a fine, a period of suspension, removal of his or her name from the registrar or a compulsory period of professional service.[275] Out of the 676 cases received by the ombudsman between 2015 and 2016, a total of 557 were resolved[276] which establishes a success rate of just over 80%.

The HPCSA, however, is not without its issues. As recently as 2015, the Minister of Health launched an investigation into HPCSA after receiving a number of allegations. The investigation found that there were a number of administrative irregularities, mismanagement and poor governance at the HPCSA. Furthermore, the HPCSA was found to be ineffective in a number of key areas.[277] In addition to the problems

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274 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 565-590 at 573.

275 Health Professions Council of South Africa available online at http://www.hpcsa.co.za/Conduct/Complaints (accessed on 2018/09/17).

276 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 573.

277 See HPCSA MTT Report – Final Version – Executive Summary at page 2 available on:http://www.health-e.org.za/wp-content/uploads/2015/11/HPCSA-MTT-Report-Final-Version-Executive-Summary-25.10.pdf where it lists the following areas; a) registration of health professionals, b) examination and recognition of foreign qualifications of practitioners, c) professional conduct enquiries, d) approval of programmes in training schools, and e) continued professional development.(f) information communication technology,(g) data management,(h) space management, (i) human resource management and;(j) risk management.

associated with the lack of adequate leadership, HPCSA also bore structural problems and were seen to have a delayed response to investigation proceedings.[278]

4.2.2) Council for Medical Schemes ('CMS')

This council provides regulatory supervision of private health financing through medical schemes.[279] The CMS is primarily concerned with investigating medical scheme complaints on behalf of medical scheme members. A complaint pertaining to medical schemes generally begins with the consumer's particular medical scheme Principal Officer and the matter is often heard at the Disputes Committee of the relevant scheme. Thereafter, an appeal can be made to the council within three months of the date of the decision. The Complaints Adjudication Unit analyse the complaint and refer back to the medical aid scheme within 30 days. After the scheme responds, it will make a binding decision which a party can appeal against to the council and as a last measure, the board. A common problem which persists in matters relating to medical schemes is that of fraud.[280] Between the years of 2015 and 2016, a total of 5089 new complaints were received and in the same year, 5794 were resolved.[281]

4.2.3) The South African Dental Association ('SADA')

The SADA is utilized where a patient wishes to lodge a complaint against a dentist. This body makes the provision for a Dental Mediator. This mediator can medicate any disputes arising out of the supply of clinical and professional treatment by practitioners to patients; investigate disputes between professional colleagues, promote and ensure ethical practice by the dental profession as well as assisting with the education of the dental profession.

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278 A Doodnath 'The trouble at the Health Professions Council of South Africa' (2016) available online at https://hsf.org.za/publications/hsf-briefs/the-trouble-at-the-health-professions-council-of-south-africa (accessed on 2018/09/17); see also A Nicolaides & F de Beer "Practitioner ethics, medical schemes and fraud in the South African private healthcare sector" (2017) 31 *Medical Technology SA* 1-11.

279 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 573.

280 See TG Legotlo & A Mutezo "Understanding the types of fraud in claims to South African medical schemes" (2018) 108 *SAMJ* 299-303.

281 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 573.

4.3) The Consumer Protection Act 68 of 2008

4.3.1) A Lacuna in the Law

The provisions relating to the redress and enforcement in the CPA are contentious to say the very least. A fundamental flaw of Part G of the Act (which thus includes the issues associated with sections 22 and 49) is that exclusive jurisdiction is awarded to normal courts. The institutions listed under section 69 appear to have no power to award damages. The unpalatable situation which then arises is that suppliers (and potentially healthcare establishments) can institute action in the High Court at an exorbitant cost to the consumer where lower courts are unexplainably left unutilised.

The preamble of the Act provides that the statute aims to supply consumers with fast, effective and economical redress for disputes. It however appears as if this aim is yet to be realised and it appears as if the multitude of forums available to the consumer have not hastened their attempt to find redress.[282] The way in which the Act sets out to achieve this goal mentioned in the preamble is by giving the consumer a number of ways in which to enforce their rights.[283] These avenues of redress are contained in section 69 which is to be read with a number of other relevant sections in order to ascertain the correct route of redress in a particular circumstance.[284] In the medical context, it has been submitted that where an ombud such as the Department of Health, the Hospital Association of South Africa, the Council for Medical Schemes or the Health Professions Council of South Africa Although, any complaint must first be referred to such accredited ombud.[285] At the level of the National Consumer Commission, the most common complaints pertain to medical aids.[286] Although an implied hierarchy can be inferred, the lack of clarity in this regard is problematic. Woker states that this often results in consumers adopting

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282 See *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and others* 2016 3 All SA 794 (FB) para 2 where the court stated that if anyone was to believe that the CPA would allow for speedy, fair and inexpensive resolution of disputes, they would be proven wrong by this particular judgement.

283 The entities capable of providing redress under this section include (in no particular order) the National Consumer Commission, the National Consumer Tribunal, ombuds with jurisdiction, industry ombuds, consumer courts, alternative dispute resolution agents as well as ordinary civil courts. See also Y Mupangavanhu "An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008" (2012) 15 *PELJ* 320-346 at 337 where the offering of multiple forums of redress may also result in forum shopping which in undesirable.

284 This is because there is no set order in which consumers are expected to resolve their disputes.

285 Slabbert *et al* (2011) *CILSA* 192-193.

286 Slabbert *et al* (2011) *CILSA* 194.

a shotgun approach in that they complain to a number of forums who are already battling a scarcity of resources.[287] Consumers are encouraged to follow the following preferred route: [288] Firstly, where a consumer and a supplier cannot resolve the dispute between themselves, the parties should first attempt to resolve the dispute by approaching one of the alternative dispute resolution agents mentioned in the CPA. Where an industry ombud exists, he or she may be approached. Alternatively, the consumer may approach a consumer court where applicable. If the issue remains unresolved, the consumer can lodge a complaint with the National Consumer Commission. After investigating the matter, the Commission may refer the matter to the National Prosecuting Authority, the equality court or it may propose a draft consent order. Otherwise, the Commission may issue a compliance notice or refer the matter to a consumer court. Alternatively, it may refer the matter to the Tribunal. Although the CPA explicitly states that a consumer may approach the Tribunal directly in certain instances, the Act actually creates an empty promise as a notice of non-referral from the Commission is provisionally required in order to provide the consumer with access to the Tribunal – thus a consumer can *never* (own emphasis) approach the Tribunal directly.[289] What is clear is that an ordinary civil court may only be approached after all the other remedies have been exhausted.

The approach adopted by the Commission in particular has been ineffective, as it often simply refers the matter back to an alternative dispute resolution agent or issues a notice of non-referral.[290] If a medical consumer has not enjoyed success upon approaching, say, an ombud with jurisdiction, what is the use in sending said patient back to this forum? Poking a steel wall with a feather is not going to bring down the wall, no matter how many times one prods. Furthermore, where the Commission issues a non-referral notice, allowing the consumer to approach the Tribunal directly, the Commission evades its investigative duties which may prolong proceedings at the Tribunal.[291] Additionally, the apparent contradiction between the provisions of section 69 and section 52 warrants further analysis.

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287 T Woker "Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress" (2017) *SA Merc LJ* 1-16 at 5.

288 See Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (original service 2014) 69-22; see also Mupangavanhu (2012) *PELJ* 336.

289 Woker (2017) *SA Merc LJ* fn 62.

290 Woker (2017) *SA Merc LJ* 11.

291 Woker (2017) *SA Merc LJ* 13.

Section 52 empowers a court to ensure fair and just conduct, terms and conditions. This section provides a number of orders that a court may make in the event of an unfair agreement or term thereof.[292] This section also specifically sets out a number of factors that a court should take into account upon embarking on this enquiry.[293] In light of the current discussion, it is not difficult to believe that an exemption clause contained within a medical contract may be considered either an unfair, unjust or otherwise unreasonable term when taking into account these factors.

A number of arguments have been advanced as to why courts should have the exclusive power to deal with disputes regarding unfair terms.[294] As such, it becomes unclear whether a consumer or patient will be required to first approach one of the alternative means of dispute resolution before approaching an ordinary civil court.[295] The position is reiterated in section 69(d), which provides a person may only approach a court for relief once all other remedies available to that person have been exhausted.[296]

At the centre of the contradiction between sections 52 and 69 is the question as to which forum has the jurisdiction to declare a contract term unfair.[297] The manner in which these sections are formulated results in the consumer being sent on a superfluous endeavour to approach a forum which in fact has no power to decide the dispute or award damages.[298] This is because the use of the term is deemed as 'prohibited conduct' only once an *ordinary* (own emphasis) court declares it to be

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292 These orders include making a declaration that an agreement or a part thereof was unreasonable, unfair or unjust; making any further order that the court considers just and reasonable which may include an order to restore money or property, to compensate a consumer for loss, or requiring the supplier to cease any practice. Furthermore, where an agreement or term thereof contravenes s49, the court may make an order declaring the provision void and sever any part of the agreement or declare the whole agreement void or make any order it deems just and reasonable. See s52(3) and (4) of the CPA.

293 These factors include: the fair value of the goods or services; the nature of the parties; the circumstances of the transaction; the conduct of the parties; whether or not there was negotiation; whether the consumer was required to do something that was not reasonably necessary for the supplier; whether s22 was complied with; whether the consumer knew or should have known of the existence of a provision that is alleged to have been unfair, unreasonable or unjust; the amount for which identical goods or services could have been acquired elsewhere. See s52(2)(a)-(i) of the CPA.

294 See Mupangavanhu (2012) *PELJ* 334 where the author mentions some of these arguments which include the fact that we follow a system of judicial precedent which means that cases are reported and legal certainty is enhanced. A further argument is that courts are led by those with an expert knowledge of the law and contract; see also Naudé (2009) *SALJ* 527.

295 Naudé (2009) *SALJ* 525.

296 See s69(d) of the CPA.

297 Mupangavanhu (2012) *PELJ* 337.

298 Ibid.

unfair.[299] The problem is that the other avenues of redress will only have jurisdiction to act against a supplier who has used a certain term after the term has been declared unfair by an ordinary court.[300] The counter-argument purported appears to be premised on the encouragement of voluntary settlement. However, where a consumer will inevitably require the hand of an ordinary civil court, it seems unfair to put him or her on a trivial pursuit through the other forums which do not wield the same powers of ordinary courts.

A further conflict exists between the provisions of section 69(1)(d) and section 52(1)(b). Section 52(1)(b) allows for court intervention where the CPA does not otherwise provide a remedy to correct the relevant unfairness whereas section 69(1)(d) makes reference to remedies in terms of national legislation, without making reference to their 'sufficiency'.[301] This brings into question the jurisdiction of ordinary courts in the resolving consumer disputes.

On the face of it, section 69(d) apparently denies consumers the ability to approach civil courts directly and instead requires that the complaint first be lodged elsewhere. Suppliers, on the other hand, do not seem to be restricted from launching a matter in a higher court which stands to adversely affect a financially distressed consumer. This is concerning when taking into account that it may, for example, be more convenient for a consumer to approach a Small Claims Court but they are seemingly prohibited from doing so by virtue of section 69(d).[302] For most consumers, the Magistrates' and High Court are beyond their financial and comprehendible reach due to the expenses attached to proceedings in these courts as well as their formal and intricate nature.[303] Van Eeden argues that this infringes the consumer's constitutional right of access to redress.[304] Court's and tribunals alike are required to make orders that give practical effect to this right.[305] If the Act is interpreted so as to give ordinary courts the exclusive power to deal with unfair contract terms, a

299 Mupangavanhu (2012) *PELJ* 335; see below 4.3.2.1.
300 Naudé (2009) *SALJ* 525.
301 Sharrock (2010) *SA Merc LJ* 324.
302 Mupangavanhu (2012) *PELJ* 336.
303 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 581.
304 E van Eeden *A Guide to the Consumer Protection Act* (2009) 38.
305 Mupangavanhu (2012) *PELJ* 338.

consumer should be able to approach an ordinary court,[306] even as a port of first entry. Bestowing this exclusive power unto ordinary courts to the exclusion of other forums does not, however, bode well with common sense and may retard the purpose of the Act to provide quick and efficient resolution of disputes.[307]

4.3.2) Case Law

4.3.2.1) National Consumer Commission v Western Car Sales CC t/a Western Car Sales (NCT/81554/2017/73(2)(b)) [2017] ZANCT 102 (14 September 2017) ('Western Car Sales')

In this matter, Ms Van Lill purchased a second hand motor vehicle from the Respondent.[308] Within a week of this purchase, Ms Van Lill began experiencing mechanical problems with the vehicle and shortly after these problems surfaced, the vehicle finally broke down.[309] Ms Van Lill requested the Respondent to refund her the purchase price but the Respondent refused to oblige this demand.[310] Following the path of redress as stipulated in the Act, Ms Van Lill lodged her complaint with the independent institution called SA Consumer Complaints who failed to resolve the dispute. She then approached the Motor Industry Ombudsman of South Africa ('MIOSA') who ruled in her favour but said ruling was ignored by the Respondent which caused Ms Van Lill to be referred to the Commission who launched an investigation into the matter.[311]

It was alleged that the Respondent had contravened sections 51(1)(a) and (b) as well as section 48(1)(c).[312] At the centre of the dispute were a number of documents signed by Ms Van Lill upon purchasing the vehicle. Some of these documents contained questionable handwritten clauses.[313] The Tribunal was left with the

306 Ibid.
307 Naudé (2009) *SALJ* 525; see also Mupangavanhu (2012) *PELJ* 339.
308 *Western Car Sales* para 13.
309 *Western Car Sales* para 14.
310 *Western Car Sales* para 14.
311 *Western Car Sales* para 15.
312 *Western Car Sales* para 16.
313 *Western Car Sales* paras 21-25 where these clauses are mentioned. The following examples deserve mentioning: 'Comments: Vehicle sold as it stand no warranty (sic)'; Fit for purpose: 1. I have read all of the material made available to me by Western Car Sales CC setting out the specifications of the vehicle and I confirm that this vehicle is fit for the purpose for which ZI an (sic) purchasing it. 2. I confirm that this vehicle is in good quality and in good working condition. 3. I understand that Western Car Sales CC will not be held responsible for normal wear and tear on the vehicle from the day of delivery onwards.'; 'Special acknowledgement: 1. I accept that Western Car Sales CC has disclosed the following risk(s), defects(s) or unsafe

responsibility of determining whether the contract signed by Ms Van Lill allowed the Respondent to escape liability. The Tribunal found that the words used by the Respondent proved its intention to contract out of liability.[314] Furthermore, the Tribunal found that the contract contained a number of clauses and statements which either contradicted the rights in the CPA or at least misrepresented them.[315]

The next part of the judgement illustrates the problems attached to exclusive jurisdiction given to ordinary courts. In this regard, the Tribunal made a distinction between sections 48 and 51 and found that while it had the power to declare contraventions of section 51 as prohibited conduct, the power to apply the provisions of section 48 rested solely with the courts.[316] After giving due consideration to the factors mentioned in section 52, the Tribunal found that the Respondent had in fact contravened section 51 and subsequently interdicted the Respondent from further contravening the Act and imposed on it an administrative penalty and demanded that Ms Van Lill be reimbursed.[317]

This case illustrates how the institutions charged with the redress and enforcement of the CPA can be used effectively in order to protect a consumer's rights. Unfortunately, the exclusive jurisdiction given to the ordinary courts proved to be a hindrance once more and frustrated the purposes of section 69. It is therefore hoped that a patient who mirrors this route to redress within the medical profession will see similar results.

4.3.2.2) Nedbank Limited v Thobejane (84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16) [2018] ZAGPPHC 692 (26 September 2018) ("Thobejane")

In this case, the learned judges narrowed down the primary issues to be considered into two focal concerns. The first addresses the apparent increase in the tendency by litigants, and in particular commercial institutions, to enrol matters in the High Court even though their matters fall within the monetary jurisdiction of the Magistrates' Courts. The second concern addresses the practice whereby litigants enrol matters

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item(s) and that I will accept the vehicle in that condition notwithstanding what was pointed out to me…'.

314 *Western Car Sales* paras 29; 33.

315 *Western Car Sales* para 37. See also paras 38 and 39 for examples.

316 *Western Car Sales* para 42.

317 *Western Car Sales* paras 55-59.

in Pretoria even where the parties involved are located within the Gauteng Local Division, Johannesburg.[318] The problems which flow from this are many and significant. It creates a bottle-neck of cases in the Gauteng Division, Pretoria which causes delays in adjudication.[319] Additionally, the *inferior* defendant's in these matters are forced to travel great distances in order to appear in court which infringes their right to access to justice.[320]

This matter in particular involved a number of large financial institutions who appeared before a *full* (own emphasis) bench. The Banks provided a number of reasons as to why they institute actions in the High Court, most of which were linked to the alleged incompetency's of the Magistrates' Courts as well as the practical problems associated with instituting action in such courts.[321] In response to this, the South African Human Rights Commission ('SAHRC'), acting as *amici curiae,* argued that already distressed debtors are adversely affected financially in this way and that the Magistrates' Courts represent a more accessible alternative.[322] The Court went on to consider the extent of congestion experienced by the High Court and the resultant affects thereof.[323]

Thereafter, the Court considered the issues surrounding accessing a court to have one's dispute of law resolved and in particular, placed its emphasis on the constitutional right of access to court in section 34 of the Constitution of South Africa,1996.[324] This enquiry traversed across a number of judgements given by our judiciary which dealt with matters relevant to this right.[325] This led the Court to the conclusion that a litigant's right of access to justice was not duly considered, nor was the substantiality of over burdening High Courts.[326] Returning to the matter at hand, the Court believed that the approach adopted by the Banks in question could well result in an abuse of process.[327]

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318 *Thobejane* para 1.
319 *Thobejane* para 2.
320 *Thobejane* paras 3 and 4.
321 See *Thobejane* para 10 for a list of their specific reasons.
322 *Thobejane* para 11.
323 *Thobejane* paras 12-29.
324 *Thobejane* para 30.
325 See generally *Thobejane* paras 31-52 where these principles are discussed.
326 *Thobejane* para 49.
327 *Thobejane* para 52; see also *Standard Credit Corporation Ltd v Bester and others* 1987 (1) SA 812 (W) p820 A and G where the court states that an abuse of process can take place

In light of a courts duty to ensure adequate access to justice as it is understood by this Court, it was found that a litigant who bypasses the Magistrates' Court is defying the attempt by the legislature to bring justice to the people which means that to allow a matter which can be decided in a Magistrates' Court to be heard in a higher court amounts to an abuse of process.[328] This Court strongly rejected the aged position which allows a plaintiff to choose his or her desired forum as to allow this practice shows ignorance towards the prevalent inequalities in our society.[329]

In totality, the Court held that the Banks reasoning to rather approach a High Court on account of the inefficiencies of the Magistrates' Court is inadequate.[330] Accordingly, it was held that where a matter falls within the jurisdiction of the Magistrates' Courts, such a matter should be heard in that court and that the existence of concurrent jurisdiction does not oblige a High Court to hear a matter which jurisdictionally pertains to the Magistrates' Courts.[331]

This judgement will have a profound effect on the dynamics of consumer law. It effectively rejects the practice whereby suppliers with superior bargaining power attempt to exploit weaker consumers by dragging them into costly and unnecessary litigation where more suitable means of redress exist. Suppliers are therefore *compelled* (own emphasis) to institute their actions in a lower court which meets the jurisdictional requirements.

This case should be considered an important step in the right direction for the plight of consumers in South Africa. That being said, the specific plight of the vulnerable patient who has been contractually harmed by a dubious healthcare establishment may not find solitude just yet. This is due to the fact that they are still required to follow the lengthily procedures prescribed by section 69 even though the bodies mentioned here are not equipped to award damages. A medical consumer who has gone the distance and exhausted all the available remedies and who now seeks damages will at the very least, enjoy the right to have his or her matter heard in a lower court.

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when a courts procedure is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party.

328 *Thobejane* paras 73; 74; 76.

329 *Thobejane* para 79.

330 *Thobejane* para 81.

331 *Thobejane* paras 91; 92.

4.4) Conclusion

The correct measure to remedy this position would be to bring about a legislative amendment rather than leave the matter up to a plethora of subjective interpretations. This paper longs for the ideal mentioned by Sharrock in that consumers should not be compelled to seek extra-juridical remedies before approaching a court and that they should be free to choose whatever remedy may suit best in a particular circumstance.[332] This is, however, nothing more than what Sharrock describes it as; an ideal. In this regard, Naudé is correct in calling for an explicit provision in the Act which allows ordinary courts to raise the issue of unfairness on their own initiative.[333] Alternatively, the Tribunal should be given the same powers as those given to ordinary courts in section 52 to circumvent the consumers need to approach ordinary courts regarding unfair terms.[334] Mupangavanhu correctly contends that this will also give effect to section 69(1)(d).[335] Naudé makes a fair suggestion that in order for the amendment to be effective; the Tribunal must employ people with legal training to deal with the complexities surrounding the notion of unfairness.[336]

Naude and Barnard offer another apt solution to this problem. These authors argue in favour of amending the CPA in order to allow a consumer who has been brought before an ordinary court to request that the action be stayed while the dispute is referred to an ombud or the Commission.[337]

Woker, however, offers an alternative solution to the qualms associated with section 69. This author contends that legislative amendment will not be required if the Commission steps up to the plate and proactively takes charge of the resolution process.[338] Gone are the days where the Commission can hide behind the provisions of section 99(a) of the CPA to support its refusal to deal with individual

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332 Sharrock (2010) *SA Merc LJ* 324.

333 Naudé (2009) *SALJ* 536.

334 Mupangavanhu (2012) *PELJ* 339. This author also contends that the other forums should also be provided with the meant to grant sufficient orders in terms of section 52.

335 Naudé (2009) *SALJ* 525; see also Mupangavanhu (2012) *PELJ* 339.

336 Naudé (2009) *SALJ* 527.

337 T Naude & J Barnard "Enforcement and effectiveness of consumer law in South Africa" in H-W Micklitz & G Saumier (eds) *Enforcement and effectiveness of consumer law* (vol 27 2018) 589.

338 Woker (2017) *SA Merc LJ* 16.

complaints.[339] This is especially true for the medical industry which requires a strong and robust Commission to protect *severely* (own emphasis) vulnerable consumers. A Commission that is timid and evasive has no place here.

As it stands, a patient who has suffered ill as a result of an exemption clause and who wishes to contest its validity will have to approach an accredited medical ombud with jurisdiction. This will require an immediately more proactive Commission to devise an effective code for the medical industry in general.[340] This code should provide more detail concerning how exemption clauses in medical contracts can be used fairly. Should this avenue of redress fail, the patient may lastly approach the courts. Prolonging the relief of an already vulnerable and potentially unwell patient hardly gives effect to the noble aims of the CPA.

339 Woker (2017) *SA Merc LJ* 16.
340 Woker (2017) *SA Merc LJ* 8.

5 Conclusion and Recommendations

From the research conducted in Chapter Two of this dissertation, it is clear that there is a wealth of jurisprudence surrounding exemption clauses contained within standard form contracts. From this jurisprudence it becomes apparent that the use of these clauses in standard form contracts has been, for the most part, problematic. The status quo allows for healthcare establishments to include exemption clauses in their contracts, however undesirable, but their inclusion is now subject to more rigorous limitations. Their consequences are far reaching in any field of law within which they arise. As such, common law methods of limiting their effects and regulating their usage have been employed but these outdated and formalistic methods (associated with Hawthorne's notion of the classical contractual model) have proven to be insufficient. The judgements handed down by our South African courts serve as evidence to this conclusion as adjudication in this regard has been inconsistent and tainted by uncertainties. The position in the medical realm of contracting has proven to be no different when considering the disappointing decision reached in the *Afrox* case. These woeful decisions can be linked to the lack of adequate instruments at the disposal of our courts when faced with these clauses in standard form medical contracts. Since then, this inadequacy has been addressed by the Consumer Protection Act 68 of 2008 ('CPA'), which in the opinion of this author, would have led to vastly different results in these landmark cases.

The research conducted in Chapter Three of this dissertation marks the significant movement towards a contractual model which is neo-liberal in nature, brought about by the CPA. The plain language requirements of section 22 and incorporation prerequisites of section 49 of the CPA are expected to fundamentally change the drafting of medical contracts. It appears as if a plainly written and duly pointed out exemption clause together with its attached consequences is likely to pass the muster of the CPA. These provisions, however, require a certain norm of behaviour on the part of suppliers which consumers are entitled to expect, now solidified in statute.[341] Not only do these sections place more onerous responsibilities on healthcare establishments that attempt to exclude their liability, but they also ensure

[341] Hawthorne (2012) *THRHR* 370.

that a patient who contracts with them are better informed.[342] This requires a high degree of professionalism and skill on the part of healthcare personnel. This is a large leap in the right direction as patients will once more enjoy their right of choice but their true bargaining position, when juxtaposed against these establishments, is unlikely to dramatically improve. Accordingly, the construction of these sections may require further amendment for reasons as indicated above. It is unlikely that the use of technical terms in standard form medical contracts will fall away entirely and therefore, guidelines should be published in this regard as permitted under section 22. In particular, section 49 of the CPA seems to oust certain exemptions on the one hand and validates their use on the other where a party offers his or her signature. It is submitted that given the circumstances under which most medical contracts are concluded, a mere signature should not be equated to true consensus. At the very least, these sections should eradicate the use of poorly written or otherwise deceptive exemption clauses employed by healthcare establishments. On an ethical level, failing to comply with these sections in the medical sphere of contracting *should* (own emphasis) result in their inclusion being rules void. Where these ethical considerations do not prevail, it is hoped that a clause of this nature will at least be considered unfair when it is considered under the auspices of sections 48, 51 or Regulation 44 of the Act. It is submitted that this desired outcome is the only way in which a consumer's rights can be realised in accordance with section 4(4) of the Act. A court which follows the example set by the *Dlamini* case may well provide such an outcome.

Rather disappointingly, the CPA could potentially further a patients ill fortune due to the Acts failure to adequately spell out a patients route of redress when they fall prey to an exemption clause. This conclusion is based upon the research conducted in Chapter Four of this dissertation. Accordingly, legislative amendment is desperately needed in this regard to allow the patient direct access to civil courts or civil court powers should be given to the alternative institutions of redress. Additionally, clarity is required regarding the preferred route to redress and this should not be left up to interpretation. Determining the appropriate forum should always be done with reference to the aim of the CPA to resolve disputes in an effective and speedy

[342] See *Walker v Redhouse* 2007 3 SA 514 (SCA) for an example as to what the court considers to be a plain and understandable clause.

manner. If one is to interpret section 69 as a mere list of *possible* (own emphasis) forums of redress, then a consumer should be able to elect the one which best suits their needs. Such an interpretation is not unreasonable if one is to consider the legislature's use of the word 'may' under this section. It is clear that the purposes of section 69 are frustrated by its ambiguous formulation. Its purposes are further retarded by the inefficiencies of the bodies charged with giving effect to this right. With the glimmer of hope offered by the *Thobejane* case, it is hoped that further strides will be taken upon ensuring that a consumer stands on an equal footing when resolving his or her dispute with dubious suppliers.

Perhaps another consideration for the South African legislature would be to impose penal sanctions against dubious healthcare establishments who fail to comply with these statutory requirements. An approach of this kind may act as a strong deterrent for contractants who wish to escape liability. This may be especially effective while the CPA is still in its infancy. The imposition of criminal sanctions may deter medical professionals from employing exemption causes within their contracts in dubious ways, but this benefit must be weighed against the potential difficulties of involving the National Prosecuting Authority in enforcing these sanctions. One only needs to look as far as the amendments included in the Competition Act 89 of 1998, and in particular, the inclusion of section 73A which criminalises cartel conduct.[343] The imposition of criminal sanctions in the civil arena of the law is contentious. Nonetheless, it is submitted that the imposition of criminal sanctions for failing to meet these specific requirements in the CPA remains a laudable consideration for the South African legislature.

Lessons should be learned from the United States of America who, although boast an entirely different legal regime, seem to recognise the patient/healthcare institute relationship as one which inherently unequal which makes the bargaining positions of the parties disparate.[344] It is submitted that this recognition forms the basis of the

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343 See L Kelly "The introduction of a 'cartel offence' into South African law" (2012) 20 *STELL LR* 321-333; L Jordaan & P Munyai "The constitutional implication of the new section 73A of the Competition Act 89 1998" (2011) 23 *SA Merc LJ* 197-213 for a discussion on the problematic aspect of this new section as it pertains to competition law for a deserving comparison to be considered.

344 The courts in various States have seemingly rejected exculpatory agreements between patients and health care establishments given the fact that they offend the public interest and therefore cannot be upheld. In this jurisdiction, courts tend to rely on the common law in its application as opposed to relying on statutory guidelines. Medical practices in this jurisdiction

diverging paths undertaken by our law when compared to these jurisdictions. Additionally, a deeper consideration should be given to the vulnerability of the patient when entering this treacherous contract.

It is submitted that both the healthcare establishment as well as the patient must accept a degree of responsibility in order to give effect to the CPA and its aims. A much higher degree of cooperation and negotiation from the outset of the contracting process is required, which only these contractants can be held responsible for. This is crucial when considering that the CPA permeates all aspects of the contracting process as suggested by Hawthorne.[345]

This dissertation supports Tembe's suggestion that South Africa can further promote the interests of its consumers by electing to join Consumer International who have been effective in promoting ethical trading practices and other consumer initiatives.[346]

It is hoped that this dissertation has exposed the inadequacy of both the previous and current legal rules governing the use of exemption clauses in medical contracts. The CPA has yet a long way to go in order to remedy this countries bias towards freedom of contract as well as its ignorance shown towards an unmistakable skewed bargaining relationship. The perfect harmony is yet to be struck, but the legal transition brought about by the dispensation of the CPA is colossal and thus time will have to take its course. Perhaps the first step towards rectification in this regard should be a proactive acknowledgement of the important distinction between standard commercial contracts and medical contracts given the substantive ethical considerations attached to the latter. That is not to say that the objectives of the CPA are unobtainable. In fact, the Act purports a strong resemblance to principles of fairness that underlie the Constitution and symbolises a movement away from the aged notion of freedom of contract. That being said, further development of the

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are governed by regulations pertaining to health, safety, welfare and ethical considerations and therefore any conduct which discharges certain professional duties is generally not acceptable. See *Tunkl v Regents of University of California* (1963) 60 Cal.2d 92 where an exemption clause contained within a medical contract was deemed invalid as it was found to offend public interest when considering the unequal bargaining positions at play between the patient and the relevant hospital. See also *Cudnick v William Beaumont Hospital* 1994 and *Ash v New York University Dental Center* 1990 164 A.D.2d. See generally Letzler (2012) *De Rebus* and Carstens & Kok (2003) *SA Public Law.*

345 Hawthorne (2012) *THRHR* 355.

346 Tembe (2017) LLD Thesis University of Pretoria 333.

notion of public policy is required by our courts in order to remain relevant to the times at hand. What remains to be seen, however, is the manner in which our judiciary will use this powerful legislative weapon, the CPA, to guard the vulnerable patient against the devastating consequences of exemption clauses, dubiously included in standard form medical contracts. The CPA should rid our consumer law of judgements comparable to *Afrox* which attempt to insubordinate fairness in their decision making. For the present, one can take comfort in the fact that the first steps of harmonising the law in this regard, has begun.

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