Faculty of Law

THE CONSEQUENCES OF EXCLUDING SPECIAL DAMAGES FROM CONTRACTS

by

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CHAPTER 1

INTRODUCTION

1.1 Background

Contracts are at the heart of well-functioning modern economies.[1] When investments and commercial arrangements fail, often the dispute is centred on a contract.[2] Contracts can be either verbal or written agreements entered into by two or more people with the intention of creating legally enforceable obligations.[3] Contracts allow parties to enter into arrangements where the risks, rewards and responsibilities of the parties are defined and enforceable.[4]

In South African contract law, the privity and sanctity of contracts entails that contractual obligations must be honoured when the parties have entered into the contractual agreements freely and voluntarily.[5] The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. This freedom to contract denotes that parties are free to enter into contracts with whomever they so wish and on whatever terms they would like to include as long as it is legal.[6] As a result of this freedom, parties have the ability to freely incorporate exemption clauses[7] in a contract to absolve them from liability in the event of a breached contract.[8]

A breach of contract occurs when a party fails to perform in terms of the provisions of the agreement. Substantive contract law states that when there is a material breach of a contract, the aggrieved[9] party is entitled to a remedy in the form of compensation for losses that result from the breach.[10] This compensational remedy takes the form of damages. These damages can be excessive and therefore should either be limited or entirely excluded by incorporating carefully drafted exemption clauses in the contract.[11]

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1 Carpenter, Jansen and Pauwelyn *The Use of Economics in International Trade and Investment Disputes* (2017) 320.
2 n 1 above.
3 Van Huyssteen, Lubbe and Reinecke *Contract: General principles* (2016) 8.
4 n 3 above.
5 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 ZASCA 176 par 23.
6 Hutchison and Pretorius *The Law of Contract in South Africa* (2018) 21 and Van Huyssteen et al (n 3)10.
7 An exemption clause is a legal instrument used in a contract to limit, alter or exclude a party's liability to the other or regulate the other party's right to remedies or restrict the scope of a party's contractual duties in the event of breach of contract. They can also be referred to as "exclusion clauses", "limitation clauses" or "indemnity clauses".
8 Van Huyssteen *et al* (n3) 10.
9 Refers to the party that has suffered injury or loss as a result of the breaching party's default in performance.
10 Hutchison and Pretorius (n 6) 342.
11 Bradfield *Christie's Law of Contract in South Africa* (2016) 217.

In a nutshell, exemption clauses concern any agreed departure from the applicable law with regard to contractual damages emanating from the breach of a specific contract.[12] They are utilized to allocate and control risk in contracts, provide legal certainty between the parties and to facilitate the calculation of damages that may arise in the event of a breach. Parties can agree to either place a monetary cap on liability[13] to partially or to entirely exclude liability for special damages.[14] The rationale for excluding or limiting liability for special damages is that these damages may be unpredictably large or open-ended representing an unquantifiable risk.[15] Limiting or excluding special damages brings indisputable advantages aimed at *inter alia* reducing or absolving the parties' liability sometimes by staggering amounts of money.[16]

1.2 **Research question**

This dissertation aims to explore the exact meaning of special damages. In addition, it investigates the consequences of the contractual exclusion or limitation of such damages. Furthermore, the dissertation systematizes the types of clauses used to exclude liability for special damages and examines the validity of those clauses.

1.3 **Motivation**

From a legal perspective, the issue of special damages is a problematic area as it is fraught with uncertainties. There is no clearly established and absolute meaning for the term special

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12 Kanamugire and Chimuka "The current status of exemption clauses in the South African law of contract" 2014 *Mediterranean Journal of Social Sciences* 164.

13 See the facts in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* and another et e contra 1983 1 All ER 101 where the total liability of a party was limited to a specific figure. Condition 2(a) of the security service contract provided that the respondents' liability was to be totally excluded in certain circumstances, while condition 2(f) of the contract stated that in the event of the respondents incurring liability for any loss or damage of whatever nature arising out of or the failure in the provision of the services' contracted for, such liability was to be limited to £1 000 in respect of any claim arising from a duty assumed by the respondents and £10 000 for the consequences of any incident involving liability by the respondents; see also *B&B Eiendomme (Pty) Ltd v Mostert van den Berg & De Leeuw* 2008 JOL 21092 (O) on limitation of liability whereby the amount of damages for which a party could be held liable under the contract was limited to double the amount of fees payable to it in terms of the agreement.

14 See the English case of *Goodlife Foods Ltd v Hall Fire Protection Ltd* 2018 EWCA Civ 1371 where Hall Fire Protection excluded all liability for loss, damages or expenses consequential or otherwise caused to Goodlife's property, goods, persons or the like, directly or indirectly resulting from its negligence, delay, failure, malfunction of the systems or components provided by them for whatever reason.

15 Murray "Drafting Exclusion of Consequential Damages Clauses" 2018 *The Lexis Practice Advisor Journal Winter* (https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/drafting-exclusion-of-consequential-damages-clauses (10-06-2020)).

16 n 15 above.

damages. Special damages can have different meanings in different agreements depending on the specific context of the agreement in which it is used.

1.4 Research methodology

In order to determine the scope of this research, the concept of special damages in South African Law is investigated in Chapter 2. The distinction between general and special damages, the efforts by the courts to make sense of those distinctions, requirements and the limitations are also set out in the same chapter.

Chapter 3 focuses on the purpose of excluding special damages, the doctrinal classification of the legal instruments used to exclude special damages from contracts and the legal consequences of such exclusion. This chapter also outlines the interpretation of the legal instruments aimed at excluding or limiting special damages liability in contracts.

Despite the importance of exemption clauses in contracts, as will be outlined in Chapter 3, there are instances where exemption clauses are declared invalid and unenforceable especially when they are used in standard form contracts by a party in an economically stronger position to the detriment of the other contracting party, most likely a consumer.[17] In this case, the aggrieved party may not have sufficient bargaining strength to refuse to accept the terms which results in the risk being placed at the door of the party who should not be responsible for it or who is unable to guard against it.

Courts are wary of exemption clauses since they can deprive a party of rights that they would otherwise have had at common law and they try to find ways to circumvent their effects.[18] Exemption clauses are regarded as problematic because they are capable of having onerous implications for the aggrieved party by excluding or limiting liability for the breaching party in the event of breach of contract leaving the aggrieved party with no legal redress at times.[19] Numerous court decisions on the issue of the validity of exemption clauses will be discussed under this chapter. Formal and material grounds of validity as applied by the courts will be analysed in Chapter 4. Chapter 5 provides the conclusion.

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17 Van Huyssteen *et al* (n 3) 290.
18 See *Van der Westhuizen v Arnold* 2002 4 All SA 331 (SCA) par 21.
19 *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) par 21; Van Huyssteen et al (n 3) 290 and Hutchison and Pretorius (n 6) 252.

CHAPTER 2

EXPLORING THE CONCEPT OF SPECIAL DAMAGES IN CONTRACT LAW

2.1 Introduction

When a breach of contract occurs, the aggrieved party's rights are vindicated by claiming damages for such breach from the breaching party. The primary remedy for breach of contract is a claim for damages.[20] Damages are an award of money made to compensate the aggrieved party who has suffered loss as a result of a breach of contract for which the breaching party is responsible.[21]

The basic rule regarding the awarding of damages for breach of contract was stated by Innes CJ in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines*[22] and has since been reaffirmed by the Appeal Court.[23] The basic rule is that the aggrieved party is entitled to be placed in his fulfilment position, that is, the position he would have occupied had there been no breach.[24] Damages cover the loss which the aggrieved party has suffered and the gain of which this party has been deprived.[25]

These damages may be in the form of general damages or special damages. The specifications of these two types of damages will be discussed below. Special damages are all damages that are not general damages.[26] They flow from general damages.[27] They can be extensive in certain circumstances thus causing unexpected and far-reaching financial consequences to a party, if not totally excluded or limited to a specified sum of money.[28] This is particularly so in situations where an insignificant breach can result in a substantial amount of special damages being payable to the aggrieved party.[29]

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20 Kramer *The law of contract damages* (2017) 4.
21 n 20 above.
22 *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD par 22.
23 Hutchison and Pretorius (n 6) 339; Zulman and Kairinos *Norman's Law of Purchase and Sale in South Africa* (2005) 246; *Novick v Benjamin* 1972 2 SA 842 (AD) par 860 per Trollip JA and *Holmdene Brickworks v Roberts Construction Co* 1977 4 all SA 94 (A) 108.
24 n 22 above.
25 Visser & Potgieter *Law of damages* (2012) 21 and Kramer (n 20) 4.
26 Van Huyssteen et al (n 3) 411.
27 Dendy M "Damages: Basic Concepts" 2018 *LAWSA Volume 14(1) 21.*
28 Fontaine and De Ly "Drafting International Contracts: An Analysis of Contract Clauses" (2009) *351.*
29 See n 15 above.

2.2 The types of damages in South African contract law

As indicated above, there are two general categories of damages that may be awarded if a breach of contract claim is proved namely, general and special damages.[30] The terms general and special damages are derived from English law and are used in a variety of senses.[31] In South African practice, the word "special" in relation to damages is generally used to indicate that the damages are connected with some special circumstance in a particular case.[32]

2.2.1 The notion of general damages

General damages are those damages that directly stem from an unfulfilled contract. They naturally and necessarily flow from the kind of breach in question in the normal course of events and are an accompaniment of the alleged breach.[33] General damages are claimed in respect of loss which is presumed to flow from the breach as a natural and probable consequence.[34] They are conclusively presumed to have been foreseen or contemplated by a party as a consequence of the breach.[35]

With regard to the test for general damages, case law developed a general formulation[36] which is still recognised today.[37] The formulation was eloquently put in *Lavery & Co Ltd v Jungheinrich*[38] where it was stated that in the case of general damages, the defendant is liable for losses which are the direct, immediate and the natural result of the breach of contract or which flow naturally from the breach or which are a probable consequence of the breach but in all these cases, the defendant is also held liable for losses which were in the contemplation of the parties, that is, foreseeable or reasonably foreseeable.[39]

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30 *Klopper v Maloko 1930* TPD 860 864 and Visser & Potgieter (n 25) 66.
31 Visser & Potgieter (n 25) 66.
32 See n 31 above.
33 Bradfield (n 11) 653; Van Huyssteen et al (n 3) *410*; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 3 All SA 71 (A) 76; *Holmdene Brickworks v Roberts Construction Co* (n 23) 109 and *Thoroughbred Breeders' Association of SA v Price Waterhouse* 2001 4 All SA 161 (SCA) par 46.
34 *Lavery & Co Ltd Appellants v Jungheinrich Respondent* 1931 AD 156 par 175.
35 *Shatz Investments v Kalovyrnas* (n 33) 76 and Visser & Potgieter (n 25) 22.
36 See *Emslie v African Merchants Ltd* 1908 22 EDC 82; *Natal Shipping & Trading Co Ltd v African Madagascar Agencies Ltd* 1921 TPD; *Marais v Commercial General Agency Ltd* 1922 TPD; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines* (n22); *Shatz Investments v Kalovyrnas* (n33); *Lavery & Co Ltd v Jungheinrich* (n 34); *Holmdene Brickworks v Roberts Construction Co* (n 23) and *Thoroughbred Breeders' Association of SA v Price Waterhouse* (n 33).
37 See *Transnet t/a National Ports Authority v The Owner of mv Snow Crystal* 2008 3 All SA 255 (SCA); *Thoroughbred Breeders' Association v Price Waterhouse* (n 33) and *Holmdene Brickworks v Roberts Construction Co* (n 23).
38 *Lavery & Co v Jungheinrich* (n 34) 174-175.
39 See Bradfield (n 11) 652 and *Lavery & Co v Jungheinrich* (n 34) 174-175.

2.2.2 The concept of special damages

Special damages[40] on the other hand are those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless the parties actually or presumptively contemplated that they would result from the breach.[41] Special damages are asked for in addition to general damages. They are actual losses caused by the breach but not in a direct and immediate way. Special damages flow from general damages.[42] They do not flow naturally from a breach of contract but they must be directly traceable from the breach and result from it.[43] A number of courts have held that general damages are direct and special damages are consequential damages.[44]

The concept of special damages requires that the aggrieved party proves that there are special circumstances which makes it reasonable to presume that the parties actually or presumptively contemplated the damages would probably result from the breach of contract in order for the breaching party to be held liable for special damages.[45] Further, the aggrieved party must also prove that the parties entered into the contract with these special circumstances in mind, or more strictly formulated, that the parties had agreed expressly or tacitly that there would be liability for special damages.[46] The aggrieved party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was concluded.[47] This makes it reasonable for the court to presume that the parties contemplated the loss as a probable result of the breach or alternatively, that the loss was actually contemplated by the parties.[48] Further, it would be inequitable to bind a party with liability for damages that were neither foreseen nor foreseeable.[49]

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40 Special damages are also referred to as consequential damages. The term "special damages" is synonymous with "consequential damages" both refer to damages that do not flow directly from the breach of the contract but are still caused by the breach. See Tembe *Problems regarding exemption clauses in consumer contracts* (2017 Thesis UP) p 166.

41 See *Shatz Investments v Kalovyrnas* (n 33) 76; *Lavery & Co Ltd v Jungheinrich* (n 34) 175 and *Holmdene Brickworks v Roberts Construction Co* (n 23) 108; see also Visser & Potgieter (n 25) 317–318 and Bradfield (n 11) 653-654.

42 Dendy (n 27) 21

43 See n 42 above.

44 See *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 3 All SA 546 (A); *Holmdene Brickworks Roberts Construction Co Ltd* (n 23) and *Transport & Crane Hire (Pty) Ltd v Hubert Davies (Pvt) Ltd* 1991 4 All SA 644 (ZS) where special damages were referred to as consequential damages.

45 Bradfield (n 11) 652 and *Lavery & Co v Jungheinrich* (n 34) 175.

46 *Lavery & Co v Jungheinrich* (n 34) 164.

47 Van Huyssteen et al *(n 3)* 412.

48 See n 47 above.

49 *Shatz Investments v Kalovyrnas* (n 33) par 74.

2.3 The distinction between general and special damages

The classification of whether a particular damage is general or special comes with uncertainty since it is difficult to distinguish between these two types of damages. What might be general damages in one case may be special damages in another case, therefore it has to be determined on a case-by-case basis, whether a particular damage is to be classified as general or special damages. There is no clearly established definition for the term special damages in South African Law.[50] Despite the vast number of cases attempting to define special damages by repeating the same habitual definitions and distinctions between special and general damages, the meaning remains elusive.[51]

Case law on the common law position tries to draw a distinction between general and special damages suffered.[52] In *Shatz Investments (Pty) Ltd v Kalovyrnas*[53] the principles relating to the distinction between general and special damages were dealt with extensively.[54] The distinction was later refined by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[55] as being between those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes that the parties contemplated would result from such a breach and those damages that although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.[56]

The two limbs of the above-stated distinction between general and special damages correspond closely to the rules set out in the English case of *Hadley* v *Baxendale*[57] which has been a source of reference in some South African cases dealing with contractual damages claims. It states that:

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50 West "Consequential Damages Redux" *The Business Lawyer Vol 70 990* in the context that "whether the courts construing the term special damages are in the United States or in any of the other commonwealth nations that inherited their common law from England (of which South Africa is included), there is simply no clearly established, immutable meaning for the term."

51 See n 50 above.

52 See *Transnet t/a National Ports Authority v The Owner of mv Snow Crystal* (n 37) par 35*; Lavery & Co Ltd v Jungheinrich* (n 34) and *Shatz Investments v Kalovrymas* (n 33). General damages are also known as intrinsic - *damnum circa rem* and special damages as extrinsic - *damnum extra rem*.

53 *Shatz Investments (Pty) Ltd v Kalovyrnas* (n 33). See also *Holmedene Brickworks v Roberts Construction Co Ltd* (n 23) and *Lavery and Co v Jungheinrich* (n 34).

54 Zulman and Dicks *Normans Law of Purchase and sale in South Africa* (2017) 288.

55 1977 3 SA 670 (A) 687D-F.

56 *Transnet t/a National Ports Authority v The Owner of mv Snow Crystal* (n 37) par 35; see also *Holmedene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* (n 23) 108; *Lavery & Co Ltd v Jungheinrich* (n 34) and *Shatz Investments (Pty) Ltd v Kalovyrnas* (n 33).

57 *Hadley* v *Baxendale* 156 ER 145.

> "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either (a) arising naturally, that is, according to the usual course of things, from such breach of contract itself, or (b) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it".[58]

The two limbs also try to differentiate between firstly, the damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes that the parties contemplated would result from such a breach and secondly, the damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote for damages to be legally recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or constructively contemplated that such damage would probably result from its breach.[59]

Another approach to try and distinguish these terms is that special damages may be regarded as all damages that are not general damages.[60] They are not general damages because they are not the usual result of the breach of contract but they must be directly traceable to the breach of contract. An example of the difference between general and special damages can be exhibited in a supply agreement, whereby a supplier fails to deliver flour to a bakery timeously and the bakery is dependent on the flour as a raw material to produce bread. The damages claimable would not only be the general damages for the replacement flour but also the reasonably foreseeable lost profits and lost sales because the bakery's products could not be produced and sold. Further, if the bakery had contracts to deliver bread to customers by certain dates or times, failure to do so could trigger damages. In most instances, where a breach of contract causes termination of other contracts, the lost profits may be regarded as special damages. These would not be intrinsic losses, that is, one affecting the bakery *per se*, but extrinsic, incidentally affecting the bakery's other affairs.

The recoverability of these damages therefore depends upon the special circumstances present upon the conclusion of the contract and to have been known to the flour supplier at the time the contract was entered into.[61] The court weighing in on the possibility of awarding losses as special damages will review whether the special damages stem from the breach and

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58 Considered in *Holmedene Brickworks v Roberts Construction Co Ltd* (n 23) 108.
59 Bradfield (n 11) 653-654 and *Shatz Investments v Kalovyrnas* (n 33) 76.
60 See n 26 above.
61 *Shatz Investments v Kalovyrnas* (n 33) 76; *Holmdene Brickworks v Roberts Construction Co* (n 23) 108; *Thoroughbred Breeders' Association of SA v Price Waterhouse* (n 33) par 49 and Kerr *Principles of the Law of Contract* (2002) 805–813.

whether the damages were foreseeable. The bakery must therefore satisfy both the foreseeability and contemplation principles.

The foreseeability of the loss suffered will be dependent on the existence of special circumstances known to the parties at the time of contracting.[62] However, there are different views regarding the question whether one or all parties to the contract must foresee the damages in question[63] and how the situation should be approached where the contracting parties fail to foresee the same extent of damage.[64]

Unlike general damages, special damages must be specifically pleaded, claimed and fully established by the evidence when claiming compensation for it.[65] The recoverability of special damages depends on the foreseeability of the damages.[66] A party who has suffered damages of a kind which the law does not presume to be the natural consequence of the act complained of, but which depends upon the particular circumstances of the case, must warn the breaching party that the claim extends to such damage.[67] However, general damages are presumed and therefore it is sufficient if they are alleged in the pleadings without particularity.[68] In principle, general damages can be recovered without pleading the particulars of such claim.

Loss on a subcontract; loss of profits; loss of business reputation and loss of trade are examples of special damages that have been awarded by the courts.[69] All of these losses must have been within the proximate consequence of the breach and were reasonably foreseeable or within the contemplation of the parties at the time of the contract and the contract was entered into on the basis thereof.[70]

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62 See n 27 above.

63 See *Thoroughbred Breeders' Association of SA v Price Waterhouse* (n 33) par 49 ("the presumed contemplation of the parties"); Joubert *General Principles of the Law of Contract* (1987) 253 (not necessary that the loss should have been foreseen by both parties); Kerr *Principles of the Law of Contract* (2002) 805 (position of both parties to be considered); Bradfield (n 11) 654 where Trollip JA was quoted thus "the rationale appears to be that the parties' rights and obligations ordinarily originate and their extent is fixed at the time they contract; it is then that they can regulate, by negotiation and agreement, the contents and extent thereof, for example, by excluding or limiting their liability for foreseen or foreseeable damages, or by stipulating for an enhanced consideration for assuming liability for them; and it is inequitable afterwards to fasten a party with liability for damages that were neither foreseen nor foreseeable at the time he contracted."

64 See n 63 above.

65 Van Huyssteen et al (n 3) 411; see also the headnote in Lavery & Co v Jungheinrich (n 34) and *Durban Picture Frame Co (Pty) Ltd v Jeena* 1976 1 All SA 362 (D) 367 where it was stated that Rule 18(10) of the Uniform Rules of Court provides that a plaintiff suing for damages must set them out in such manner as will enable the defendant to reasonably assess the quantum thereof.

66 See Van Huyssteen et al (n 3) 411.

67 See n 27 above.

68 In *Israel* v *Louverdis* 1942 WLD 160 it was held that as a general rule, no particulars can be required of the damages which a party alleges he has sustained as the normal and ordinary loss suffered, that is, the damages which the law takes to be the necessary legal consequence whether actually contemplated or not.

69 Zulman and Dicks (n 54) 289.

70 Bradfield (n 11) 654; See also n 57 above and *Emslie v African Merchants* (n 36) 82.

The only conclusion that can be drawn from the various South African sources[71] on contractual damages and other commonwealth countries[72] that inherited their common law from England is that, the term special damages can have a different meaning in different agreements, depending on the specific context of the agreement in which it is used. Similarly, American courts do not appear to follow a clearly defined rule that certain types of damages are always special and certain other types of losses are always general.[73]

2.4 **Lost profits: general or special damages**

The question of whether lost profits resulting from a contractual breach constitutes general or special damages is tricky. Many contracts merely state that the recovery of special damages is excluded in the event of breach without defining or specifically stating what those special damages are, thus significant sums of money in lost profits hang in the balance of whether they are general or special damages.

Lost profits would be general damages if the losses flow naturally and necessarily from the breach and at the time the contract was entered into the losses were likely to result from the breach in question as they are immediate or natural consequence of a damage-causing event.[74] Lost profits would be special damages if there were special circumstances known to the breaching party at the time of the contract that such a breach would be liable to cause more loss. They do not flow naturally from the breach but may be directly traceable from the breach and result from it. They flow from a general or direct loss.[75]

There is no rule that implies that certain types of losses are always classified as special and others as general damages. The distinction between these losses depends on the facts of each case. As a matter of general law, a claim for loss of profits may be either general damages or special damages depending on the context of the matter. In order to avoid the uncertainty inherent in this potential dual characterisation of loss of profit and the additional requirements and difficulties of having to prove special damages, it is crucial to specifically list losses that are of interest to the parties so that it is clear how those losses are to be dealt with in the event that they are characterized as general or special losses.

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71 See Van Huyssteen et al (n 3) 398-428; Zulman and Dicks (n 54) 289; Visser & Potgieter (n 25*)* 23; Dendy (n 27); *Lavery & Co Ltd v Jungheinrich* (n 34) 174-176 and *Shatz Investments v Kalovrymas* (n 33) 76.

72 Such as Zimbabwe.

73 See n 50 above.

74 Visser & Potgieter (n 25) 65–66 giving the example of damage to a vehicle used as a taxi: the reasonable cost of repairs is direct loss, whereas the resultant loss of profit is consequential loss.

75 See n 27 above.

CHAPTER 3

THE EXCLUSION OF SPECIAL DAMAGES BY CONTRACTUAL AGREEMENT AND THE CONSEQUENCES OF SUCH EXCLUSION

3.1 Introduction

Excluding special damages is critical especially in complex commercial contracts dealing with major long-term projects in these uncertain economic times where the success of a project cannot be guaranteed and drafters can anticipate the unexpected.[76] It keeps businesses safe from financial ramifications associated with a contractual dispute and limits obligations owed under a contract or completely absolve a party from liability.[77] The potential cost of performing some of the basic services on a commercial scale would be grossly prohibitive without limiting or excluding special damages.[78]

From the concept of special damages discussed in Chapter 2 above, special damages flow from general damages[79] and they are asked for in addition to general damages. This therefore means that a party to a contract runs the risk of being liable for both general damages and special damages. It is therefore preferable to reduce or exclude exposure to risk as doing so may significantly reduce a party's liability.[80] It is also favourable for the parties as it creates certainty. The parties will know the effect on damages in the event of breach, how much compensation in damages the breaching party will be liable to pay and the aggrieved party will know what compensation to expect in the event of failed performance.

While the exclusion of special damages in contracts is legal, at times it results in disastrous consequences for the parties in the event of breach of contract.[81] It is important for parties to know the purpose, consequences and implications of excluding or limiting liability for special damages.

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76 Stone and Devenney *The Modern Law of Contract* (2013) 221.
77 Maharaj "Limits on the Operation of Exclusion Clauses" 2012 *Alberta Law Review Vol 49 Issue 3 635-654.*
78 See n 77 above.
79 See n 27 above.
80 See n 15 above.
81 Pretorius "Exemption Clauses and Mistake: Mercurius Motors vs Lopez 2008 3 SA 572 (SCA)" 2010 *Journal of Contemporary Roman-Dutch Law Vol 73 491.*

3.2 The purpose of excluding special damages in contracts

In today's economy, the viability of a transaction is measured by the profit it generates.[82] The cost of a transaction to the relevant party must always be lower than the benefit they receive. If the potential cost involved in undertaking a particular contractual obligation is too high compared to the contract price, it would be disadvantageous for a party to proceed. Therefore, it is logical for a party to exclude special damages from contracts. The economic perspective on exclusion or limitation of damages is to maximize the parties' chances of obtaining the benefit of their contract.[83]

Excluding special damages may appear to be immaterial during the formation of a contract but it allows parties to protect themselves from exposure to potentially huge losses in the event of breach of contract. It also enables parties to reap the benefits of competitively priced contracts. When parties enter into agreements without excluding special damages, they are left at the mercy of the common law to resolve disputes that arise and uncertainty as to the extent of their liability as a result of breach of contract.[84] This often results in the prejudice of at least one of the party's interests.

Special damages often present substantial latent risk for all parties. For instance, at the inception of a venture, the financial risks and obligations of the proprietor, architect and contractor appear to be axiomatic. The proprietor believes that his only financial risk is the amount of the fees payable to the architect and the negotiated price payable to the contractor for the construction of the venture. The architect believes that his only financial risk is whether or not the proprietor will pay the agreed fees, whilst the contractor believes that his only financial risk is whether he will be able to construct the project at the negotiated price. If the architect's plans and specifications do not contain material errors or omissions and the contractor delivers a flawless building by the mutually agreed date, then parties would have amicably concluded their business.

However, if something goes amiss, for example, the architect prepares erroneous plans which result in the new construction being corrected after completion of the venture and the proprietor suffering loss on the venture or the contractor causes an inexcusable delay that requires the proprietor to pay proliferated costs for financing a delayed venture, the loss of use

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82 Maharaj (n 77) 637.
83 Maharaj (n 77) 638.
84 See Van Huyssteen and Maxwell *Contract Law in South Africa* (2017) 129. Parties must formulate the express terms of their agreement exhaustively so that tacit terms and terms implied by law do not have to be considered to resolve their disputes.

and the increased borrowing costs that arise are forms of special damages. The proprietor's claim for special damages may far exceed the claim for general damages if not mutually limited or excluded. A party thereby runs the risk of being financially ruined.

Parties should create a contract that predetermines certain expenses that may be incurred in the event of pervasive errors or significant project delays in order to counteract any extensive liability for special damages that might arise from their contractual obligations. In the end, the difference between substantial and reasonable special damages can be decided by taking time to appreciate the language of a contract and negotiating terms that create an equitable balance by limiting or excluding special damages in advance.[85]

Further, the exclusion or limitation of special damages facilitates a better assessment and control of business risks arising from commercial transactions. It serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.[86] The exclusion of special damages can also be applied as a planning instrument to achieve an acceptable limitation or exclusion of the risk inherent in a transaction.[87] Excluding or limiting special damages also reduces the uncertainties and allow parties to make allowances in their planning and costing by defining the possible extent of the parties' liability.[88]

Take for example a situation whereby an aircraft crashes due to manufacturing defects which triggers the loss of the aircraft, other property and causes the death or injury of many passengers.[89] Such damages may be very extensive in terms of both general and special damages. By excluding or limiting special damages in this illustration, a party discards certain risks which are a necessary condition to the performance of risky ventures of this nature.[90] Limitation of these damages often make the risk of special damages foreseeable and insurable or at least renders the cost of insurance bearable, which insurance may also impact positively on third party relations.[91] The other party may also benefit in the form of a price reduction as parties will take into account the clearly outlined risks to be borne by each party.[92]

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85 Maharaj (n 77) *646*.

86 West and Duran "Reassessing the consequences of consequential damage waivers in acquisition Agreements" 2008 *The Business Lawyer Vol 63* 783.

87 See n 11 above.

88 Ibid.

89 See BBC News "Boeing 737 Max Lion Air crash caused by series of failures" 2019 (https://www.bbc.com/news/business-50177788 (30-07-2020)) where a series of failures led to the crash of a Lion Air flight which killed 189 people and led to the grounding of the Boeing 737 Max.

90 Fontaine and De Ly (n 28) 351.

91 Fontaine and De Ly (n 28) 351.

92 See Fontaine and De Ly (n 28) 351 and Hutchison, Pretorius, Naude, Du Plessis, Eiselen, Floyd, Hawthorn *The Law of Contract in South Africa* (2017) 521.

When negotiating contracts, it is common for parties to rely on company policy not to accept liability for special damages under any circumstances because without the exclusion or limitation of liability there will be no financial limit on the damages that may be recovered in the event of a breach of contract.[93] Unless reigned in, special damages could extend far beyond the terms of the contract and can cause severe financial repercussions which may push a financially stable company out of business. This is particularly so in situations where an insignificant breach can result in a substantial amount of special damages to the aggrieved party or when the potential prejudice is out of proportion with the profit a party will derive from the contract.[94]

Basically, special damages are understood to be damages encompassing all contractually recoverable damages that do not fit within the category of general damages.[95] By that definition, special damages can represent a huge amount of money which could quickly spiral out of control. Accepting such an open-ended liability without limiting or entirely excluding it just for the sake of securing business may cause the unintended consequence of expensive and protracted litigation that could have been avoided in the event that the damages are so huge and the breaching party fails to settle or disputes those damages.

Every contract involves some risk of liability which may occur with or without fault or through the action of others. In most contracts where parties fail to explicitly deal with the extent of the damages that will be payable in the event of a breach, courts are forced to apply default rules that supposedly reflect how the parties would have likely allocated the risks had they expressly so provided.[96] Parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary.[97] In the end, an award of damages for breach of contract, general or special, would typically be based on judicial precedents developed by the common law to reasonably compensate the aggrieved party for the breaching party's failure to perform the contract as promised.

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93 Bradfield (n 11) 217.
94 Fontaine and De Ly (n 28) 69.
95 See n 26 above.
96 West (n 50) 997.
97 See *First National Bank of SA Ltd v Rosenblum* 2001 4 All SA 355 (A) par 6 *where* Marais JA stated that in matters of contract the parties are taken to have intended that their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intended to conclude, it is for that party to ensure that the extent to which he, she is absolved is plainly spelt out.

Parties can avoid burdening the courts unnecessarily by agreeing to limit or exclude certain categories of liability when contracting. They can explicitly set out their intentions regarding the allocation of risk between them.[98] Excluding or limiting liability further creates certainty regarding a party's legal consequences and liability to that which is set out in the contract.[99] It brings about certainty in the sense that parties will know the legal consequences and the extent of their liability in the event of breach of contract rather than leaving a party in suspense or second-guessing its actual obligations.[100]

3.3 The doctrinal classification and the legal consequences of exclusion of special damages clauses

As discussed above, it is advisable for parties to exclude or restrict the amount of liability for which they are responsible in the event of breach. Parties can incorporate contractual terms into their contract often referred to as exemption clauses to exclude, alter or limit the liability that normally flows from contractual relations[101] and which is generally prescribed by the *naturalia* of a specific contract[102] or which would under normal circumstances have been attached to that agreement by the law.[103]

Exemption clauses are generally and indiscriminately used in various contracts and in particular standard form contracts in an effort to exclude or limit common law liability.[104] They are broadly classified into three categories, being exclusion, limitation and indemnity clauses.[105] Such classification, as discussed below, is mainly depicted from the basis of the effect they purport to have on a contract and the ability of the aggrieved party to recover damages after the breach.[106]

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98 West (n 50) 976-977.
99 Van Huyssteen *et al* (n 3) 217.
100 Tembe (n 40) 68.
101 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 Mercantile Law Journal (SA Merc LJ) 496–509;* Kanamugire (n 12) 164 and Devenish "The Interpretation and Validity of Exemption Clauses" 1979 *De Rebus* 69-76.
102 Van Huyssteen and Maxwell (n 84) 143.
103 Kanamugire (n 12) *165.*
104 Devenish (n 101) 69
105 Beale *Chitty on Contracts* (2018) 15 – 001; See also Van Huyssteen et al (n 3) 289.
106 n 105 above.

3.3.1 ***Exclusion clauses***

An exclusion clause excludes a party from liability in *toto*.[107] In the ordinary sense, an exclusionary clause absolves parties from liability to which the parties are susceptible as per the terms specified in the clause. From a legal perspective, an exclusion clause excludes rights, liabilities and remedies which would have been part of the contract in the absence of such a clause.[108]

The benefits of this type of exclusion are significant because it absolves a party from all liability. However, the validity of this type of clause may be questionable in certain instances[109] as it is naturally doubtful that one party to the contract would intend to absolve the other party entirely from the consequences of its own breach[110] especially in standard form contracts where one of the parties may not have sufficient bargaining strength to refuse to accept the terms of such a clause. More exacting standards are applied to exclusion clauses since courts are often suspicious of clauses that totally exclude liability.[111]

Exclusion clauses must be drafted with precision. The crafting of a special damages exclusion clause should capture the parties' intentions clearly without ambiguity.[112] In *Shatz Investments (Pty) Ltd v Kalovyrnas*,[113] the court held that where it is in the contemplation of the parties at the time of the conclusion of a contract that a loss of trade will occur as a result of a breach, the injured party will be entitled to recover damages for such loss of trade if the contract was entered into on such basis. Parties must therefore predict which special damages may be incurred and which losses they wish to exclude, include them in the contract then negotiate for appropriate exculpatory language that commensurate with such risks.[114]

The use of exclusion clauses to exclude special damages from some contracts has drastic consequences and this often prompts courts to find a means to circumvent their effect in certain instances.[115] Since an exclusion clause serves the purpose of entirely absolving a party from responsibility in the event of a breach of contract, a party in a stronger economic posi-

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[107] See the English case of *Goodlife Foods Ltd v Hall Fire Protection Ltd* 2018 EWCA Civ 1371 where Hall Fire Protection excluded all liability for loss, damages or expenses consequential or otherwise caused to Goodlife's property, goods, persons or the like, directly or indirectly resulting from its negligence or delay or failure or malfunction of the systems or components provided by them for whatever reason.

[108] Beale (n 105) 15 – 001.

[109] Beale (n 105) 15-013.

[110] n 109 above.

[111] n 109 above.

[112] n 97 above.

[113] 1976 (2) SA 545 (A) par 78.

[114] Dannecker Jill Kofron & Rycraft "Recovering and avoiding consequential damages in the current economic climate" 2010 *30 Construction Law 34*.

[115] Pretorius (n 81) 491.

tion can exclude liability of all losses resulting from defective performance and deprive the other party of legal redress.[116] A party can act unreasonably or negligently without consequences.

Exclusion clauses may also work against the purpose of the contract in that they could affect the essence of the agreement. They can be used to relieve a party from all liability caused by the breach of contract including fundamental breach, that is, the most important condition of the contract, its indispensable nature and its main purpose,[117] especially in standard form contracts where they are mostly not negotiated but imposed on a weaker party[118] which could point to the possible consequence of invalidity[119] and on the other hand, on the flirtation with what legal policy may tolerate.[120]

However, where the contract is between two parties of equal bargaining power, an exemption clause may signify a veritable agreement as to the risk allocation and can provide certainty to the parties in terms of what each party will be liable for in the event of breach.[121]

3.3.2 Limitation clauses

Unlike exclusion clauses, limitation clauses do not go to the extent of absolute exclusion. These types of clauses are often acceptable in court as compared to exclusion clauses. They limit liability by capping the amount payable in damages in the event of breach, irrespective of the actual loss or restrict the types of loss recoverable or the remedies available or place a time limit for submitting claims.[122]

Limitation clauses may be expressed in different ways, for example, a fixed amount, a percentage of the performance in question, imposing procedural restrictions or time limits on any

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116 *Bafana Finance Mabopane v Makwakwa* (n 19) par 21 and Van Huyssteen et al (n 3) 290.

117 See *Mercurius Motors v Lopez* 2008 3 All SA 238 (SCA) par 33 an exemption clause failed to protect a party in a contract of deposit. The Supreme Court of Appeal held that an exemption clause that undermines the essence of a contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard contract. If the bailee in a contract of deposit for a reward negligently exposes the goods to risks that he cannot rely on clauses in the contract designed to protect him against liability if he hasn't brought such an exemption clause to the attention of the other party.

118 See n 117 above.

119 Pretorius (n 81) 500.

120 Ibid.

121 Naude and Lubbe "Exemption clauses - A rethink occasioned by Afrox Healthcare Bpk v Strydom" 2005 *SALJ 441-463*.

122 An example of a limitation clause limiting the type of loss which is recoverable or the remedies available would be a seller providing a buyer with a right of repair or replacement in respect of defective products rather than a right to return the goods and claim a refund. Ashurst Quickguides "Limitation and exclusion of liability" 2019 (https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-limitation-and-exclusion-of-liability/(20-07-2020).

claim to that which is reasonable depending on the nature and extent of the contract.[123] Parties may also use limitation clauses to limit certain types of losses for example special damages, certain types of conduct such as negligent conduct as opposed to grossly negligent conduct.[124]

Limitation clauses may also be used to limit a period within which a claim can be lodged. This type of limitation clause is called a time limitation clause. It denies a party the right to seek redress by a court once the action is barred and proceedings were not instituted within the stipulated timeframe.[125] The various time limitation provisions in the Prescription Act[126] are typical examples of statutory time limitation clauses. Such clauses limit the right to seek judicial redress as provided by section 34 of the Constitution and in some instances may be found to be invalid.[127]

An example of a time limitation clause was in the matter of *Barkhuizen v Napier*.[128] The time limitation clause in issue was contained in a short-term insurance policy requiring the insured to submit an insurance claim to the insurer within a period of 90 days from the date of the insured event. The imposition on the insured of a contractual time limitation period, shorter than the statutory period of three years allowed by the Prescription Act by means of a limitation clause to the detriment of the insured, was found to be invalid.[129]

Since a contract of insurance is regularly a standard form contract where little to no negotiation of the terms takes place, the courts may declare such limitation invalid. However, a time limitation clause for special damages claims in a different contract where parties negotiated on an equal footing, agreed to the clause and freely incorporated it in their contract may be permissible by the courts.[130] A party will therefore need to submit their claim for special damages within the stipulated period.

Limitation clauses offer the advantage of precluding the possibility of any dispute about the existence or the amount of the damages to be paid.[131] Such clauses may also have the effect of exerting pressure on a party to perform and also function as a form of penalty in that a

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[123] Hutchison *et al* (n 92) 521. A limitation clause may state that a party may not claim more than 50% of the total contract value as damages for any breach by the other party.
[124] See *B&B Eiendomme v Mostert van den Berg & De Leeuw* (n 13) 2 where the amount of damages was limited to an amount equal to twice the amount of fees payable to the Consulting Engineer.
[125] See *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) 692 and Van Eeden and Barnard *Consumer Protection Law in South Africa* (2018) 80-81.
[126] 68 of 1969.
[127] Van Eeden and Barnard (n 125) 80-81.
[128] 2007 7 BCLR 691 (CC).
[129] See n 125 above.
[130] Naude and Lubbe (n 121) 463.
[131] Fontaine and De Ly (n 28) 355.

party will know how much they will be liable for in the event that they fail to perform.[132] They usually stipulate the amount of money payable in case of breach of a contractual obligation or establish a ceiling above which a party will not be held liable.[133] Parties are able to quantify the amount of damages in advance, through the specification of an amount to be paid to the aggrieved party in the event of breach of a contract.[134]

Limitation clauses also have the effect of inducing a party to lodge its claim for damages timeously and the matter to be resolved within an acceptable period. A claim for damages may be rejected by the other party if parties agreed to a time limitation clause to institute a claim within and fails to adhere to the timeframe.

3.3.3 Indemnity clauses

Indemnity clauses are often the most complex out of the three main classifications. With this particular clause one party agrees to indemnify the other party by compensating for the harm or loss incurred by them in the performance of the contract. A claim for indemnification is based on a separate contractual undertaking by a party to specifically indemnify the other party of all defined losses that may arise as a result of a triggering event, which event can be breach of contract.[135]

A claim for an indemnification for breach of contract is subject to the same default contract rules as any other claim for damages arising from a breach of contract.[136] For example, an indemnification for all losses including liability, costs and expenses can be the subject of an indemnification which could give rise to the argument that indemnification provisions may override the common law's limits on damages otherwise available for breach of contract. An indemnification clause may thus be used to exclude special damages in contracts.[137]

Indemnity clauses may also set a cap on the maximum amount that may be recovered in the event of breach of contract and, may contain exclusions or limitations of recoverable losses most notably, special damages.[138] Ultimately, a contractual indemnification provision may unequivocally indemnify a party for special damages.

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[132] Fontaine and De Ly (n 28) 355. Limitation or even exclusion of special damages can also be achieved by incorporating a penalty clause or forfeiture clause in the contract.
[133] See (n 13) above and Fontaine and De Ly (n 28) 369 on limitation of liability.
[134] Fontaine and De Ly (n 28) 355.
[135] West (n 50) 998.
[136] Ibid.
[137] Ibid.
[138] Ibid.

The consequences of indemnity clauses are potentially far more serious than an exclusion or limitation clause. In standard form contracts indemnity clauses are the rule rather than the exception.[139] They are often incorporated in standard form contracts by a party in an economically superior position to the detriment of the other contracting party.[140]

The recent tragic drowning of a Parktown Boys High School pupil on a school excursion has highlighted the public's need to understand the purpose and significance of indemnity forms which are often used in many situations in standard form contracts such as, parking lots; adventure sports; theme parks; concerts; etc.[141] An indemnity form such as the one that participants in adventure activities are usually required to sign are not meant to protect the party who signs it but designed to protect the service provider from being held legally liable for the damages including special damages arising out of actions taken or not taken in providing that service to the party who signs the form.

3.4 **Interpretation of exemption clauses**

3.4.1 Exclusion and limitation clauses

The same interpretation techniques applied by the courts when interpreting exclusion clauses apply when the courts are interpreting limitation clauses. The courts attempt to interpret these clauses narrowly to limit their effect or even declare them invalid in order to protect the public from the abuse of such clauses.[142] However, the courts apply more rigorous standards when interpreting exclusion clauses as compared to limitation clauses.[143] Courts also use the

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[139] *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) 126 and Van Eeden and Barnard (n 125) 73.

[140] Van Huyssteen et al (n 3) 290 and Beale (n 105) 15-001.

[141] 13-year-old Mpianzi was on a grade 8 orientation camp at the Nyati Bush and River Lodge in the North West when a makeshift raft that he and his classmates made overturned in the river and he drowned and died as a result of the drowning. The activity required the learners to build a makeshift raft using objects around them such as wooden poles and shoelaces. The boys then sailed the raft across the Crocodile River where it capsized. An independent law firm that conducted the investigation into Mpianzi's death, found that the school was grossly negligent as well as the School Governing Board for allowing the camp to take place without authorisation. The law firm's report revealed that Nyati Bush and River Breakaway's camp manager, told investigators the entire water exercise took place in shallow water and on dry land but during an investigation the statement was found to be misleading and false. The report found that water levels were high and the current was strong and the boys were not wearing life jackets which points to gross negligence. His parents had signed indemnity forms which were meant to indemnify the school against civil claims for any loss or harm and for death or personal injury that might be sustained by the child during the outing or the event. https://ewn.co.za/2020/03/04/report-into-enock-mpianzi-s-death-finds-parktown-boys-high-negligent (20-07-2020).

[142] Bradfield (n 11) 122-123; Van Huyssteen and Maxwell (n 84) 144 and *Van der Westhuizen v Arnold* (n 18) par 18.

[143] Beale (n 105) 15-013.

contra preferentum rule[144] in interpreting both exclusion and limitation clauses restrictively.[145]

In *Stott Johannesburg Country Club and Another*,[146] the court held that the impact of an exclusion clause may be limited by way of restrictive interpretation but only within the limits of what the process of interpretation permits.[147] This practice of restrictive interpretation is exercised by the courts to confine exclusion clauses within reasonable parameters.[148] However, the court can only use this method where the language used is ambiguous. If the language is unambiguous and is not against the provisions of mandatory law, the court is bound to validate such a clause.[149]

In *Afrox Healthcare Bpk v Strydom*[150] the Supreme Court of Appeal held that the approach to exemption clauses excluding liability, despite being valid and enforceable, is that they should be interpreted restrictively.[151] The basis of the approach can, *inter alia*, be found in the well-established presumptions of interpretation which state that parties to a contract do not intend to change or alter the existing law more than is required and that parties to a contract intend or seek reasonable and equitable results.[152] Exclusionary clauses can be invalid if they are unconscionable, manifestly unreasonable and unfair.[153]

3.4.2 Interpretation of Indemnity clauses

Although lawful, the courts have recognised how devastating indemnity clauses often are and have been rather inventive in limiting their scope in certain instances.[154] Their devastating effect was best described in the English case of *George Mitchell Ltd v Finney Lock Seeds*

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144 The rule states that where there is doubt about the meaning of the contract, the words will be construed against the person who drafted the contract or the words will be interpreted in favour of the party not responsible for the drafting of the agreement.

145 See section 4(4)(a) of the CPA which gives statutory power to the *contra proferentem* rule of interpretation in that consumer contracts must thus be interpreted to the benefit of the consumer. See also Stott v *Johannesburg Country Club and Another* 2004 JOL 13368 (T) 9; *Durban's Water Wonderland v Botha* & Another 1999 1 All SA 411 (A) 415 and *Van der Westhuizen v Arnold* (n 18) par 19.

146 *Stott v Johannesburg Country Club* (n 145) 9 and Van Huyssteen et al (n 3) 291.

147 Van Huyssteen et al (n 3) 291.

148 Hutchison and Pretorius (n 6) 271.

149 *Durban's Water Wonderland v Botha* (n 145) 415.

150 *Afrox Healthcare Bpk v Strydom* (n 139) par 9.

151 See n 150 above and Stoop (n 101) 503-506.

152 Stoop (n 101) 504-505.

153 Van Huyssteen et al (n 3) 189; Van Eeden and Barnard (n 125) 78 and Schulze, Manamela, Stoop, Manamela, Hurter, Masuku and Stoop *General Principles of Commercial Law (2019)* 88-89.

154 Pretorius (n 81) 491.

Ltd[155] and cited with approval by McNally JA in *Transport and Crane Hire Ltd v Hubert Davies & Co Ltd*.[156]

The most popular technique in interpreting indemnity clauses has been through restrictive interpretation. In *Drifters Adventure Tours v Hircock*,[157] the court held that indemnity clauses in general should be construed restrictively and, in a case of doubt, the clause, reasonably capable of bearing more than one meaning, should be given the interpretation least favourable and biased against the *proferens*.[158] This means that if there is any uncertainty or doubt as to the scope or meaning of an indemnity clause, the ambiguity would be interpreted against the *proferens*.

3.5 **Summary**

The exclusion of special damages in contractual agreements is an important decision to make when negotiating and drafting contracts.[159] It allows the parties to better assess and control business risks arising from commercial transactions.

Parties exclude or restrict the amount of liability for special damages in the event of breach through incorporating exemption clauses in their contracts. These clauses are generally classified into three categories on the basis of the effect they have on a contract and the ability of the aggrieved party to recover damages after the breach.[160] The categories are exclusion, limitation and indemnity clauses.[161] Exclusion clauses absolve a party from liability in *toto* while a limitation clause fixes an amount of damages payable, places a ceiling or cap or a percentage of the performance in question or impose procedural restrictions or time limits on a claim

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155 1983 QB 284 296–297, 1983 1 All ER 108 (CA) 113.

156 The description by Lord Denning which was cited with approval by McNally JA in *Transport and Crane Hire Ltd v Hubert Davies & Co Ltd* 1991 4 All SA 644 (ZS) 654. "None of you nowadays will remember the trouble we had, when I was called to the Bar with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press . . . It was a bleak winter for our law of contract . . . Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the Judges did what they could to put a curb on it...."

157 2007 2 SA 83 (SCA).

158 *Drifters Adventure Tours v Hircock* (n 157) par 9; *Van der Westhuizen v Arnold* (n 18) par 19 and *Durban's Water Wonderland v Botha* (n 145) 415.

159 See n 15 above.

160 Ibid.

161 Beale (n 105) 15 – 0001; See also Van Huyssteen et al (n 3) 289.

for damages whereas an indemnity clause indemnifies the other party from defined losses that may arise as a result of breach of contract.[162]

Since exemption clauses may be used by a party in a stronger bargaining power to the detriment of the party in a weaker position, which is usually a consumer,[163] courts often find a means to circumvent their effect in certain instances by interpreting them narrowly to limit their effect or even declare them invalid in order to protect the public from the abuse of such clauses.[164] However, where a contract is between two parties of equal bargaining power, an exemption clause may be used to allocate risk fairly and signifies an authentic agreement as to the risk assumed by each party in the event of breach and the rules of interpretation may be relaxed in those circumstances.[165]

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[162] West (n 50) 998.

[163] See Van Eeden and Barnard (n 125) 83 where it is stated that the use of standard form contracts is coupled with inequality in bargaining power which may render it difficult for the weaker party to resist their imposition. They have a 'veiling effect', the consequence of which is that standard terms are accepted unseen, unread and often without any understanding of the implications thereof by the signing party. In recognition of the injustice that may be caused by the inequality of bargaining powers, Brand JA in *Afrox Healthcare v Strydom* (n 139) 139 stated that the unequal bargaining position between the parties is a *factor* which the courts consider along with other factors to assess public interest.

[164] Bradfield (n 11) 195; *Drifters Adventure Tours v Hircock* (n 157) par 9; *Van der Westhuizen v Arnold* (n 18) par 19 and *Durban's Water Wonderland v Botha* (n 145) 415.

[165] See n 130 above.

CHAPTER 4

THE VALIDITY OF EXCLUDING SPECIAL DAMAGES IN CONTRACTS

4.1 Introduction

Special damages are excluded or limited by the incorporation of exemption clauses in a contract.[166] However, these clauses may be constructed in a way which is in conflict with the interests and convictions of society and may be rendered illegal and invalid. Illegality occurs where the exemption clause or the agreed performance or the purpose for which the clause is incorporated into the contract is contrary to the law.[167]

Despite their pervasiveness the use of exemption clauses often give rise to difficult questions that go to the heart of the legal system, such as how to balance the parties' freedom to contract against the provisions of mandatory law as well as the respective interests of the contractual parties. According to the traditional approach employed by our courts, an exemption clause will be valid on account of the concept of sanctity of contracts, the principle of autonomy of will and the principle of *pacta sunt servanda.*[168] The concept rests on the interests and convictions of society pertaining to the recognition of transactions between parties and that contracts entered into freely, seriously and properly should be enforced.[169]

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166 See the discussion in chapter 3.2 above.

167 Van Huyssteen et al (n 3) 188.

168 *Pacta sunt servanda* is a common law principle which means that every contract entered into freely must be enforced. This principle is based on the ideas of autonomy of will, personal liberty and freedom of contract. It connotes that the creation of a contract is a result of free choice, without external interference and in the process of contracting the parties are sovereign. Therefore if the parties have full contractual capacity and the meaning of the exemption clause is clear then the contracting parties must essentially live with that which they have agreed to. The aim of *pacta sunt servanda* in contract law is to ensure certainty and that the contracting parties honour their obligations as a matter of ethics and principle. For commercial enterprises to succeed parties must know that should either of them fail to honour their contractual obligations, the other party may seek assistance of the courts to hold them accountable. However even if the contract must be honoured, it must be subject to the considerations of public policy, reasonableness and fairness especially in the face of standard form contracts, market practices and limited competition among suppliers. The concepts of reasonableness and fairness constitute good faith in contract law and these concepts cannot be separated from public policy. Accordingly, once a court is satisfied that the contract was freely entered into and that its terms are not immoral, illegal or contrary to the public policy and are fair and reasonable, it should uphold the contract. See Van Eeden and Barnard (n 125) 134; Hutchison and Pretorius (n 6) 24; Van Huyssteen et al (n 3) 11 and 187; Kanamugire and Chimuka (n 12) 174; Stoop (n 101) 507; Hutchison "Good Faith in Contract: A Uniquely South African Perspective" 2019 *Journal of the Commonwealth Law* 227; *Barkhuizen v Napier* (n 125) par 150; *Everfresh Market Virginia v Shoprite Checkers* 2011 JOL 28058 (CC) par 70 and *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another* 2009 JOL 24236 (C).

169 Van Huyssteen et al (n 3) 11 and 187.

Like any other contractual clause, exemption clauses are subject to the general principle of legality in the law of contract which may render some of them invalid.[170] The grounds for invalidity of exemption clauses can have different origins. A clause can be invalid because it does not meet the formal requirements of a contract. Further, a clause can be invalid because it violates the standards of the law, for example, an exemption clause may be unconstitutional and invalid when public policy and good faith considerations are involved.[171] Furthermore, if a clause is unfair or unreasonable or against statutory provisions it can be declared invalid. Those grounds mentioned above which render clauses invalid will hereinafter be referred to as material grounds for invalidity and are discussed below.

4.2 **Formal grounds for validity of exemption clauses**

The validity of an exemption clause is governed by the requirements of a valid contract. In order for an exemption clause to be valid, it needs to comply with the formal requirements of a valid contract since it is incorporated into a contract and forms part of the contract. It further needs to comply with the formal requirements of a valid exemption clause. Non-compliance with those formalities, whether imposed by statute, case law or by the parties themselves may result in the nullity of the exemption clause or the agreement as a whole.[172] In this respect, a number of circumstances are of particular relevance. In this subparagraph the formal requirements for the validity of an exemption clause excluding or limiting liability for special damages in contracts - standard form and non-standard form contracts will be dealt with. Case law outlining circumstances where an exemption clause may be declared invalid because of non-compliance with formalities and the formulation required for an exemption clause as grounds for validity will be discussed.

*4.2.1 **Formal requirements developed by case law***

Through case law, certain obligations to inform the other party about the existence of an exemption clause in standard form contracts were developed. This requirement to inform the other party may be considered as a formal ground for validity since it requires an undertaking of a particular procedure, which is to provide the other party with information in order to val-

[170] Hopkins "Exemption clauses in contracts" 2007 *De Rebus* 22.
[171] Van Huyssteen et al (n 3) 10 and n 170 above.
[172] Van Huyssteen et al (n 3) 188.

idly incorporate such clauses into a contract. The effects of non-disclosure are illustrated by the cases below.

In *Mercurius Motors v Lopez*[173] the claim failed even though Mercurius Motors pleaded that the contract was subject to an exemption clause. The court held that an exemption clause that undermines the very essence of a contract of deposit for reward should be clearly and pertinently brought to the attention of a customer who signs a standard form contract. The conditions on which Mercurius Motors relied were not brought to Mr Lopez' attention and were located in such a manner so as not to draw his attention. Mercurius Motors therefore could not rely on the exemption clause to exclude liability.[174]

In *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands*[175] the claim failed because the appellant was at all times unaware of the exemption clause on the job cards. She did not read it nor was her attention directed to its presence as she would not have signed the job cards had she known of the exemption clause.[176] Dlovo signed the job card believing that she was only authorising the repairs required and did not think she was at the same time acceding to a provision which exempted the respondent from liability suffered in the event of theft of her vehicle whilst it remained in the respondent's custody.[177] Generally, where the contract assertor is aware or reasonably ought to have been aware that the other party is labouring under some or other misconception, he is under a duty to enquire so as to clear up the misapprehension.[178] The exemption clause could not protect Brian Porter Motors as they did not fulfil the formal requirement of drawing Dlovo's attention to the unexpected clause.

A court may also rely upon the principles set out in *Durban's Water Wonderland (Pty) Ltd v Botha & Another,*[179] the leading judgment on disclaimer notices, in terms of which it was held that a party relying on such notice has the duty to prove that it took reasonably sufficient

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[173] 2008 3 All SA 238 (SCA).
[174] See n 117 above.
[175] *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 3 all SA 366 (C). The facts in Dlovo were almost similar to those in *Mercurius v Lopez*. Dlovo took her motor vehicle for repairs to Brian Porter Motors. She was asked to sign a job card to authorise the necessary repairs. Dlovo signed the job card without reading the terms and conditions believing that she was merely authorising Brian Porter Motors to do the repairs and accepting to pay for the repairs. Her attention was not drawn to the terms and conditions. One of the conditions printed in very small print was that the vehicle was left in the company's custody, parked, stored and driven entirely at owner's risk and the company would not be liable for any damage or loss to the vehicle. The vehicle was stolen. The question was whether the exclusion of liability clause was valid. She had signed the contract but was misled as to the presence of the exemption clause as she thought she was only signing the job card to authorise the repairs. Brian Porter Motors failed to draw her attention to the unexpected clause.
[176] *Dlovo v Brian Porter Motors Ltd* (n 174) 368.
[177] *Dlovo v Brian Porter Motors Ltd* (n 174) 373.
[178] Van Huyssteen et al (n 3) 103-104 and Bradfield (n 11) 315–320.
[179] 1999 1 SA 982 (SCA).

measures to notify the other party of the notice and the reasonableness of the steps taken by the other party to bring the terms of the disclaimer notice to the attention of another party.[180]

*4.2.2 **Formulation of Exemption Clauses as a ground for validity***

Parties may validly exclude special damages by the express terms of the contract provided that the language of the exclusionary clause is unambiguous and sufficiently indicates that the parties intended that such exclusion to be applicable.[181] It is settled law that a party wishing to contract without liability must do so in clear and unequivocal terms.[182] In *First National Bank of SA Ltd v Rosenblum & another*[183] Marais JA said:

> "In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out."[184]

The courts often overturn exclusion clauses if they are not properly drafted. An exclusion clause must be clearly formulated in order to be valid.[185] Schutz JA in a judicial sentiment quoted by Pretorius[186] agreed with the words of Denning LJ in *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd*[187] where he stated that the courts have repeatedly refused to allow a party to a contract from escaping his liability because of an exemption clause unless he does so by words which are perfectly clear, effective and precise.[188]

It is therefore imperative that exemption clauses especially those which seek to exclude the recovery of certain categories of damages in *toto* be drafted with precision in order to be valid and to ensure that they exclude or limit what they are supposed to.[189] The crafting of a special

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[180] *Durban's Water Wonderland v Botha & Another* (n 145) par 417. See also Van Huyssteen and Maxwell (n 84) 143 where it is stated that an exemption clause may fall away sometimes together with the contract if the duty to bring a clause to the other party's attention is not fulfilled.
[181] n 97 above.
[182] Ibid.
[183] 2001 4 SA 189 (SCA).
[184] See n 97 above.
[185] Beale (n105) 15-008.
[186] Pretorius (n 81) 499.
[187] 1957 2 QB 233 (CA).
[188] See (n 186) par 269. See also n 97 and n 145 above.
[189] In *Shatz Investments v Kalovyrnas* (n 33) the court held that: "Where it is in the contemplation of the parties at the time of contract that a loss of trade will occur as a result of a breach the injured party will be entitled to recover damages for such loss of trade if the contract was entered into on such basis".

damages exclusion clause that captures the parties' intentions, without ambiguity, requires bespoke drafting and not general language. The express terms of the resulting written agreement will then govern the resolution of any dispute which may arise.[190]

The courts may not interfere with exclusion of special damages clauses if the language is unambiguous and is not against the provisions of mandatory law.[191] There seems to be no law that precludes an unambiguous contractual clause from excluding liability arising as a result of a fundamental breach of a contract.[192]

4.3 **Material grounds for validity of exemption clauses**

A contract that contains an illegal exemption clause is materially invalid and has the consequence that it may not create legally binding obligations.[193] Illegality occurs where the exemption clause or the agreed performance or the purpose for which the clause is incorporated into the contract is contrary to the law.[194] Legality is one of the requirements for the formation of a valid contract. Since an exemption clause is incorporated in a contract and forms part of the contract, it must comply with both the material requirements of a valid contract and the material requirements for a valid exemption clause in order for both the contract and the exemption clause to be valid. The material requirements for a valid exemption clause are discussed below.

*4.3.1 **Consensus***

Consensus is one of the most important requirements for the material validity of a contract. All contracts derive their validity from the mutual consent of the contracting parties.[195] It involves the intention of the parties to enter into a legally binding agreement. The parties must

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[190] See an example of an exemption clause excluding and limiting liability for special damages. Neither party shall be liable for special, indirect or consequential damages or losses of any kind, including lost profits, loss on a subcontract; loss of business reputation, loss of trade or any other loss sustained in connection with its performance under this Agreement or arising out of any contractual obligations to third parties linked to the contractual obligations of this Agreement even if those damages were foreseeable and were in the contemplation of the parties during the execution of this agreement. A party will only be liable for special, indirect or consequential damages or losses suffered by the other part as a result of the other party or its employees' gross negligence, fraud or wilful conduct to the extent permissible by the applicable laws, in which case the total liability may not exceed the amount of R2 000 000.

[191] Hutchison and Pretorius (n 6) 271.

[192] Bradfield (n 11) 224.

[193] Van Huyssteen et al (n 3) 187.

[194] Van Huyssteen et al (n 3) 188 and Van Huyssteen and Maxwell (n 84) 131.

[195] Van Eck *The drafting of contracts in South Africa* (2015 LLD thesis UP) 96.

be *ad idem* regarding the whole contract and all of its terms.[196] The requirement of a definite or ostensible meeting of the minds of the parties as the basis of a contract means that the intention or will of the parties is the essential crux of the juristic act concerned.[197] Provided the other requirements for validity are met, a contract is formed when the parties reach an agreement on all the material terms of the contract including the terms of the exemption clause included in the contract.[198]

The absence of consensus between the contracting parties could render an exemption clause or the whole contract void.[199] A party who relies on a clause exempting him or her from liability is not protected if another party was not aware that the document contained such a contractual term as there is no meeting of the minds regarding the contractual term.[200] A party cannot be in agreement to that which he or she is not aware of.

A contract involving true consensus after a process of bargaining is relatively rare as such contracts are outnumbered everyday by contracts between members of the public and companies that provide a service to the public on standard form contracts.[201] In standard form contracts, an exemption clause is typically drafted by the company which benefits from such a clause. The company as the party in a stronger bargaining position[202]is usually protected by the clause as it ordinarily fixes and unilaterally determines the language of the clause.[203] The consequence of this is that no real consensus is obtained and no real freedom of contract exists and thus the courts apply more exacting standards to exemption clauses and the enactment of legislation which excludes the use of exemption clauses in certain agreements.[204] However, as stated above, where parties are of equal bargaining power, consensus as to the terms of their contract is mostly genuinely obtained and less exacting standards may be applied to determine the validity of those terms.

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196 See n 104 above.
197 Van Huyssteen et al (n 3) 94.
198 Hutchison and Pretorius (n 6) 48.
199 Van Huyssteen *et al* (n 3) 290 and Hucthison *et al* (n 92) 290, 357.
200 *Mercurius Motors v Lopez* 2008 3 All SA 238 (SCA) par 33 and *Dlovo v Brian Porter Motors Ltd* (n 173) 368.
201 Bradfield (n 11) 211.
202 In recognition of the injustice that may be caused by the inequality of bargaining powers, Brand JA in *Afrox Healthcare v Strydom* 2002 SA 125 (SCA) stated that the unequal bargaining position between the parties is a *factor* which the courts consider along with other factors to assess public interest.
203 Van Eeden and Barnard (n 125) 80 and Bradfield (n 11) 183.
204 Stoop (n 101) *496–509*. See also n 102 above and n 295 below.

*4.3.2 **Statutory Provisions***

Exemption clauses are no longer an exclusive right of the contracting parties.[205] The Consumer Protection Act[206] (CPA) and the Constitution have altered the use of exemption clauses in the law of contract to ensure fairness between contracting parties.[207] The CPA creates a general standard of fairness by listing a variety of prohibited terms which are presumed to be unfair for the benefit of consumers.[208] It ensures and facilitates a fair, reasonable and valid conclusion of contracts. The scope of the CPA is limited to every transaction or every standard form or contract entered into within the Republic of South Africa between a supplier and a consumer and prepared by the supplier.[209]

It introduced comprehensive changes which invalidates a variety of exemption clauses which would have been enforceable under the common law. Section 51(1) contains a list of prohibited terms or conditions which parties may not include in a contract. This means that if parties enter into a contract using the prohibited terms, the contract or the terms thereof would be invalid.[210]

In seeking to restrain the use of exemption clauses to the detriment of consumers in contracts, the CPA requires a party to draw the other party's attention to certain categories of notices or provisions which seek to exclude or limit the risk or liability of the other party or constitute an assumption of risk or liability by a party or impose an obligation on a party or to indemnify a party or any other person for any cause.[211]

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[205] Kanamugire and Chimuka (n 12) 164.

[206] Consumer Protection Act No 68 of 2008.

[207] See s 49 and s 51 of the CPA.

[208] See n 208 below and Van Huyssteen and Maxwell (n 84) 144.

[209] Section 4(4)(b) of the CPA has important directives that any standard form contract between a supplier and a consumer must be interpreted to the benefit of the consumer and the effect of the exemption clauses on the consumer should be limited. See also Van Huyssteen *et al* (n 3) 292.

[210] Prohibited transactions, agreements, terms or conditions in terms of s 51 (1) of the CPA which parties must be aware of when entering into contracts with exemption clauses. S 51 (1) A supplier must not make a transaction or agreement subject to any term or condition if : *(a)* its general purpose or effect is to - (i) defeat the purposes and policy of the Act; (ii) mislead or deceive the consumer; or (iii) subject the consumer to fraudulent conduct; *(b)* it directly or indirectly purports to - (i) waive or deprive a consumer of a right; (ii) avoid a supplier's obligation or duty; *(c)* it purports to - (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier; (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier; (2) A supplier may not - *(a)* directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1); (3) A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section.

[211] See s 49(1) of the CPA and Mupangavanhu "Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of Naidoo v Birchwood Hotel 2012 6 SA 170 (GSJ)"*2014 PELJ 1172-1173*.

Further, if a provision or notice concerns any activity or facility that is subject to risk of an unusual nature, or of which a party could not reasonably be expected to be aware of or reasonably be expected to notice or contemplate,[212] or that could result in serious injury or death, the other party must specifically draw the fact, nature and potential effect of that risk to the attention of the other party.[213] Failure to do so would lead to the clause being declared invalid.

Furthermore, the CPA does not permit a party to exclude liability for gross negligence[214] nor does it allow a party to a consumer agreement to contract out of liability for fraud, dishonesty[215] and breach of contract.[216] In the end, if an agreement falls within the definition of a "consumer agreement", it may not contain exclusion or limitation of liability clauses which are deemed to be unfair, unreasonable or unjust.[217]

A supplier can therefore not deceive the consumer or subject the consumer to fraudulent conduct or insert an exemption clause that exclude the supplier from all liability, or misrepresenting the true extent of the exclusion of liability without bringing such clauses of unusual nature to the attention of the consumer. Most consumer agreements are standard form contracts where the exclusion clauses are unclear and confusing to a consumer and drafted by the supplier without any negotiation. Consumers may be easily misled into accepting agreements with terms that are detrimental to themselves and the Act is there to guard against such influences.

*4.3.3 **Misrepresentation and fraudulent behaviour***

A material misrepresentation is of such a nature that it would induce a person to contract.[218] If a party induces the other party to enter into a contract by misrepresenting the facts concerning the purpose, scope and the existence of an exemption clause, same may not be valid.[219] Further, if fraudulent means is used to obtain a party's consent to enter into a contract incorporat-

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[212] See s 49(2) (a) of the CPA.
[213] See s 49(2) (a)-(c) of the CPA.
[214] S 51(1) (c) (i) of the CPA. See also Van Huyssteen *et al* (n 3) 216.
[215] s 51(a) (ii) and (iii) of the CPA.
[216] See Regulation 44(3) (b) of the CPA regulations.
[217] See section 48(2) of the CPA and Mupangavanhu (n 210) 1177-1189.
[218] Van Eck (n 195) 119.
[219] *Wells v SA Alumenite Co* 1927 AD 69 72 and Van Huyssteen *et al* (n 3) 290. See also Beale (n 105) 15-146 where it is stated that a party who misrepresents, whether fraudulently or otherwise, the terms or effect of an exemption clause inserted by him in a contract will not be permitted to rely on it in the face of his misrepresentation and Van Huyssteen and Maxwell (84) 143 which states that a clause exempting a party from liability for fraud is against public policy and is not valid.

ing an exemption clause the clause or even the entire contract of which it is a part may not be valid.[220]

A party cannot escape liability for fraud by inserting an exemption clause to protect him from such conduct.[221] The case of *Wells v South African Alumenite Co*[222] makes it apparent that a party cannot contract out of liability for fraudulent conduct.[223] The court held that based on public policy, the law will not recognise an undertaking whereby one of the parties to the contract is bound by such a contract to disregard and surrender to the fraudulent behaviour of the other party to the contract. The courts will not enforce such an undertaking because by doing so they would appear to condone and promote fraudulent behaviour.[224] A contract or an exemption clause within a contract that allows a party to contract out of liability induced by fraud or dishonesty may be declared invalid and unenforceable.[225]

When a party acts fraudulently or misrepresents facts when entering into a contract, they act in bad faith. An example of bad faith and misrepresentation is illustrated in *Du Toit v Atkinson Motors*.[226] Atkinson Motors concluded an agreement with Du Toit for the sale of a motor vehicle which contained an exemption clause absolving Atkinson from any liability for any misrepresentation regarding the year of manufacture of the motor vehicle. Du Toit later discovered that the model year of the vehicle was different from what he had been led to believe by Atkinson. He instituted legal action for the cancellation of the contract. The court held that Atkinson misled Du Toit and did not inform him of the existence of the exemption clause in the contract and on that basis, should not rely on the exemption clause.[227]

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220 Ibid.

221 Ibid.

222 1927 AD 69.

223 In *Wells v South African Alumenite* (n 219) 69-73 the defendant was sued for the purchase price of a lighting plant purchased by him from Plaintiff. He raised the defence that he had been induced to enter into the contract by certain misrepresentations made by the salesman who negotiated the sale on behalf of the plaintiff. He claimed for rescission of the sale on the ground of the alleged misrepresentations. The specified misrepresentations had reference to the consumption of petrol, to the construction and mode of the ignition of the lamp, to the arrangements made to prevent the escape of petrol from the burner and to the promised erection of a shed for the petrol container. After he had signed the order, in reliance upon the said representations, he later ascertained that they were false and upon that ground it was prayed that the demand for payment of the purchase price should be dismissed and the contract should be rescinded.

224 See n 219 above.

225 See n 219 above.

226 1985 2 All SA 149 (A).

227 In *Du Toit v Atkinson Motors* (n 226) 153, the court stated that "…it is clear that the contract which the defendant was asked to sign, departs most seriously from the advertisement. The onus then lay really on the plaintiffs to show that they had clearly explained to the defendant that they were departing from the terms of their advertisement…. Everything shows that the defendant signed this memorandum under a misapprehension as to its real effect, and for that misapprehension the plaintiffs themselves are to blame... In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an

In South African law there is no general legal duty which requires a party to bring a specific clause to the contracting party's attention.[228] However, the requirement that the parties to a contract act in good faith entails that a party relying on a clause should bring it to the attention of a party it intends to enforce it against in order to constitute good faith. Further, in situations where a party has signed a contract containing a misrepresentation or has been fraudulently induced to sign such a contract, the court may relax the *caveat subscriptor* rule[229] in instances where an unexpected surprising exemption clause especially one which purports to exclude all liability for damages is contained in a contract and the other party failed to bring such a clause to the attention of the other party. The court can also abate the *caveat subscriptor* rule where exclusion of a party's liability undermines the essence of the contract or the layout or headings of the contract are misleading or the contract has been signed without being read or where the contract has been incorrectly explained to the other party.[230]

In *Mercurius Motors v Lopez*,[231] the court took cognisance of the *caveat subscriptor* rule. However, the nature of the documents in which the exemption clauses appeared and the respondent's contention that he had been misled as to the nature, purport and contents of the document, led the court to conclude that the document was misleading and confusing.[232] Lopez's signature did not amount to a true assent to the exclusion clause and Mercurius owed Lopez a special obligation to inform him of the exclusion clause and what it excluded. The clause was declared invalid.

4.3.4 ***Good faith, reasonableness and fairness and the principle of pacta sunt servanda***

The Constitution has brought to the fore the debate as to the role of fairness, reasonableness and good faith as well as the principle of *pacta sunt servanda* in contract law.[233] A careful balance is required between the principle that contracts freely entered into must be honoured and good faith which encompasses the values of fairness, reasonableness and justice.[234] The key question discussed below is whether good faith, reasonableness and fairness operate as

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innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption".

228 Van Eeden and Barnard (n 125) 71.

229 This rule provides that when a person signs a contractual document he or she agrees to be bound by the contents of the document. See Schulze et al (n 153) 117.

230 Stoop (n 101) *496–509.*

231 2008 3 All SA 238 (SCA).

232 *Mercurius Motors v Lopez* (n 117) 238 and Stoop (n 101) 499.

233 Saner *Agreements in Restraint of Trade in South African Law* (1999 updated 2020) 16; Lewis "The uneven journey to uncertainty in Contract" 2013 76 THRHR 81.

234 See *Botha v Rich NO* 2014 4 SA 124 (CC) par 45-46.

comprehensive overriding principles covering the law of contract as a whole, or whether they manifest themselves as solutions to specific areas of it.[235]

The concept of good faith or *bona fides* encompasses the values of reasonableness and fairness. It has deep roots in our legal system and is of such pivotal significance not only for contract law, but for legal relationships as a whole, that the parties may not contractually exclude or limit its application.[236] Its function is to give expression to what is fair, reasonable and just in the view of the legal convictions of a community.[237] Good faith plays an important role in ensuring equity in South African law in the context of contractual negotiations as well as in the performance of contracts.[238]

The concept of good faith and the values it embodies may be used to interpret contracts and the implication of contractual terms such as exemption clauses.[239] Since the values of reasonableness, fairness and good faith are encompassed by *ubuntu*, which is now recognised as a constitutional value which in turn informs public policy,[240] where a clause is so unreasonable and unfair on its face as to be contrary to public policy it may not be valid.[241] These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy. Such an approach is compatible with the direction indicated by the Constitutional Court in *Everfresh Market Virginia v Shoprite Checkers*[242] where Yacoob J, writing for the minority, said that good faith is a matter of considerable importance in our law of contract and the extent to which our courts enforce the good faith requirement in contracts is a matter of considerable public and constitutional

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235 Zimmermann, Visser and Reid *Mixed Legal Systems in Comparative Perspective (*2004) 94-116.

236 Hutchison and Pretorius (n 6) 27.

237 See *Eerste Nasionale Bank van Suidelike Afrika Bpk v* Saayman 1997 4 SA 302 (SCA) where the Supreme Court of Appeal per Olivier JA described in a minority judgement what constitutes good faith and the purpose of measuring a contract against the notion of good faith.

238 See Hutchison (n 168) 259 where it is stated that good faith is an organizing principle which underlies other areas of contract law and which has as a minimum core a standard of honest conduct in the performance of contractual obligations.

239 Van Huyssteen and Maxwell (n 84) 70 states that good faith being a consonant of the Constitution may influence the content of public policy and its application may influence the interpretation of contracts by influencing the extent to which effect is given to the ordinary meaning of the words used in the contract. See also Hutchison (n 168) 260.

240 This statement may essentially mean that good faith may not be separated from public policy. See also Lewis (n 233) 81; Kruger "The role of public policy in the law of contract" 2011 *SALJ* 712; *Barkhuizen* v Napier (n 125) par 70-71 and *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13 par 72-78.

241 Lewis (n 233) 82.

242 *Everfresh Market Virginia v Shoprite Checkers* (n 168) par 22.

importance.[243] The values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution.[244] Contracts in general may be susceptible to parties acting in bad faith.[245] When parties enter into a contract they must do so honestly and they should bring all matters surrounding the contract to each other's attention as well as disclosing the material terms of the contract especially the exclusion, limitation and indemnification of liability. Failure to disclose may be viewed as acting in bad faith and may render a contract or an exemption clause invalid. Further, in certain cases intentional concealment of a material fact to a contract may constitute acting in bad faith as well as fraud and it is a written rule that parties cannot contract out of fraudulent behaviour.[246] Contracting parties certainly need to relate to each other in good faith. Good faith in a basic sense is conduct which is not arbitrary, not motivated by bad faith or fraud and in the positive sense is honesty.[247] Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done fairly and reasonably with a view to reaching an agreement and in good faith.[248]

However, although good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships.[249] They perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly.[250] In *Brisley v Drotsky*[251] the Supreme Court of Appeal laid the foundation for its approach to the proper roles of good faith, fairness and reasonableness in the law of contract in the new constitutional era.[252] It held that good faith does not form an independent basis upon which a court can refuse to enforce a contractual provision and that the acceptance of good faith as an independent ground would create an unacceptable state of uncertainty in our

[243] See *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* (n 5) par 17.
[244] See s 39 of the Constitution of South Africa 1996 which sets out the values which form part of the concept of *ubuntu* as a foundation for democratic principles which should be promoted by the courts; see also *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), a leading case regarding the concept of *ubuntu* enunciated in the constitution; *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* (n 5) par 12 and par 17 and Schulze *et al (*n 153) 8 and 22.
[245] Ibid.
[246] See *Wells v South African Alumenite Co* (n 219) 72 which case makes it apparent that a party cannot contract out of liability for fraudulent conduct.
[247] Hutchison (n 168) 266.
[248] Lewis (n 233) 84.
[249] Hutchison (n 168) 239 and *Van Eeden and Barnard (n* 125) 85.
[250] *SA Forestry Co Ltd v York Timbers Ltd* (2004) 4 All SA 168 (SCA); Saner (n 233) 18 and Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" 2016 27 *Stellenbosch Law Review* 239-240.
[251] *Brisley v Drotsky* 2002 JOL 9693 par 23.
[252] Saner (n 233) 17 and *Beadica v Oregon Trust* (n 240) par 29.

law of contract.[253] The views expressed in *Brisley v Drotsky*[254] were affirmed in *Afrox Healthcare Bpk v Strydom*[255] where the Supreme Court of Appeal explained that courts do not make decisions regarding the enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness and fairness but only on the basis of established legal rules.[256] The court emphasised that good faith, reasonableness and fairness, although they form the basis for our legal rules, are not themselves legal rules.[257] The court cautioned that legal certainty would be undermined if freestanding notions of good faith were to be adopted.[258]

Innes CJ stated in *Burger v Central South African Railways*[259] that our law does not recognise the right of a court to release a contracting party from the consequences of an agreement freely entered into by him merely because that agreement appears to be unreasonable.[260] In a more recent case of *Beadica v Trustees for the time being of the Oregon Trust*[261], the court also confirms that whilst the values of fairness, reasonableness and good faith may play a role in mitigating unreasonable prejudice in contractual relationships, these values are not standalone rules that can be applied freely to undermine commercial and legal certainty.[262] Public policy which supports the notion of *pacta sunt servanda* demands that contracts, freely and consciously entered into, must be honoured, however there should be a balance between the considerations of good faith, the values it encompasses and *pacta sunt servanda*. This is crucial to ensuring certainty and promoting economic development and at the same time enabling the courts to achieve a balance that strikes down the unacceptable excesses of freedom of contract while seeking to permit individuals the dignity and autonomy of regulating their own lives.[263] In a 2020 judgment, the Constitutional Court clarified the relationship between the concept of *pacta sund servanda* and other constitutional values that are materialised through public policy:

> "In our new constitutional era, *pacta sunt servanda* is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range

[253] Ibid.
[254] 2002 JOL 9693 (A).
[255] 2002 4 All SA 125 (SCA).
[256] *Brisley v Drotsky* (n 245) par 23 and *Afrox Healthcare Bpk v Strydom* (n 139) 126.
[257] Ibid. See also Brand (n 250) 239-240 and Naude and Lubbe (n 121) 442.
[258] Ibid.
[259] 1903 TS 571.
[260] *Burger v Central South African Railways* 1903 TS 576 and *Beadica v Oregon Trust* (n 240) par 29.
[261] 2020 ZACC 13.
[262] *Beadica v Oregon Trust* (n 240) par 29.
[263] *Barkhuizen v Napier* (n 125) par 70-71.

> of constitutional values. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances."[264]

In *Tuckers Land v Hovis*[265] the court developed the law of contract based on the requirement that contracts are to be performed in good faith. Similarly, in *BK Tooling v Scope Precision Engineering,*[266] the court developed the law of contract to permit a relaxation of a principle on the grounds of fairness. These cases illustrate the development of clear doctrines that brought our law of contract in line with the values of good faith, fairness, reasonableness and justice.[267]

4.3.5 ***Public policy***

Courts decide what is permissible and what is not permissible on the basis of public policy.[268] Public policy imports the notions of fairness, justice and reasonableness.[269] Those principles also apply in the context of clauses exempting liability for special damages in all their doctrinal forms of appearance.[270] Exemption clauses which are clearly inimical to the interests of the community will, on the grounds of public policy, be invalid.[271] Further, an exemption clause may be declared invalid if its enforcement would result in an injustice even if the parties have agreed upon it.[272] Examples of unfair, unreasonable or unjust clauses include ones that are excessively one-sided and those clauses with terms that are so adverse as to be inequitable.[273]

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[264] *Beadica v Oregon Trust* (n 240) par 87.
[265] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A).
[266] *Bk Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).
[267] *Beadica v Oregon Trust* (n 240) par 77.
[268] Bradfield (n 11) 217.
[269] Schulze *et al* (n 153) *88-89.*
[270] Kanamugire and Chimuka (n 12) *164 - 175.*
[271] Hucthison, and Pretorius (n 6) 182 and Van Eeden and Barnard (n 125) 77.
[272] *Barkhuizen v Napier* (n 125) par 73 and *Morrison v Angelo Deep Goldmine Ltd* 1905 TS 775 779 where it was held that a man contracting without duress, without fraud, and understanding what he does may freely waive any of his rights, however there is exceptions to that rule as the law will not recognise any arrangement which is contrary to public policy. See also n 241 above.
[273] Bradfield (n 11) 255. See also s 48(2) (*a*) and 48(2) (*b*) of the CPA. An example of a clause which is excessively one-sided would state that one party shall not have any claim whatsover against the other party nor be liable in contract or delict for any general, special or consequential damages sustained by the one party or any third party flowing directly or indirectly from a contract whether due to acts, omissions or otherwise of the one party or its employees or agents or any other person for whom the one party may be held liable, and the other party indemnifies the one party and holds it harmless against any such claim.

Exemption clauses that are against public policy are not recognised by our law and are not valid.[274] An exemption clause will be against public policy and *contra bonos mores* if it contravenes or tends to induce a contravention of a fundamental principle of justice or of statutory law or if it is against the common law as well as the interests of the individual parties to the contract.[275] *Boni mores*, public interest and public policy provide the basis upon which a decision on the question of legality is made in law.[276] The validity of this statement was demonstrated in the matter of *Sasfin v Beukes,*[277] where it was held that courts should not hesitate to declare a contract contrary to public policy if the circumstances so demand.[278] This was consistent with what was said by Innes CJ in *Eastwood v Shepstone*[279]where he stated that:

> "Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void."[280]

Exemption clauses are often used to exclude all forms of liability including liability for damages caused by gross negligence or wilful misconduct. In *Government of the Republic of South Africa v Fibre Spinners & Weavers*[281] the court concluded that gross negligence amounted to wanton irresponsibility. The court considered *inter alia* the question of whether a party could contract out of liability for gross negligence but found it unnecessary to decide on the point.[282] However, the court referred to the case of *Rosenthal v Marks*[283] where it was held that gross negligence implies recklessness and total failure to give consideration to the consequences of a party's actions and a total disregard of duty.[284] The court further referred to the case of *Central South African Railways* v *Adlington & Co*[285] where a contract of carriage at "owner's risk" was held not to have protected the carrier against liability for gross negli-

[274] See *Sasfin v Beukes* 1989 1 All SA 347 (A) 349, 350; *Brisley v Drotsky* (n 251) 81 and *Barkhuizen v Napier* (n 125) par 73.
[275] Van Huyssteen *et al* (n 3) 290.
[276] Van Huyssteen *et al* (n 3) 188.
[277] 1989 1 All SA 347 (A).
[278] *Sasfin v Beukes* (n 247) 351.
[279] 1902 TS 294.
[280] *Eastwood v Shepstone* (n 279) par 302. See also *Sasfin v Beukes* (n 274) 351.
[281] 1977 2 All SA 411 (D).
[282] *Government of the Republic of South Africa v Fibre Spinners & Weavers* (n 281) 420.
[283] 1944 TPD 172.
[284] *Rosenthal v Marks* (n 283) 176.
[285] 1906 TS 964.

gence.[286] In *Naylor v Munnik*[287] the court held that a carrier could not exempt itself from malfeasance or gross negligence although it could for ordinary negligence.[288]

It can therefore be deduced that a clause exempting liability for ordinary negligence is not prohibited and is valid[289] but a clause exempting a party from liability for loss or damage due to gross negligence may be regarded as invalid, unenforceable and against public policy.[290] In this regard, a party can exclude or limit special damages liability caused by ordinary negligence and may not exclude liability for gross negligence.[291]

4.3.6 ***Public policy and the doctrine of pacta sunt servanda***

The law of contract calls for a balancing and weighing-up of the consideration of the notion of public policy, the principle of *pacta sunt servanda* including the constitutional requirements when considering the validity of exemption clauses.[292] This is supported by the court in *Wells v South African Aluminite Co*[293] to the effect that

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by our courts of justice."[294]

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[286] *Central South African Railways* v *Adlington & Co* (n 285) par 974. See also *Government of the Republic of South Africa v Fibre Spinners & Weavers* (n 281) 420 where the court referred to what Murray J said in *Rosenthal* v *Marks* (n 283) par 180 that "Gross negligence… connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty." Wessels, J in *Central South African Railways* v *Adlington & Co* (n 285) had much the same idea in mind in having expressed it at par 973 where he gave as an example of gross negligence what happens when "…a person who takes charge of property leaves it so exposed that thieves may carry it off."

[287] 1857-1860 3 Searle 187.

[288] *Naylor v Munnik* (n 287) 192.

[289] In *Afrox Healthcare Bpk v Strydom,* (n 139) 126 the court accepted an exemption clause absolving a private hospital from liability for harm caused negligently to patients. The court was not convinced by the argument brought by the plaintiff that the clause was contrary to public policy and that it offended constitutional provisions.

[290] See the Consumer Protection Act No 68 of 2008 section 51(1)(c)(i).

[291] The CPA does not permit a party to exclude liability for gross negligence, see s 51(1)(c)(i) of the CPA. See also Van Huyssteen *et al* (n 3) 216, however in certain contracts to which the CPA does not apply parties may agree to contract out of gross negligence.

[292] See the matter of *Combined Developers v Arun Holdings and others* (2014) JOL 31897 (WCC) where the court found that the manner in which the lender wished to enforce a contractual clause was contrary to public policy. The court rejected the lender's argument and found that even if the rule of *pacta sunt servanda* is a key principle in our law, testing the contents of an agreement against public policy is still the default position in our law. The court confirmed that the test is an objective one of ascertaining whether the values of the Constitution, which is an important source of public policy, would be breached by the lender's interpretation of the clause. The court further confirmed that although a contractual provision itself may not run counter to public policy, the implementation thereof may be so objectionable that it is sufficiently oppressive to constitute a breach of public policy, thus justifying non-enforcement.

[293] 1927 AD 69.

[294] *Wells v South African Aluminite* (n 219) 73.

The tension between contractual freedom and the influence of public policy was also addressed in *Barkhuizen v Napier*.[295] In this judgment and according to Ngcobo J, a term opposed to the values enshrined in the Constitution would be against public policy and therefore invalid. The learned judge articulated his discernment on public policy by adding that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of the freedom to contract and a vital part of dignity.[296]

Further, the court in *Sasfin v Beukes*[297] stated that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms or some of them offend one's individual sense of propriety and fairness.[298]

In *Brisley v Drotsky*[299] Cameron JA held that judges must exercise "perceptive restraint" lest contract law becomes unacceptably uncertain. The court noted that the judicial view of contractual terms as agreed to is supported by the importance of commercial dependence and social certainty.[300] Davis J made a similar point in *Mozart Ice Cream Franchises v Davidoff & another*[301] when he held that without the principle of *pacta sunt servanda* the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties.[302] In *Fourways Haulage SA v SA National Roads Agency*,[303] Brand JA analogously remarked that a legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose.[304] It appears obvious that there is great value in promoting certainty and it is also obvious that certainty alone is not a consideration that can trump all other policy considerations in all circumstances.[305]

In the end, the balancing and weighing up of the principles of *pacta sunt servanda*, public policy and the constitutional requirements against exemption clauses enables the principle of *pacta sunt servanda* to operate and at the same time allows the courts to declare exemption

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[295] 2007 SA 323 (CC).
[296] *Barkhuizen v Napier* (n 125) par 57.
[297] *Sasfin v Beukes* (n 274) 351. See also Van Eeden and Barnard (n 125) 73.
[298] Ibid. See also See *Afrox Healthcare Bpk v Strydom* (n 139) par 8 where the Supreme Court of Appeal held that a contract that is unfair to such an extent that it is contrary to public policy will not be enforced. However, the Court also held that the power to declare contracts contrary to public policy should be exercised sparingly.
[299] *Brisley v Drotsky* (n 251) 82.
[300] Ibid.
[301] 2009 JOL 24236 (C).
[302] *Mozart Ice Cream Franchises v Davidoff & another* (n 168) 17.
[303] 2008 JOL 22803 (SCA).
[304] *Fourways Haulage SA v SA National Roads Agency* (n 303) 7.
[305] Kruger (n 240) 738.

clauses that are in conflict with public policy and the constitutional values invalid even though the parties may have agreed to them.[306] The extent to which a contract was freely and voluntarily concluded, with all its terms, will be a vital factor which assists the courts in determining the weight that should be afforded to the values of freedom of contract, public policy and dignity of the parties.[307]

It may lead to a great injustice to enforce a contractual provision inflexibly in the face of standard form contracts where the relevance of power imbalances between contracting parties and the question whether true consensus could ever be reached have often been emphasised.[308] The law of contract, based on the principles of public policy and good faith, should therefore encompass the necessary flexibility to ensure fairness in commercial agreements. A careful balancing act is required between the principle that contracts freely entered into must be honoured (*pacta sunt servanda*) and other constitutional requirements such as public policy.[309] The general rule that agreements must be honoured cannot apply to immoral agreements and exemption clauses that violate public policy.[310] Whilst individuals are at liberty to conclude contracts with whom and on what terms they deem fit, and the courts may by way of the principle of *pacta sunt servanda* generally enforce these contracts, the courts may also retain a residual power to refuse to enforce the terms of a contract when to do so would be contrary to public policy.[311]

4.4 **Summary**

It should be concluded that the requirements for a valid exclusion of special damages clause set out by statutory law and case law can be systematised into formal and material grounds for validity. On this basis, a scheme for testing the validity of such clauses can be deduced as follows:

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[306] *Mozart Ice Cream Classic Franchises v Davidoff* (n 168) 15.
[307] *Barkhuizen v Napier* (n 125) par 57.
[308] *Barkhuizen v Napier* (n 125) par 87. It would be illegitimate for our law to allow *pacta sunt servanda* and outdated notions of freedom of contract to be used as a vehicle to facilitate the abuse of power by unscrupulous persons, see Louw "Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room" 2013 (16) 5 *PELJ* 87.
[309] *Beadica v Oregon Trust* (n 240) par 71. Legislation such as the CPA provides a mechanism for addressing the interpretation of exemption clauses as they would apply in consumer agreements in light of constitutional values and public policy, see Van Huyssteen et al (n 3) 216. See also Van Eeden and Barnard (n 125) 74 and *Barkhuizen v Napier* (n 125) par 87.
[310] *Barkhuizen v Napier* (n 125) par 87 and Stoop (n 101) 502.
[311] Kruger (n 240) 715.

1. Formal requirements for validity

1.1 Information of the other party

Where there is a duty for a party to inform the other party of the existence of an exemption clause and a party fails to do so, the contract will be invalid.[312]

1.2 Clear wording of the clause

An exemption clause's linguistic construction must be clear and unambiguous in order to create certainty and to avoid being subjected to the rules of interpretation of exemption clauses.[313]

2. Material requirements for validity

2.1 Consensus

Consensus is the foundation of a valid contract.[314] The contract must reflect what has been agreed by the parties for it to meet the requirements of consensus.[315]

2.2 Statutory law

Statutory provisions like the CPA influence the validity of exemption clauses by setting requirements and specifications of what must and must not be included in exemption clauses incorporated in consumer contracts.[316] The validity of a contract or a contractual term may be questioned if it falls within the conduct that the statutes have prohibited.[317]

2.3 Absence of misrepresentation or fraud

Inducing the other party to enter into a contract by misrepresenting the facts concerning the purpose, scope and the existence of an exemption

[312] See *Mercurius Motors v Lopez* (n 117) par 33and s 49(2) (a) and (c) of the CPA.
[313] Van Eck (n 195) 197.
[314] Bradfield (n 11) 24 and Hutchinson *et al* (n 92) 46-48.
[315] Van Eck (n 195) 98; Hutchinson *et al* (n 92) 48 and Bradfield (n 11) 24.
[316] See s 51 of the CPA.
[317] Kerr (n 61) 188 and Hutchison and Pretorius (n 6) 181.

clause may render the clause invalid.[318] Further, if a party uses fraudulent means to obtain consent to enter into a contract incorporating an exemption clause, the clause may not be valid.[319] A party cannot escape liability for fraud by inserting an exemption clause to protect him from such conduct.[320]

2.4 No violation of public policy

Contracts must also not be *contra* common law. While the law favours freedom of contract, if a contract is so unfair, vicious or overbearing, it can be found to be against public policy and declared invalid.[321]

2.5 No violation of good faith and the values it encompasses

If an exemption clause fails to give an expression of what is fair, reasonable and just in the view of the legal convictions of a community it may be violating the notion of good faith and may be declared invalid.

[318] Van Eck (n 195) 119.
[319] *Wells v SA Alumenite* (n 219) 72.
[320] Ibid.
[321] Van Eck (n 195) 183.

CHAPTER 5

CONCLUSION

Contracts are drafted with a view to protect a party in the event that the other contracting party fails to keep their commitments. In this regard, a contract must clearly reflect the parties' obligations and the allocated risks and liability payable in the event of a breach of contact. When a breach of contract occurs, the aggrieved party is entitled to compensation in the form of general or special damages or both, with the purpose of placing the aggrieved party in the position he would have been had proper performance taken place.[322]

General damages are the most common type which is claimed in respect of loss that is presumed to flow from the breach as a natural and apparent consequence.[323] Special damages, on the other hand, are claimed in addition to general damages, they arise from general damages.[324] In that regard, special damages can represent a huge amount in liability which can immensely affect a party's finances in the event that a breach of contract occurs and parties have not excluded or limited them in their contract. The rationale for excluding or limiting liability for special damages is that these damages are claimed over and above general damages and may be unpredictably exorbitant representing an unquantifiable risk.[325]

To avoid uncertainties and to allow parties to plan; make allowances and to define the possible extent of the parties' liability,[326] parties should incorporate exemption clauses in contracts to exclude or limit their liability for special damages. Where the parties are of equal bargaining power, incorporating exemption clauses into contracts can operate to allocate risk in respect of the parties and signifies an authentic agreement as to the parties' intentions in assessing and controlling business risks arising from a commercial transaction. However, it is not always the case. The use of exemption clauses may lead to abuse, especially where the parties are not in positions of equal bargaining strength. They are often incorporated in standard form contracts to exclude or limit liability to the detriment of a party in a weaker bargaining position especially if the contract is between a company and a consumer.[327] In most instances, a consumer is presented with a printed standard form contract without any form of

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[322] Bradfield (n 11) 544.
[323] Bradfield (n 11) 653; Van Huyssteen et al (n 3) 410; *Shatz Investments v Kalovyrnas* (n 76) 76; *Holmdene Brickworks v Roberts Construction Co* (n 23) 109 *Lavery & Co Ltd v Jungheinrich* (n 34) 174.
[324] See n 27 above.
[325] See n 15 above.
[326] Bradfield (n 11) 191.
[327] Van Huyssteen et al (n 3) 290 and Hutchison and Pretorius (n 6) 252.

negotiation about its terms because the content of the contract already exists prior to any negotiation between the parties.[328]

Cases such as *Mercurius Motors v Lopez*[329] suggest a willingness on the part of the judiciary to police exemption clauses more closely, especially where consumers are involved. By way of the CPA, the legislature has also attempted to curtail the abuse of exemption clauses in consumer contracts by, *inter alia*, requiring them to be brought to the attention of consumers.[330] A trap may be easily set by a party in a better bargaining position seeking to give the party the maximum protection by concealing contractual terms in an unlikely part of the agreement.[331]

The courts, in trying to protect the public from the abuse of such clauses, attempt to interpret exemption clauses designed to exclude or limit the liability of a *proferens* narrowly to limit their effect or even declare them invalid.[332] The grounds for invalidity of such clauses can have different origins as discussed in Chapter 4. If exemption clauses are drafted in such a way that they do not comply with applicable legislation, are contra *boni mores*, are against public interest, the notions of good faith and public policy they may be declared invalid. Parties must ensure that their contract and exemption clauses comply with the formal and material requirements of their contract imposed by statute, common law or by the parties themselves to ensure validity.[333] A claim for special damages may not succeed in instances where the exemption clause itself is unlawful.

In essence, when entering into agreements it is important for parties to be aware of the limitations to which contractual terms such as exemption clauses are subject and when excluding or limiting liability for special damages. The key to drafting these clauses is to carefully consider what special damages are likely to flow from a breach of that particular contract and then precisely provide for those types of damages using clear and unambiguous language.

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328 See Van Eeden and Barnard (n 125) 80.
329 2008 3 All SA 238 (SCA).
330 Pretorius (n 81) 491.
331 Bradfield (n 11) 191.
332 *Drifters Adventure Tours v Hircock* (n 157) par 9; *Van der Westhuizen v Arnold* (n 18) par 19 and *Durban's Water Wonderland v Botha* (n 144) 415.
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