THE ROLE OF PRIVATE LAW IN THE CONSOLIDATION OF CONSTITUTIONAL DEMOCRACY IN SOUTH AFTERICA AFTER 20 YEARS

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> And so I join the raconteurs and roustabouts in saying:
> 'Buddy, come on in, 'cause 'cause the dreams ain't broken down here
> now, they're walkin with a limp'
> --Tom Waits 'Small Change (Got Rained on With His Own .38)'[1]

In 2005 I wrote about an article evaluating the role of private law in consolidating democracy in South Africa.[2] In that article, I traced the apartheid cancer from the public law to the private law, and then focused in on the law of delict, which is the rough equivalent of tort law. I argued that at best, the development of the law of delict was arrested under apartheid in that a number of progressive developments that took place in the United States during this period (a period of significant democratic development in this country) did not occur in South Africa. These developments generally made it easier for average people, particularly consumers, and employees to have access to civil justice. I argued that the values that animated the law of delict under apartheid are inconsistent with the values, goals and aspirations of the democratic transformation of South Africa. The South African interim, and particularly the final Constitution, created a number of mechanisms to bring the private law in line with the values of the democratic transformation to a constitutional democracy. I concluded by arguing that that the transformation of South Africa has helped propel the transformation of delict, and this in turn has added fuel to the transformation, helping to further consolidate South Africa's democracy.

The present piece explores what has happened since, both in terms of the state of democracy and of the private law in South Africa. As in the U.S., there is no guarantee that all the social forces will come together to strengthen and reinforce democratic values and principles over time. Every country's record is mixed. While there continue to be democratic gains in South Africa, there have also been set backs, challenges and perhaps even a few trends marching against democracy. There continue to be serious problems with racial, wealth and gender inequality at all levels of society, including in the legal profession and courts. There have been issues with the way the police conduct themselves. There have been serious political scandals, not the least of which includes the revival of the apartheid Key Points Act to shield scrutiny of President Jacob Zuma's Nkandla homestead. In the same vein the controversial Protections of State Information Bill is still in limbo. Voter turnout is down and South Africa's economic growth, human development growth and overall happiness rates have been disappointing.

While some may view South Africa as limping along the democratic path, and may have expected more from South Africa at the twenty year mark, it is worth remembering how far the

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[1] Tom Waits 'Small Change (Got Rained on With His Own .38)' in *Small change* (Asylum Record) (1976). I used this quote in the first piece I wrote on transitional justice in South Africa. *Living Well is the Best Revenge' – If One Can: An Invitation to the Creation of Justice Off the Beaten Path*, 15 S. AFR. J. HUM. RTS. 75 (1999) (review essay).

[2] Christopher J. Roederer, *The Transformation of South African Private Law After Ten Years of Democracy*, 37 Colum. Hum. Rts. L. Rev. 447 (2005).

U.S. had come 20 years after the Civil War ended in 1865. In the first 10 years there was some real progress, namely the passing of the 13th, 14th and 15th Amendments, which, at least on the books, gave the slaves their freedom, citizenship, rights to equality, due process, and the right to vote. During this period Congress passed a number of Reconstruction Acts, the Klu Klux Klan Act (1871) and at the end of the decade, the Civil Rights Act (1875). During this period there was a steady increase of African American representatives which peaked in 1875 at 6 representatives in the 44th Congress.[3] Over the next decade those numbers dwindled down to 2 by the 48th Congress in 1885.[4] It would not be until the 89th Congress in 1965 (100 years after the Civil War) that the numbers would rise above 5 again and not until the 91st Congress in 1969 that they would rise above 10.[5] Sadly, but similarly, the Supreme Court struck down the Civil Right Act in 1883[6] and it would be nearly another century before the substantially same legislation would be passed again in the Civil Rights Act of 1964.[7] As noted, African American representation would not rise again until the late 60s after the Voting Rights Act of 1965 started delivering on the promises made in the 15th Amendment which was ratified in 1870.

Thus, in comparison, South Africa is doing remarkably well in staying on the democratic track during its first 20 years. In addition to early and important public law changes, there have been numerous democracy reinforcing gains in the private law. These are gains that make it easier for South Africans to realize private law rights, to both access the courts and to be made whole when they have been injured or harmed. In addition to cases where the courts have progressively developed the common law in light of the spirit, purport and objects of the Bill of Rights, Parliament has also passed a number of laws that give effect to the Constitution and to democratic principles. In addition to legislation passed in the first decade, (e.g. the Employment Equity Act of 1998 and the Promotion of Equality and Unfair Discrimination Act of 2001) in the second decade, parliament passed the Consumer Protection Act 68 of 2008, which came into effect in 2011. Further, South Africa continues to allow suits against public official and institutions for both acts and omissions when they have breached duties arising from fundamental rights. In the recent case of *Loureiro and Others v Imvula Quality Protection (Pty) Ltd*, 2014 (3) SA 394 (CC) (20 March 2014) a unanimous Constitutional Court overturned the Supreme Court of Appeal and found a private security firm both contractually and delictually liable for the actions of its employee in failing to properly guard the plaintiff. The Court noted that the SCA had failed to have regard to weighty normative and constitutional considerations in considering the issue of the Security firm's legal duty.

In the pages that follow, I will briefly make the case for why transforming South Africa's public law is not and cannot be the only mechanism for ensuring South Africa's democratic future. I will make the case that given the reality that South Africa is a liberal democracy and not a socialist nor libertarian state, the private law has an important place in the continued, if slow, transformation of South African law and society. I will note briefly some of the main achievements over the last 20 years and will then turn to an area that has been the most resistant to change, namely the law of contracts. I will first look at common law contracts and in particular a modern case that addresses both contractual and delictual liability. I will then address what is perhaps the most major legislative change in the private law in the last 20 years,

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[3] http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*PLW%3C%20P%20%20%0A.
[4] Id.
[5] Id.
[6] Civil Rights Cases, 109 U.S. 3 (1883).
[7]

namely the Consumer Protection Act of 2008, which has implications for both contract law and delict. I will explore the implications of the Act by contrasting two factually similar cases, one in 2004, before the introduction of the Act, and the other in 2013 after the Act came into effect. [This roadmap still needs work].

Transitioning to Democracy

There is a vast literature on that addresses the question of how states move from totalitarian or authoritarian regimes to "democratic" regimes. As Ruti Teitel notes, this literature tends to focus on the consolidation of democracy through the establishment of the rule of law and holding regular and free elections.[8] The focus has been on public law solutions to the problem ranging from constitutions, mechanisms for criminal punishment, truth and reconciliations commissions, mechanisms for reforming the bureaucracy (lustrations), and mechanisms for providing restitution for victims.[9] For instance, Ruti Teitel's work addresses three areas that she believes most reflect the transformative potential of the law: the rule of law, criminal justice and constitutional justice.[10] While it is true that these areas of the law demonstrate the clearest impact on political transformation, it does not follow that they are the only areas of the law that have an impact. While it is difficult to dispute their impact on political transformation, they do not have equal impact on economic transformation.

It is probably safe to say that South Africa has done a very good job at transforming its political system, even if there are still challenges in the criminal justice system and some challenges with regards to the rule of law. South Africa had amazing turnouts for its first democratic election in 1994[11] and it made a very smooth transition from its Interim Constitution in 1993 to its Final Constitution in 1996. If these were enough, South Africa should be well on its way after twenty years of constitutional democracy.

In an earlier review article on transitional justice in South Africa, I argued that the best revenge for the injustices of Apartheid would be for those previously disadvantaged by Apartheid and their descendants to be living well.[12] While economic prosperity and human development are not the same as democracy, there is no question that these are needed for democracy to flourish. One might also expect that if democracy is flourishing that this would

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[8] Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2013 (1997) [hereinafter Teitel, *Jurisprudence*]; *See also* RUTI TEITEL, TRANSITIONAL JUSTICE 5 (2000) [hereinafter TEITEL, JUSTICE].Teitel, *Jurisprudence*, *supra* note 3, at 2011. Teitel points out that the literature on transitions to democracy often focuses on political rights such as voting. TEITEL, JUSTICE, *supra* note 3.

[9] See, e.g. International Center for Transitional Justice, *Our Mission*, http://www.ictj.org/aboutus.asp.

[10] Teitel's book is somewhat broader in that the chapters are broken down into, (1) The Rule of Law in Transition, (2) Criminal Justice, (3) Historical Justice, (4) Reparatory Justice, (5) Administrative Justice, (6) Constitutional Justice and (7) Toward a Theory of Transitional Justice. TEITEL, JUSTICE, *supra* note 2. Nonetheless, she never ventures outside of the public law domain into the private law.

[11] In 1994 voting age population (VAP) turnout was at 85.53%. See, http://www.idea.int/vt/countryview.cfm?CountryCode=ZA. Although voter turnout from those of voting age has significantly diminished since 1994, it was higher in 2014 (at 60.03%) than it was in 2004 (56.77%). It is worth noting that it is perhaps unrealistic to expect to be able to sustain the same enthusiasm for elections that existed at the end apartheid. Although these numbers are not great, the U.S. VAP voter turnout in 2012 was a mere 54.62%. See, http://www.idea.int/vt/countryview.cfm?CountryCode=US.

[12] Christopher J. Roederer, 'Living Well is the Best Revenge'--If One Can, 15 SAJHR 75 (1999) (discussing the difficult task of transforming social and economic institutions in order to empower those who were previously excluded or marginalized under apartheid).

have a positive impact on economic development. But economic development alone is insufficient if the rewards of that development are too unequally distributed. While, no one expects democracy to deliver total equality, gross inequality at some point is simply inconsistent with a thriving democracy. Few, if anyone, are arguing that South Africa should have communist style economic equality,[13] where each South African has equal income or equal wealth, no matter how talented, hard working or even lucky he or she may be.[14] Nonetheless, economic inequality becomes problematic from the standpoint of democracy both when it reaches a point where it seriously undermines political equality and when it undermines fair equality of opportunity in the market.

The principle of political equality is enshrined in John Rawls' first principle of justice which requires that "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." [15] As he states in his later work, "The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."[16] The goal of equal opportunity where people have a fair, if not equal, chance of achieving more is a fundamental principle undergirding our free market democracies.[17] Rawls' second principle of justice requires that social and economic inequalities be arranged so that they are "attached to offices and positions open to all under conditions of fair equality of opportunity."[18] People accept a certain level of economic inequality based on the idea that those with less can have more if they have talent and if they put that talent to use in the market. Income or wealth mobility based on fair equality of opportunity may even be counted as a principle of capitalist democracy. This draws its appeal both from an idea of fairness or desert where one gets out of the economic system in proportion to what one puts in, as well as from an idea of efficiency, namely that there will be more for everyone. The later notion is based on the assumption that people will contribute more if their input into the system results in fair outputs from the system.

It does not follow that the market provides fair equality of opportunity. The capitalist market is not like a game of chess, an Olympic competition or even championship boxing where one wins a ribbon or a gold medal and the loser goes home to practice in the hopes of taking the ribbon, gold medal or belt the next time. Left to its own, the market does not allow for comebacks on a level playing field. It does not allow Mohamed Ali, much less Rocky, to win the belt one more time, just because he has the talent and energy to do it. It does not, because the

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[13] Ronald Dworkin makes this point in RONALD DWORKIN, SOVEREIGN VIRTUE 2 (2000).

[14] Ronald Dworkin would subject all choice independent luck-based economic inequality to redistribution including the luck of having or not having talent. *Id.* at 90-91, 287. Dworkin sees this as following from the principle of equal resources, which in turn follows from his principle that governments should show equal concern for the fate of each of its citizens. *Id*. at 1, 65-119. For Dworkin, equal concern is the sovereign virtue of political community. *Id*. at 1.

[15] JOHN RAWLS, A THEORY OF JUSTICE 302 (1971). The point of Rawls' theory of justice, justice as fairness, is to provide a moral and philosophical basis for democratic institutions. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 5 (2001). Rawls believes that his two principles of justice can be realized under either a property owning democracy or a liberal socialist regime, but not under a laissez-faire capitalist regime. *Id*. at 137-38. Ronald Dworkin shares this view. Ronald Dworkin, *Liberalism*, *in* LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984) (arguing for a social democratic form of liberalism). For Dworkin, the demands of equality require either "redistributive capitalism or limited socialism—not in order to compromise the antagonistic ideal of efficiency and equality, but to achieve the best practical realization of the demands of equality itself." *Id*. at 69.

[16] RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 8, at 46.

[17] What John Rawls call fair equality of opportunity. RAWLS, A THEORY OF JUSTICE, *supra* note 8, at 302-03.

[18] *Id*. at 303.

market doesn't merely dole out awards and prizes for those who win, it doles out money and other tools for winning the next round of competition. It is more akin to each round of chess or checkers, where it becomes harder and harder to win, the less pieces one has; it is like games where one picks up more resources, tools or weapons and ammunition the more points one scores. As disheartening as it is to lose round after round to the bitter end, the game needs to end, or one needs to be able to regenerate. In order to get people interested in playing again the playing field needs to be rebalanced. There is not much sport in starting the checker game or the boxing match where he or she left off, much less where one's parents left off. People want a fair chance to win the next game. If it is desirable for people to contribute – then inequalities produced by the market should to be harnessed and re-directed to make it worth participating in the market. For instance, the fact that one's parents were relative losers cannot be allowed to doom one's children to being losers and thus certain levels of health and education are crucial for giving the losers in the game back the pieces needed to contribute and compete once again.[19]

As noted above, if the transformation of the public law was sufficient to create a thriving democracy, then one would expect, not only economic development, but economic development that lived up to the preamble's aspiration to "Improve the quality of life of all citizens and free the potential of each person."[20] As we shall see, there is still much work to be done in this area.

Economic Development: Are South African's Living Well?

Reports on this question are mixed at best. A few notable reports appear to sing the praises of South Africa's economic development. Most notably, and perhaps unsurprising is the South African Government's own positive report, *South Africa Twenty Year Review: 1994-2014*.[21] The Goldman Sachs review *Two Decades of Freedom: What South Africa is Doing with It, and What Now Needs to be Done*[22]is also rather complimentary, and even the United Nations in its *Human Development Report 2013 The Rise of the South: Human Progress in a Diverse World* complements South Africa on its achievements. For instance, it reports that "Although most developing countries have done well, a large number of countries have done particularly well—in what can be called the "rise of the South". Some of the largest countries have made rapid advances, notably Brazil, China, India, Indonesia, South Africa and Turkey"[23] It also notes that these countries, including South Africa, have excelled in creating substantial export and import relationships with more than 100 economies.[24]

Yet, some reports and a number of indicators are not so positive. Sanlam, one of South Africa's largest investment companies, warns that while the increase in GDP per capita of 33% in South Africa since 1994 may sound impressive, it is not all that impressive when compare with other emerging markets. As they note, "During the same period the GDP per capita of emerging markets and developing countries increased by 115% on average. Brazil, India,

[19] There is a considerable amount of literature on the need for redistribution and delivering on socio-economic rights in South Africa. See, e.g.
[20] S. Afr. Const. 1996, Preamble.
[21] Available at: http://www.thepresidency-dpme.gov.za/news/Pages/20-Year-Review.aspx
[22] *Two Decades of Freedom: What South Africa is Doing with It, and What Now Needs to be Done (2013) available at* http://www.goldmansachs.com/our-thinking/outlook/colin-coleman-south-africa/20-yrs-of-freedom.pdf
[23] U.N.D.P. Human Development Report 2013 The Rise of the South**:** Human Progress in a Diverse World at 1.
[24] At page 43

Indonesia and Turkey, for example, all fared much better than South Africa."[25] Even more troubling, is the fact that the increase of 33% did not redound to the benefit of all South Africans in the same way. As they note, South Africa has a "GINI coefficient of between 0,6 and 0,7, depending on how it is calculated, and an unemployment rate of approximately 40% in terms of the wider definition."[26]

From 1990 to 2012 South Africa's Human Development Index (HDI) has barely improved; it moved from .621 to merely .629.[27] During the same interval, the U.S. HDI went from .878 to .937,[28] Brazil went from .590 all the way to .730,[29] and Turkey went from .569 to .722.[30] According to the UNDP Human Development Report, South Africa has a Human Development Index ranking of 121 out of 186.[31] The U.S. is now ranked 3.[32]

South Africa's ranking for happiness is at 96th in the world appears to be an improvement over its 121st HDI ranking, but there were only 156 countries in the Happiness Report, thus making the HDI and Happiness rankings very close.[33]

If one looks at the income inequality rate, South Africa has a GINI coefficient of 60.8.[34] There are very few countries in the world with as much inequality. The only countries that are more unequal are Namibia at 63.9, Comoros at 64.3, and Seychelles at 65.8. South Africa is less equal than countries like Angola, Haiti, and Honduras.[35] Sadly, South Africa makes the U.S. look like a country that values equality. The U.S. GINI coefficient is the worst by far in the

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[25] http://www.sanlam.co.za/wps/wcm/connect/sanlam_en/sanlam/investor+relations/economic+information/economic+commentary/economic+growth+in+south+africa+-+a+20+-+year+review

[26] Id. Explain the Gini coefficient. 0 is perfectly equal while 1is perfectly unequal.

[27] Table 2 at 148-151, 150. The U.N. Human Development Index measures "average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living." As the U.N.D.P. goes on to explain:

> The health dimension is assessed by life expectancy at birth component of the HDI is calculated using a minimum value of 20 years and maximum value of 85 years. The education component of the HDI is measured by mean of years of schooling for adults aged 25 years and expected years of schooling for children of school entering age. Mean years of schooling is estimated by UNESCO Institute for Statistics based on educational attainment data from censuses and surveys available in its database. Expected years of schooling estimates are based on enrolment by age at all levels of education. This indicator is produced by UNESCO Institute for Statistics. Expected years of schooling is capped at 18 years. The indicators are normalized using a minimum value of zero and maximum aspirational values of 15 and 18 years respectively. The two indices are combined into an education index using arithmetic mean.
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> The standard of living dimension is measured by gross national income per capita. The goalpost for minimum income is $100 (PPP) and the maximum is $75,000 (PPP). The minimum value for GNI per capita, set at $100, is justified by the considerable amount of unmeasured subsistence and nonmarket production in economies close to the minimum that is not captured in the official data. The HDI uses the logarithm of income, to reflect the diminishing importance of income with increasing GNI. The scores for the three HDI dimension indices are then aggregated into a composite index using geometric mean. Refer to Technical notes for more details.
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> The HDI does not reflect on inequalities, poverty, human security, empowerment, etc.

http://hdr.undp.org/en/content/human-development-index-hdi

[28] Table 2 at 148-151

[29] Table 2 at 149.

[30] Table 2 at 149

[31] U.N.D.P. Human Development Report 2013 The Rise of the South**:** Human Progress in a Diverse World at 1. Table 1 Pp 144-147

[32] Id.

[33] http://unsdsn.org/wp-content/uploads/2014/02/WorldHappinessReport2013_online.pdf

[34] The U.S. is 40.8 See Table 3 at 152

[35] Table 3

economically developed world, at 40.8.[36] It is bad enough that the U.S. inequality adjusted HDI ranking is 16 instead of 3.[37]

Impact on Democratic Participation

While democracy cannot be measured by voter turnout alone, participation in elections is one of the most basic, if not most fundamental aspects of democratic participation. According to the International Institute for Democracy and Electoral Assistance (IDEA), South Africa has seen a significant decrease in the percentage of the voting age population (VAP) turn out since its first democratic election in 1994.[38] In 1994 VAP turnout was at 85.53%, while in 2014 the turnout was a mere 60.03%.[39] While it is perhaps unrealistic to expect South Africans to be able to sustain the same enthusiasm for elections that existed at the end apartheid, the fact that nearly 40% of the voting age population is not showing up for elections is troubling.[40] Perhaps more troubling is that low voter turnout is also correlated with the inability to close the gap in income inequality.[41]

My guess is that democratic participation in voting and across the spectrum is lowest amongst those who are still suffering from the legacy of Apartheid.[42] While I do not have any data on this, if South Africa is following in the footsteps of the U.S., (and I acknowledge that it is a big if) there is plenty of data showing that low voter turnout persists among the same groups to whom the franchise was limited throughout much of American history, namely, the poor, the young, certain minorities and those with less education—i.e. the 'have-nots.'[43] Inequality has an even larger impact on other forms of democratic participation in the U.S.[44] As I noted in a previous work, "Looking across the spectrum of participation, the statistics show that those making over $75,000 per year are between two and six times more likely to participate in politics through campaign work, direct contact, protests, affiliation with political organizations, informal

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[36] Table 3

[37] Table 3 at 152. One must go down as far as 36 in rankings before one finds another country that is as unequal as we are, and that is Qatar at 41.1

[38] See, http://www.idea.int/vt/countryview.cfm?CountryCode=ZA. See also, Collette Schulzherzenberg, *Voter participation in the South African elections of 2014*, INSTITUTE FOR SECURITY STUDIES 61 POLICY BRIEF 2 (AUGUST 2014). Available at http://www.issafrica.org/uploads/PolBrief61_Aug14.pdf

[39] Id.

[40] Id. at 7.

[41] See, e.g. Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSPECTIVES ON POL. 449, 459, 462 fig.9 (2005), *available at* http://www.u.arizona.edu/~lkenwor/pop2005.pdf. In the countries surveyed by Kenworthy and Pontusson, the differences in responsiveness to inequalities roughly track voter turnout rates. In other words, the higher the voter turnout, the more redistribution from rich to poor, and the lower voter turnout the less redistribution from rich to poor.

[42] I have yet to find demographic data on who is registering and turning out to vote in South Africa. It does not appear that South Africa's Independent Electoral Commission distributes that data, if it has it.

[43] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 321 (2001).

[44] See, e.g. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647,669-674 (2008). See also, KAY L. SCHLOZMAN ET AL., TASK FORCE ON INEQUALITY & AM. DEMOCRACY, INEQUALITIES OF POLITICAL VOICE (2004), http://www.apsanet.org/imgtest/voicememo.pdf. Larry M. Bartels, *Economic Inequality and Political Representation* (2005) (unpublished manuscript, on file with Princeton University), www.princeton.edu/~bartels/economic.pdf

community activities, and campaign contributions than those making under $75,000 per year."[45] It is not surprise that "The affluent and well-educated are not only able to afford the financial costs of organizational support but they are in a better position to command the skills, acquire the information, and utilize the connections that are helpful in getting an organization off the ground or keeping it going."[46]

Most of the above information and analysis would point to the continued need to increase equality of opportunity through access to free and/or affordable education, health, and welfare, including water, food, sanitation, land and housing. There is a significant amount of literature on the need and desirability of delivering on socio-economic rights.[47] It is not difficult to link these continued needs with the injustices of the past. Injustices in the economic sphere are relatively clear in the cases of unjust takings of property, unequal access to education and basic needs, as well as unfair labor/employment practices. Despite the injustices, the calls for justice, and the numerous smalls steps forward in many areas, large scale redistribution has not taken place, and is not likely to take place. Standing in the way, is both the public law ideal of a more liberal/ less authoritarian regime and the fear of slipping into the status of something like Zimbabwe. South Africa's ideals as captured in its Constitution are very egalitarian,[48] but its reality is played out in an arena with deeply entrenched libertarian ideals.[49] Those ideals are not only found within South Africa, but they also permeate the global scene in which South Africa operates. Thus, I don't hold out much hope that South Africa will become a social democratic state, much less a socialist state. I also do not think that it will abandon its constitutional aspirations which largely point in this direction and adopt a libertarian approach to either its public law or even now, its private law.

As a result, I don't expect radical change to take place the economic front. The most that I think can be expected, and hoped for is continued incremental steps forward in attempting to consolidate and maintain a liberal democracy in South Africa. This is where I think the private law has an important, if subsidiary, role to play.

The Role of Private Law in Advancing Democratic Principles

While it is obvious how sweeping public law changes could bring about radical transformation, it is less obvious how private law areas like contract and delict have anything to do with democracy. It is both less obvious how they perpetuated the inequities and injustices of apartheid, and how they could be changed in a way that would be democracy reinforcing. Nonetheless, if one is interested in the role of law in transforming South Africa into a thriving democracy, public law is only half of the picture. Put simply, the injustices of the past cut across

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[45] Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647,669-674 (2008) (citing Schlozman et al., supra note 37, at at 22 fig.1). See also Keyssar, supra note 36 at 321-22.

[46] Schlozman et al., supra note 37, at 20.

[47] Cite.

[48] See, e.g. Carl Klare in 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 and the vast literature that it inspired. See also Christopher J. Roederer, *Race Cards, Academic Debate and Progressive Scholarship: What is a Liberal Anyway?*, 118 S. AFR. L.J. 708 (2001) where I argue that It is difficult to see how one could read the new South African Constitution and not have a social democratic view (eg, a view of the Constitution as transformative and highly egalitarian in the sense used by Carl Klare. I argue that not only is the social democratic interpretation that a viable, competing interpretation, it is the 'best' interpretation.

[49] See, e.g. *The Hegemony of Contract*.

the public and private spheres; those injustices were both made possible by, and were further entrenched by both public law and private law. But perhaps more importantly the legacies of those injustices continue to exist, in part, because of the way the private law is organized.

From the perspective of many authors in this area, getting the government involved at all in the private sphere is antithetical the transition.[50] If the problem is an authoritarian regime, then the solution is often seen a liberalization, and not more meddling by the government.[51] Liberalization is primarily about getting the government out of the private sphere: privatizing, deregulating, and at most, acting as a neutral referee in the "free-market" economy.[52] If liberalization is the goal then it would appear that South Africa's private law was not in great need of transformation in 1994. Under apartheid, private law, particularly the areas of contract and torts (delict), were considered to be libertarian.[53]

It is important to remember, however, that not all authoritarian regimes are alike. While South Africa's transformation came on the heels of the rise of democracy in Central and Eastern Europe,[54] the South African regime had little in common with the state socialist regimes of Europe. It was not communist, and as noted, it had a thriving libertarian private law. Thus, it would be a mistake to think that just because the recipe for transforming other authoritarian regimes is liberalization, that same blunt instrument is appropriate in South Africa. In fact, liberalization in the private sphere poses the severe risk of simply perpetuating the injustices of the past.

Post-apartheid South Africa deconstructs the public/private split which is so entrenched in liberal thought. The goal has not been merely to create a liberal order. Rather, the Constitution which is the supreme law of the land, not only contains the foundational value of the rule of law, but also the values of achieving equality, dignity, the advancement of human rights and freedoms as well as non-racialism and non-sexism.[55] In addition to having a number of socio-economic rights provisions, the constitution also allows for its extensive set of rights (set forth in the Bill of

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[50] Thomas Frank, etc.

[51] On this view, all that would have been needed would be to dismantle the apartheid public law system and then to transform the constitution, the criminal justice system, and the administration, as well as to provide for prosecutions, truth and reconciliation, reparations and perhaps some affirmative action.

[52] It is important to remember that "In our Western societies the democratic franchise was not installed until after the liberal society and the liberal state were firmly established. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist, market society, and by the operation of the liberal state, which served that society through a system of competing though not democratic political parties. It was the liberal state that was democratized, and in the process, democracy was liberalized." C.B. MACPHERSON, THE REAL WORLD OF DEMOCRACY 5 (1966).

[53] I will defend this view below.

[54] This is what Samuel P. Huntington terms the third wave of democratization. See, Samuel P. Huntington The Third Wave: Democratization in the Late Twentieth Century (1991).

[55] The Final Constitution reads:

1 The Republic of South Africa is one, sovereign, democratic state founded on the following values:
   a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
   b. Non-racialism and non-sexism.
   c. Supremacy of the constitution and the rule of law.
   d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

S. AFR. CONST. (Act 108 of 1996) ch. 1 (Founding Provisions), §1.

Rights) to apply to the private sphere – i.e. to natural and juristic persons.[56] Further, and perhaps most importantly for our purposes, the Constitution mandates that every development of the private common law must promote the spirit, purport and objects of the Bill of Rights.[57] Thus, South African law allows for the transformation of the private law to take place in harmony with the broader transformation of the public law, and since 2001, the Constitutional Court has mandated that courts take on the responsibility to harmonize the common law with the Constitution's values.[58]

While it is true that the private common law of South Africa was not poisoned by apartheid to the same degree as were areas of public law, it did not need to be directly poisoned in order to spread and deepen the wounds of apartheid. On its face, the libertarian private law was completely neutral. It operated on the assumption that everyone was free and equal. People were free to contract, free to own property and free to take responsibility for their own futures. In the law of delict, this idea is echoed by the authors of the leading South African book on the law of delict which states, "The fundamental premise in law is that damage (harm) rests where it falls, that is, each person must bear the damage he suffers (res perit domino)." [59] Under apartheid, the private law operated under a veneer of libertarianism, democracy, and the rule of law. This system favored freedom of contract over notions of social responsibility (i.e., contract over delict).[60] Individuals were presumed to be free and equal and fully able to determine their own legal relationships under the state enforced law of contracts. Thus, the principles which underlay this authoritarian, racist regime generally did not impact private relations between relatively equally situated parties (for instance, two corporations or two white male professionals).[61] However, nothing perpetuates inequality better than a private law system that presumes everyone is free and equal when its political system is guaranteeing that the vast majority is neither free nor equal.

Thus, private law under apartheid was very similar to classic libertarian contract law and the law of torts un the U.S. prior to the 1960s. This was the age of buyer beware, assumption of risk, and contributory fault. Even at the end of Apartheid there were those who maintained that

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[56] "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right." S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), §8(2).

[57] "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 39(2). Note that legislation includes the Constitution of the Republic of South Africa (Act 108 of 1996).

[58] The Constitutional Court in Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC) 954A held that "[Where] the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."

[59] J. NEETHLING ET AL., LAW OF DELICT 3 (J.C. Knoble trans. & ed., 4th ed. 2001) (referencing J.C. VAN DER WALT & J.R. MIDGLEY, DELICT: PRINCIPLES AND CASES 19 (1997)).

[60] Alfred Cockrell, in The Hegemony of Contract, 115 SALJ 286 (1998) has persuasively argued that the law of contract occupied a position of privilege in South African law and that "its supremacy has served to check the expansionist ambitions of rival compartments of law." Id.

[61] The apartheid system was also sexist, heterosexist, and relatively unsympathetic to those with disabilities. See, e.g., Harksen v Lane No. 1998 (1) SA 300 (CC) at 322 ("[W]hat [factors such as race, sex, sexual orientation, and disability] have in common is that they have been used... to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics.").

contract law was insulated from the fundamental rights in the Interim Constitution.[62] Alfred Cockrell describes the libertarian values which support this notion that freedom of contract should trump its rivals:

> Liberty is the prime political virtue, and coercion is prima facie an evil. The law should be reluctant to impose affirmative duties on individuals unless those duties have been voluntarily assumed. Since individuals are the best assessors of their private desires and preferences, legal rules should create the maximum free space to allow for the satisfaction of those wants . . . Finally, the court's role is an essentially facilitative one of giving effect to the wishes of the parties.[63]

This libertarian view of the legal system was couched within the authoritarian apartheid regime. The result is in many ways the best of both worlds for the privileged and the worst of both worlds for the disadvantaged.

One of the starkest examples of this can be found employment or labor law.[64] Under apartheid, black workers were excluded from collective bargaining under the Labour Relations Act 28 of 1956, and were instead subjected to a committee system under the Bantu Labour (Settlement of Disputes) Act 48 of 1953. Black unions were not afforded the same legal protection and benefits given to white unions. Employers were not required to recognize black unions and as a result were able to harass and victimize black employees who attempted to exercise their rights to association (such harassment often being assisted by the police). Further, black workers were not allowed to strike under the Bantu Labour (Settlement of Disputes) Act 48 of 1953.[65] Many jobs, especially skilled and semi-skilled jobs, were reserved for whites--for example, those under the Mines and Works Act 12 of 1911 and also the Conciliation Act 28 of 1956.[66] The systematic racial discrimination in the workplace was further entrenched by the absence of legislation providing for fair discipline and dismissal of workers. The plight of black employees was worsened since they could be dismissed for any reason whatsoever under the common law. Finally, the influx of control and residential segregation laws placed black workers at an even further disadvantage in the labor market. All the while, contract law, treated everyone as equals, free to contract in and contract away what few rights they had.

It is not surprising that in such a system, the courts would not emphasize such concepts as good faith and unconscionability in contracts and that they would be conservative when it came to expanding tort or delictual liability. They might be expected to fail to include mechanisms that make it more affordable to sue in delict or to make it easier to prove a claim in delict. This libertarian attitude greatly benefits those who have access to information, power, and the ability to cover any losses they may suffer. It allows the powerful who have economic means to dictate the terms of contracts, and it binds those who sign or agree to the contract through the sanctity of

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[62] Cockrell refers by example to J. D. van der Vyver, Constitutional Free Speech and the Law of Defamation, 112 SALJ 572, 577 (1995) (arguing that contracts "cannot be tested against the provisions of the Chapter on Fundamental Rights" in the Interim Constitution). Cockrell, supra note 54, at 303 n.104

[63] Cockrell, supra note 62, at 309

[64] The racially discriminatory labor policies of the late 1950s and early 1960s raised concerns for the International Labor Organization (ILO), which did not subside with South Africa's withdrawal in 1964. Between 1964 and 1979 the ILO compiled twenty-two reports and made a number of resolutions regarding the unfair labor practices of South Africa. David Woolfrey, The Application of International Labour Norms to South African Law, 12 SAYIL. 135, 140 (1986-1987). See also Martin Brassey, Employment and Labour Law I, A1:36-42 (1998) (providing a concise history of South African labor law from 1948 to 1977).

[65] Brassey, supra note 64, at A1:38

[66] Id.; Woolfrey, supra note 64, at 141

contract. In a libertarian system, those who cannot afford to protect themselves in a risk-laden society are at a much great disadvantage.

In a society where people actually are fairly free and equal, with relatively equal access to education, decent accommodation, health care, food, water and income opportunities, the libertarian approach has some attraction. But when one lives in a society that includes separate and radically unequal opportunities based on apartheid legislation covering education, what jobs one can and cannot take, where one can live, what services one gets, etc.,[67] the freedom that is exalted in the private sphere is a ruse. It simply acts as a secondary source of further inequality.

During the apartheid years, countries like the U.S. adopted a number of reforms in both contract law and delict that mitigated some of the inequities that existed in the private law justice system. Contracts moved from classical contract to modern contract and U.S. labor laws and consumer protection laws came in to protect people those who were not as free and equal as the businesses they were contracting with. The U.S. allowed for class action lawsuits, developed strict liability/products liability and related doctrines like res ipsa loquitur, allowed for punitive damages, and contingency fees (as opposed to loser-pay-costs awards). South Africa did not develop its private law to have any of these mechanisms which would level the playing field and provide easier access to just for those less fortunate.

Changes during the first 5 years were slow, but within the first decade there were numerous changes in the private law, particularly in the law of delict. As one might expect, changes in the law of contracts came much slower, but there have been some very promising developments in the last five years.

Democracy reinforcing changes to the Private law

[needs an introduction]

Contingency Fees

Contingency fees in the U.S. are sometimes blamed for our litigiousness, but without them many plaintiffs who lack the resources to pay for lawyers' fees up front would be denied access to justice. Given gross inequalities that existed at the end of apartheid and that continue to this day, there has always been a need for this kind of mechanism in south Africa. However, under apartheid, South Africa did not allow for contingency fees and, in fact, the losing party was required to pay the opposing party's legal fees.

Three years in to South Africa's Democracy, it passed the Contingency Fees Act 66 of 1997 upon the recommendation of the South African Law Commission on Speculative and

[67] Further examples of these types of legislation include the Natives Land Act of 1913 (restricting black ownership of land to 13 percent of the territory); Population Registration Act 30 of 1950 (classifying South Africans as Black, Coloured, Indian, or White); Group Areas Act 41 of 1950 (segregating cities and towns based on "racial" categories); Prohibition of Mixed Marriages Act 55 of 1949 (prohibiting marriage between Europeans and non-Europeans); Immorality Act 23 of 1957 (prohibiting sexual intercourse between races); Black Education Act 47 of 1953; Indians Education Act 60 of 1965; Coloureds Education Act 47 of 1963 (segregating education for non-whites); Black (Urban Areas) Consolidation Act 25 of 1945; Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952; Prevention of Illegal Squatting Act 52 of 1951(requiring non-whites to carry pass books). For a representative list of racist apartheid legislation, see, e.g., Johan de Waal, Constitutional Law, in Introduction to the Law of South Africa 58 (C.G. van der Merwe & J. E. du Plessis eds., 2004).

Contingency Fees.[68] The Act removed the common law prohibition on contingency fees except in family law and criminal proceedings.[69] This was one big step at opening up access to justice for those South Africans who claims have merit, yet whose pocket books are empty.[70]

Class Actions

Under Apartheid there were no mechanisms for class action law suits. As a result numerous relatively small harms that were spread amongst significant number of people went un-redressed. As early as 1998, the South African Law Commission called for the urgent introduction of legislation allowing for class actions and public interest actions in addition to those that are allowed under the Constitution for Bill of Rights matters.[71] Although the Law Commission's recommendations never became law, Parliament did open the door with the new Companies Act, No. 71 of 2008 in Section 157(1), which provides,

> When, in terms of this Act, an application can be made to, or matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person -
>
> a) …
> b) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members; or
> c) acting in the public interest, with leave of the court."

In the meantime, class actions were allowed under the Promotion of Equality and Prevention of Unfair Discrimination Act.[72] The Act follows the language of the Final Constitution, which provides for very broad standing:

> 20. (1) Proceedings under this Act may be instituted by -
>
> a) any person acting in their own interest;
>
> b) any person acting on behalf of another person who cannot act in their own name;
>
> c) any person acting as a member of, or in the interest of, a group or class of persons;

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[68] Contingency Fees Act 66 of 1997.
[69] Id. at § 1(v).
[70] It is important to note that the Act does not remove the requirement that the losing party of the lawsuit pay the cost of the prevailing party (§ 3(b)(ii)). While the contingency fee will make it more affordable to bring a claim with merit, if the claim does not have merit, then a lawyer who takes the case risks remaining uncompensated. Furthermore, the losing party is still generally required to pay the opposing party's legal fees even if she or he is not required to pay her or his own lawyer.
[71] S. Afr. Law Comm'n, The Recognition of Class Actions and Public Interest Actions in South Africa ch. 1 § 2.1 (1998) available at http:// www.doj.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf. Note that Equality Act proceedings deal exclusively with issues of unfair discrimination, hate speech, and harassment, while the Bill of Rights has a broader scope. The South African Law Commission's proposed legislation would have allowed for both public interest litigation, which it recommended would not result in res judicata, and normal class actions, which would. Id. at 32.
[72] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 20

d) any person acting in the public interest;

e) any association acting in the interest of its members;

f) the South African Human Rights Commission, or the Commission for Gender Equality.[73]

The Act also defines "person" broadly to include a juristic person, non-juristic entity, group, or category of person.[74] The Final Constitution's standing provisions mirror those of the Equality Act, save the omission of standing for the Gender and Human Rights Commissions.[75] Persons under the Final Constitution include juristic persons, and the Bill of Rights applies to such persons "to the extent required by the nature of the rights and the nature of that juristic person."[76]

Although Parliament has not acted so as to clearly delineate the parameters of class actions, the Supreme Court of Appeal finally took up the mantel in the 2013 case of *Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd.* [77] The Court held that the recognition of class actions should not be limited to constitutional claims, but should be recognized in any other case where that would be the most appropriate means of litigating the claims of the members of the class. As the court noted in para 21 of the judgment:

> [I]t would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights.[78]

It then laid down the requirements for such an action, starting with the need for certification by the court at the outset and the various requirements for certification.[79]

Manufacturers' liability (From Res Ipsa Loquitor to Strict Liability)

During South Africa's first decade of democracy neither the courts nor the legislature was willing to impose strict liability on manufacturers for product failures. The Supreme court of Appeal declined the opportunity in the 2003 case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*, [80] were it was asked to develop the common law in light of the constitutional right to bodily integrity in Section 12(2) of the Constitution so as to impose strict liability in

[73] Id.
[74] Id. § 1 (xviii).
[75] S. Afr. Const. 1996. § 38.
[76] Id. § 8(4).

[77] 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012).
[78] Id at para 21
[79] Id. at para 22-26.
[80] 2003 (4) SA 285 (SCA).

products manufacturing cases. Justice Howie, for a unanimous Court, recognized that the Section 12(2) right to bodily integrity was both constitutionally entrenched and protected by the common law,[81] but the Court considered it unnecessary to develop the common law so as to impose strict liable on the basis that the Court could take the less drastic measure of taking a more liberal approach to the doctrine of res ipsa loquitur by, for instance, allowing for the onus to shift to defendants to rebut a presumption of negligence in such cases.[82] The Court went on to express the view, that it would be it would be preferable for the legislature to effect the more drastic change of imposing strict liability.[83]

The legislature finally took action with section 61 of the Consumer Protection Act 68 of 2008, which came into effect in 2011. The provision introduces strict product liability for the entire supply chain in the event of supplying unsafe goods, product failure, or inadequate warnings. As the Act states in part:

> (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—
> (a) supplying any unsafe goods;
> (b) a product failure, defect or hazard in any goods; or
> (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
>
> irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.[84]

The Common law of Contracts

As noted above, the law of contracts is one area that was very slow to change after the end of apartheid. As late as 2002, after the watershed case of *Carmichell*,[85] the Supreme Court of Appeal still refused to develop contract law in line with constitutional values.[86] In both *Brisley v Drotsky*.[87]a case involving the contractual requirement that all variations to the contract be in writing and signed and *Afrox Health Care Bpk v Strydom*,[88] a case involving an exemption of liability clause in the contract, the Supreme Court of Appeal refused to develop the law so as to include a good faith defense to contract law. In *Brisley*, the Court held that there was "no general equitable discretion enabling a court to refuse to enforce a non-variation clause, or indeed any other contractual provision, merely on the grounds of it being unreasonable, unconscionable or against good faith."[89] The Court in *Afrox* rejected the argument for the good faith defense, but

[81] Id. at para. 17.
[82] Id. at paras. 14 & 19-21
[83] Id. at paras. 26-38.
[84] Consumer Protection Act 68 of 2008 section 61.
[85] Cite
[86] See, e.g. Gerhard Lubbe, *Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law*, 121 SALJ 395 (2004)
[87] 2002 (4) SA 1 (SCA)
[88] 2002 (6) SA 21 (SCA)
[89] Id at 397 (citing Brisley, 2002 (4) SA 1 (SCA) at 121). Lubbe notes that this is contrary to the approach taken in section 242 of the German BGB. Id.

left the door open for cases involving extreme unfairness which may render a contract unenforceable due to public policy.[90]

Contract Law a Decade Later: A Case Involving Both Contractual and Delictual liability

If one fast forwards to 2014, one finds the Constitutional Court finally entering into this area to inject Constitutional values into the law of contract. In the case of *Loureiro and Others v Imvula Quality Protection (Pty) Ltd*, 2014 (3) SA 394 (CC) (2014), a unanimous Constitutional Court overturned the Supreme Court of Appeal and found a private security firm both contractually and delictually liable for the actions of its employee in failing to properly guard the plaintiff.

The case is interesting in part, because on its face it would appear to be a rather ordinary South African breach of contract and delict case. Although it is a sad fact that so many people need to turn to private security firms to protect their persons and property, and even more tragic when those private arrangements fail, it is not self-evident there is anything about this situation that would implicate the Constitution, or Constitutional Court jurisdiction.

The basic facts were that the respondent's security guard allowed criminals who were impersonating police officers onto the petitioner's property. [91]The High Court found that the guard and company were negligent in doing so because a reasonable security company would have foreseen the possibility of criminals attempting entry through the use of disguises, there were reasonable steps that they could have taken to guard against this risk,[92] both the company and the guard on duty failed to take reasonable precautions, and that in any event, the employer was vicariously liable for the actions of the employee.[93] The High Court found the company liable to Mr. Loureiro in contract and to Mrs. Loureiro and her two sons in delict.[94]

The issue on appeal to the Supreme Court of Appeal (SCA) focused in large part on how to construe an oral amendment to an oral contract. The amendment stipulated that no one other than immediate family, and a relieving guard was to be allowed into the gate without the authorization of either Mr. or Mrs. Loureiro. The question was whether to read the clause to impose strict liability or a reasonableness standard. The SCA held that, given the contract as a whole, the clause should be read to have an implied reasonableness standard.[95] It additionally implied an exception for the police to be allowed entry as this was required under law.[96] By a majority vote, the SCA overturned the High Court, holding that the contract had not been breached as it was not unreasonable for the guard to have believed the imposter was the police.[97]

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[90] Lubbe, at 398-99 (citing Afrox, 2002 (6) SA 21 (SCA) at 34).
[91] Para 15
[92] The company failed to provide special surveillance and management of the only point of access, failed to check the intercom, which was the only means of communication from the guardhouse to the home, failed to give its employee clear instructions, and failed to provide the employee a reliable means to contact his employer. At para 18. The guard also failed to take reasonable and appropriate steps to prevent the anticipated harm when he opened the gate without verifying the entity card of the imposter, made no inquires of the imposter, and did not attempt to contact the main house for information or permission. At para 19.
[93] Para 18
[94] Para 20
[95] Para 21
[96] Para 22
[97] Para 23

When it came to delict, the SCA found, first, that the guard had not acted negligently and second, that because he acted in good faith in letting the police officer in, he did not act wrongfully.[98]

If the Constitutional Court had not taken the case, the plaintiffs would have found themselves without a remedy. Of course, wanting a different result is not a basis for jurisdiction, no matter the injustice. Prior to August 2013, even if the matter was "of general public importance" there would not be jurisdiction without a constitutional issue.[99] Petitioners argued that there was both a constitutional issue and that South Africa's17th Constitutional Amendment giving the Constitutional Court jurisdiction in cases where "the matter raises an arguable point of law of general public importance" was also applicable.[100] Although the application to the Court was prior to the Amendment coming into effect, the Court applied it retroactively, on the basis that it was procedural and did not affect a party's substantive rights.[101] The Court was not bothered by the fact that the parties did not raise and constitutional issues in the courts below.[102]

The Court acknowledged that the mere fact that a matter is located in in an area of the common law that may give effect to constitutional rights is not enough; however, it was enough if the matter posed a question about the interpretation and development of the law.[103] Although the Court did not say so, this is because the interpretation and development of the law must follow section 39 of the Constitution, namely in light of spirit, purport and objects of the Bill of Rights.[104] The Court did reference its precedents holding that appeals based on wrongfulness, do ordinarily raise constitutional issues.[105]

The Court noted that the SCA had failed to have regard to weighty normative and constitutional considerations in considering the issue of the Security firm's legal duty (the question of wrongfulness).[106] It further held that it was in the interest of justice and for the benefit of the public to determine the correct approach for security companies' liability, given the public role they play in giving effect to fundamental rights.[107]

Oddly enough, the Court spent very little time discussing constitutional considerations. The first paragraph of the majority opinion talked about the founding values of the Constitution, a few very relevant rights, the preamble, and the duties of the police.[108] The second paragraph

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[98] Para 24

[99] What counted as a constitutional issue, was broadly interpreted by the CC in Carmichele (2005) add cite.

[100] Para 31

[101] At para 31

[102] Para 32. Although it mentioned this, it did not address it. After the Constitutional Court's decision in *Carmichele* [add] it is the Courts duty to address such issues, even if the parties do not.

[103] At para 33

[104] Section 39 of Constitution.

[105] Para 34

[106] Para 35, 36.

[107] Para 37.

[108] Para 1 states:

> The founding values of our Constitution include human dignity, the advancement of human rights and freedoms and the rule of law[citing section1 of the constitution]. The Bill of Rights recognises the rights to life, freedom and security of the person, freedom from all forms of violence, privacy and not to be arbitrarily deprived of property [citing sections 11,12,14, and 25 of the Constitution]. And the Preamble of the Constitution calls for our people to be protected [its asks God to protect the people]. Our police service is mandated—
>
> > "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law" [quoting from Section 205(3) of the Constitution].

described the very serious crime problems in South Africa and the third and fourth paragraphs note the increasing role of private security firms in carrying out the role of protecting private individuals' safety and security. There was neither a claim nor an argument that that these rights were somehow binding on the private security firm under section 8(2) of the Constitution.[109] Neither was this a case where the Court spent a great deal of time considering how the law of delict should be developed in light of the spirit, purport and objects of the Bill of Rights under section 39(2).[110] Rather this was a case where the Court looked to the "norms and values of [South African] society, [as] embodied in the Constitution, to determine the issue of wrongfulness, or the legal convictions of the community.[111] Although less clear, these values likely impacted the CC's evaluation of the contract issue as well.

On the contract issue, the CC held that the amended clause, which imposed a negative obligation not to admit anyone without prior authorization, was not a matter left up to the reasonable discretion of the guard, but was a strict obligation.[112] The Court noted that while a reasonableness standard is often appropriate for positive obligations, negative obligations (i.e. not to do x or why) are more appropriately read as imposing strict liability.[113] This was especially so in this case, in light of previous breaches by security guards in letting the petitioner's brother in without authorization.[114]

On the issue of delict, the Court held that the guard's state of mind (that he acted in good faith) was not the proper focus of a wrongfulness inquiry.[115] Rather, the focus is on whether the "policy and legal convictions of the community, constitutionally understood, regard [the conduct] acceptable."[116]

While the court acknowledged that if the guard had allowed actually police officers in, it would not have been wrongful, not matter how careless his actions may have been.[117] However, he had no obligation to allow in intruders who were not police, and the community expects security guards not to.[118] Not only was it wrongful on this ground but the wrongfulness is bolstered by public policy, including the constitutional rights to safety and security both as to one's person and property.[119] Given that private security firms have taken on the role of crime prevention for remuneration,[120] there is a great public interest in them succeeding.[121] Thus, there is an important public interest in not insulating them from delictual liability, for to do so would

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[109] Section 8(2) reads:
[110] Section 39(2) reads:
[111] Para 35. See Christopher J. Roederer (2009) where I describe four mechanisms available for bringing the common law in line with the Constitution.
[112] Para 45
[113] Para 45
[114] Para 45. In para 43 the CC notes that the amendment and obligation were triggered by the unauthorized access of the petitioner's brother.
[115] Para 53
[116] Para 53.
[117] Para 54.
[118] Para 55.
[119] Para 56.
[120] The Court began its opinion noting the very high levels of crime in South Africa. Para 2.. After doing so, it noted that private security is one of the largest growing business in South Africa, and that they have taken over many of the security and crime control functions that the police at one time exclusively controlled. Paras 3-4.
[121] Para 56.

diminish their incentive to avoid causing harm.[122] Thus, the Court concluded that the convictions of the community both as to law and policy motivate for liability to be imposed.

This, then left open the question of negligence. The Court adopted the classic test of negligence which has not changed since 1966, from Kruger v. Coetzee.[123] As the Court stated,

> The questions in this case are whether (i) a reasonable person in the position of [the security guard] would have foreseen the reasonable possibility of his conduct injuring another's person or property and causing loss; (ii) a reasonable person in the position of [the security guard] would have taken reasonable steps to guard against that loss; and (iii) [the security guard] failed to take those steps.[124]

While this question is arguably one for the trial court (High Court), the CC determined that the question of negligence was one of both law and fact, and was thus reviewable. The CC determined that is was foreseeable that criminals might try to impersonate police officers in order to gain entry, and that should they gain entry loss could arise.[125] The court held that the extent of the risk of harm and the gravity of the consequences was high, while the burden of eliminating the risk was slight.[126] When the imposter pulled up in an unmarked car with a blue flashing light, wearing a disguise all he did was quickly flash an identity card and demand entry. The court held that a reasonable person in the position of the guard would have checked the identity card and ensured that the police was making a lawful demand for entry before allowing the person in. Failing that, he should have contacted the main house or his employer.[127] As the court concluded, "When one is tasked with protecting a property against intruders, it is simply not reasonable to open a door for a stranger without adequately verifying who that person is or what he or she wants."[128] This was particularly so in this case, given that the guard was an experienced guard with Grade A qualifications.[129]

Statutory Changes in Consumer Protection Law

As I note in my previous work in this area, "[t]he current body of consumer law in South Africa [was] fragmented, outdated and predicated on principles that are not applicable in a democratic and developing society"[130] Serious work on producing consumer protection laws started at the end of the first decade of Democracy in South Africa with the publication of the commissioned Consumer Law Benchmark in 2004.[131] Following this, the Department of Trade and Industry published its Draft Green Paper on the Consumer Policy Framework.[132]

The Green Paper reported consumer needs including non-misleading marketing and selling practices; adequate disclosure of information; fair contract terms; safe products and a

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[122] Para 56
[123] 1966 (2) SA 428 (A) at 430 E-F.
[124] At para 58
[125] Para 61
[126] Para 63.
[127] At para 63.
[128] Para 63.
[129] At para 64.
[130] Roederer Decade at 496
[131] Botha & Kunene Advisors, Department of Trade & Industry, Consumer Law Benchmark Study (May 2004), www.dti.gov.za/ConsumerLawBenchmarkStudy.pdf
[132] Department of Trade and Industry South Africa, Draft Green Paper on The Consumer Policy Framework 31-32 (2004), www.dti.gov.za/ccrdlawreview/conslawreview.htm [hereinafter Green Paper].

better product liability regime; guarantees and warranties for product quality and aftercare; respect for their privacy; better access to tribunals for redress (including alternative dispute resolution mechanisms); and awareness and education.[133] While South Africa did have safety standards regarding medicines, foodstuffs and electrical goods, there are other types of manufactured goods, such as children's clothing, to which no safety standards applied.[134] "Furthermore, consumers [did] not have some of the most basic rights, such as a right to fair contract terms and fair and transparent adverting and marketing."[135]

All of this changed significantly with the introduction of the Consumer Protection Act of 2008.

[need an introduction to the scope of the Act]

Wedding Crashes: Applying the Consumer Protection Act in Light of Some Recent Pre-Act Cases

A few examples from the intersection of delict and illustrate how far South Africa had come in 2004 versus how much further it has come by 2014. The two examples are based on actual incidents, one that took place in 2004 and the other in 2013. The factual scenarios are remarkably similar. Both involved dream weddings in beautiful natural venues in South Africa, the one at Devil's Peak in the Drakensberg Mountains[136] and the other in the Pietermaritzburg Botanical Gardens.[137] In both cases the wedding parties chartered helicopters to bring members of the wedding party to the venue. The good news is that while the original wedding plans were ruined in both cases, and a few people suffered significant injuries, no one died and the weddings went forward. Neither case went to trial, nor as we shall see, it is likely that the parties in the 2004 case would have much success if they did go to trial.

The facts of the 2004 case, as we know them, come from a report on IOL News back in 2004. According to the news story, the bride was in the helicopter (along with a bridesmaid, her husband, and a photographer). It would appear that all went wrong when the pilot flew the helicopter into a cable which smashed the glass dome of the helicopter, snapped and then got caught up in the rotor blades. As the report states, "the helicopter began spinning and careered straight down the gorge at high speed… Then, through some absolute miracle they spotted a piece of flat land at the bottom of the gorge and the pilot managed to lift the helicopter almost horizontally to crash land it in the field." The bride reportedly believed that she was going to die and the helicopter pilots were reported as saying that if it were not for the specific type of helicopter, which was reportedly very safe, everyone would have perished. Luckily, she was not seriously injured but was merely lost her flowers, dirtied her dress and ruined her make-up. As the story highlights, "the traumatised, battered and bruised bride finally married her groom after he and priest had to be rescued from the top of a mountain."

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[133] Id. at 25-41.
[134] Id. at 31.
[135] Id. at 24
[136] Barbara Cole, *Bruised bride weds groom after chopper crash*, November 4, 2004 at 10:12pm available at http://www.iol.co.za/news/south-africa/bruised-bride-weds-groom-after-chopper-crash-1.226061#.VDftJ00tDGI
[137] Jeff Wicks, Groom survives wedding crash, March 24 2013 at 12:00pm. Available at: http://www.iol.co.za/news/south-africa/kwazulu-natal/groom-survives-wedding-crash-1.1490718#.VDfsok0tDGJ

Fast forward nearly another decade and you have the scene of a bride in a horse-drawn carriage, along with over 300 guests, awaiting the grand entrance of the groom. As they were waiting, the see the helicopter carrying the groom, her brother, and his parents crashes near on the road near the gardens. A bystander is reported as saying "I was watching the chopper as it flew over the city. Then it descended and started to bank. It sounded like the engine had gone off and it started to spin. It looked as if the pilot was trying to put it down in the middle of a large traffic circle. There was a loud metallic thump as it hit the road. Then it was flung into the fence. When the dust had settled, I ran over and the pilot was lying on the floor. The four passengers were still strapped into their seats."[138] According to another report, the groom, who was a dentist from Trinidad and Tobago, needed stitches to his head and brow, his mother suffered a broken arm, his dad a bump on his head and whiplash and the brother in law suffered a fracture in the pelvic area.[139] According to this report, "despite the tragedy that struck, and luckily no fatalities, the wedding still went on and ended 'just like in a fairy tale'." The report also notes that all injured parties have retained an attorney.

Under a normal tort or delict claim in these two scenarios, one might expect a range of claims from damage to property, personal injuries, pain and suffering, perhaps loss of earnings, and even psychological harm. All of these could be claimed under South African law, even just before the end of apartheid, if the defendants were negligent, and their negligence wrongfully caused the above mentioned harms to the victims. Assuming both negligence,[140] and causation, these appear rather straight forward delict or tort cases. The only hurdle in these types of cases is a standard clause on the back of the ticket purchased for these flights that tells the passenger that the carrier is liable for any damage to the passenger of any kind caused by the act, omission, neglect, gross neglect, omission or default of the Carrier(s) their servants or agents.[141]

If this clause is a valid waiver of liability then the harm caused was not wrongful, due to the fact that the victim consented

As noted, until very recently, South African law followed the classical contract model; it was very libertarian.[142] There have been some recent cases that hold otherwise, and this area of the law has change considerably under the Consumer Protection Act no 68 of 2008, which came into effect in 2011. Although it is still unclear how the courts will interpret the Act,[143] the

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139 Rhondor Dowlat, EXCLUSIVE: Trini Groom, his Best Man and his parents injured in Helicopter Crash in South Africa, March 28, 2013 available at: http://ttnewsflash.com/?p=24888.

140 Note that I am not claiming that the companies in question, nor even the pilots acted negligently. This has not been clearly established.

141 See, e.g. the example attached.

142 See, e.g. Alfred Cockrell, in *The Hegemony of Contract*, 115 SALJ 286, (1998) who argues that the law of contract occupied a position of privilege in South African law and that "its supremacy has served to check the expansionist ambitions of rival compartments of law," including the law of delict. 115 SALJ 286, 287-91 (1998).He notes that some commentators have maintained that contract law was insulated from the fundamental rights in the Interim Constitution. Id. at 303.

143 Although Section 4 of the Act requires a liberal, pro-consumer approach to interpreting the provisions of the Act (see footnote 13 below), South Africa's judiciary has a record of being conservative in this area even in the face of a constitutional mandate to develop the law in accordance with the spirit, purport and objects of the Bill of Rights under section 39(2) of the Constitution. See, e.g. *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) (upholding a waiver of liability for negligence), and *Barkhuizen v Napier* 2007 5 SA 323 (CC) (upholding a contract clause which barred claims made after 90 days). I have not been able to find a case that addresses any of the relevant sections of the Consumer Protection Act.

provisions of the Act and this recent case law make it unlikely that the exemption clause on the back of the ticket would be enforced. This would have been true for the wedding party in 2004.

There is, nonetheless still a chance under the current law that a court could uphold the clause and exclude liability for a breach of the contract, and for negligently inflicting harm, if:

1. It was not a case of gross negligence; or
2. The clause was brought to the attention of the client "in a conspicuous manner before entering into the transaction, and with adequate opportunity to receive and comprehend the provision or notice" and
3. The client assented to that provision or notice by signing or initialing the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision."[144]

If these conditions are not met, then a court should not uphold the clause. There are also additional arguments that can be made under other provisions of the Act, that the exemption clause in this case is unenforceable. This argument is bolstered by the recent High Court case of *Naidoo v Birchwood Hotel*.[145] The above bulleted points and these further considerations will be explained in detail below. First, I will briefly outline the law on exemption clauses as it existed before the Consumer Protection Act, how *Naidoo* creatively interprets and applies the pre-Consumer Protection Act law, and how the law has been impacted by the provisions of the Consumer Protection Act.

Analysis

Courts have regularly upheld exemption clauses in contracts, even in cases involving adhesion contracts (standard boiler plate contracts) when the fine print is not read.[146] Although the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom* accepted the idea that a contract provision may be unenforceable if it was "surprising or unexpected", it held that because exemption clauses are the rule and not the exception in South Africa, they are not surprising.[147]

In cases of fraud, or duress, the clause would not be enforceable and the contract could be rescinded.[148] Also intentional breaches, intentional conduct and fraudulent misrepresentation cannot be excluded through exemption clauses, as these are contrary to public policy.[149]

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[144] This is assuming that a court found that the notice concerns an "activity or facility that is subject to … risk …. that could result in serious injury or death" under section 2 of the Act.

[145] 2012 (6) SA 170 (GSJ)

[146] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470 et seq. Note that if the term undermines the essence of the contract, then that term should be brought to the attention of the party. *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) (case involving an exemption clause from liability for the theft of plaintiff's car from the defendants repair shop – exempted from reasonable care in safekeeping the property). Does the front of the ticket suffice in giving notice to the foreigner to read the fine print on the back of the ticket?

[147] 2002 6 SA 21 (SCA) at paras 34-6. *Afrox* involved the negligent conduct of a nurse at the defendant's hospital. The patient/plaintiff had signed a document when being admitted to the hospital that included an exemption clause. The Supreme Court of Appeal upheld the clause that exempted the defendant from liability. The Consumer Protection Act no 68 of 2008 severely undermines the precedential authority of this case. See, e.g D McQuid-Mason, *Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?* 5(2) *S Afr J BL 2012 65-68 (available at www.ajol.info/index.php/sajbl/article/download/83486/73521)*

[148] *Northwest Provincial Gov & Another v Tswaing Consulting CC & Others* 2007 (4) SA 452 (SCA).

However, exclusion of liability for breach of contract (unless it is total non-performance,) is not contrary to public policy,[150] and neither is the exclusion of negligence, as a general rule.[151] Up until recently, even liability for gross negligence could be waived.[152] The Consumer Protection Act no 68 of 2008 section 51(1)(c)(i)) does not allow for the waiver of liability for gross negligence, although it remains an open question as to whether one can exclude liability for the negligent causing of death.[153]

Narrow/ strict construction in favor of the consumer

The general rule is that such clauses should be construed restrictively and that the terms should be unambiguous and clear. [154] If they are ambiguous, then the clause is interpreted against the person relying on the clause.[155]

Justice and Fairness (Public Policy under the Constitution): The Case of *Naidoo*

In the recent South Gauteng High Court decision of *Naidoo*, the Court refused to enforce an exemption clause because of public policy considerations of justice and fairness based on the values of the Constitution. In *Naidoo*, the plaintiff was injured while exiting the defendant's hotel because a negligently maintained gate fell on him when a security guard negligently tried to force the gate open. The guard had summoned the plaintiff for help and the gate fell on the plaintiff. There was a disclaimer of liability on the back of the Hotel guest registration card (he signed the front of the card). Although the plaintiff was aware of such disclaimers in general he claimed not to have read the one on the back of the card. The bottom of the front of the card he signed stated "Please read terms and conditions on reverse!" Clause 5 of 7 on the back read in

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[149] *Wells v South African Alumenite Company* 1927 AD 69; *Goodman Brothers* (*Pty) ltd v Rennies Group Ltd* 1997 (4) SA 91 (W).
[150] *Elgin Brown & Hammer (Pty) Ltd v Industrial Machine Suppliers (Pty) Ltd* 1993 (3) SA 424 (A).
[151] *Drifters Adventure Tours CC v Hircock* [2007] 1 All SA 133 (SCA) at 88 G-H.
[152] *Masstorres (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA); In *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 35, the court remarked that liability for gross negligence (medical) could possibly be excluded.
[153] *Johannesburg Country Club v Stott & Another* 2004 (5) SA 511 (SCA) para 12.
[154] *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 9; Drifters Adventure Tours CC v Hircock 2007 (2) SA 83 (SCA) 87E.
[155] *Walker v. Redhouse* 2007 (3) SA 514 para 13 (upholding a clause that excluded liability for "any loss or damage . . . sustained as a result of . . . injury to my person . . . in the course of my horse-riding about the property of Walkersons" in a case where a horse bolted, causing injuries to the rider/plaintiff).

Section 4 of the Consumer Protection Act no. 68 of 2008 states:
To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—

> *(a)* so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
> *(b)* so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to—
>
> > (i) the content of the document;
> > (ii) the manner and form in which the document was prepared and presented; and
> > (iii) the circumstances of the transaction or agreement.

pertinent part, "The guest hereby agrees on behalf of himself and the embers of his party that it is a condition of his/her occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of, any person … caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel."[156]

The Court applied the law above regarding the strict construction in favor of the consumer and found that the notice on the front of the registration card was clearly visible and the exemption clause on the back was straightforward in absolving the defendant from liability.[157] In fact the court found that even if the plaintiff had not read the disclaimer, he conceded that he ought reasonably be aware of the disclaimer and its contents.[158]

Nonetheless, the Court still found for plaintiff. The Court distinguished the two leading Supreme Court of Appeal cases of *Durban's Water Wonderland* (1999) and *Afrox* (2002) on two grounds: 1) the facts of each case arose prior to the Constitution[159] and 2): that the activities in those cases (amusement park rides and surgical operations) are inherently risky while being a guest in a Hotel is not.[160]

The Court also distinguished the Constitutional Court's 2007 decision in,[161] which upheld a contract clause that barred plaintiff's claims made after 90 days, based on the fact that there was "scant" evidence in that case. The Court did, however apply *Barkhuizen*'s analysis as to whether a contractual provision was contrary to public policy and therefor invalid.

In *Barkhuizen* the test was whether the clause afforded a party a reasonable and fair opportunity to approach a court. At paragraph 53 *Naidoo* quoted from *Barkhuizen*, "Public policy imports the notions of fairness, justice and reasonableness and would preclude the enforcement of a contractual term if its enforcement would result in an injustice.[162]" *Barkhuizen* held that a clause could either be inherently unreasonable and thus invalid on its face or unreasonable as applied in a given set of circumstances and therefore unenforceable.

Although the court in *Naidoo* did not hold that such clauses are inherently unreasonable,[163] it held that the present clause should not be upheld on the facts of the present case because it unfairly and unjustly limited the plaintiff's right to a judicial remedy. As the court stated at paragraph 53, "A guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness."

Consumer Protection Act

[156] Although the defendant claimed that it had posted disclaimers of liability at the entrance of the gate and around the hotel premises, this fact was in dispute. Given the time of his arrival, the Court did not believe that the plaintiff was aware of them, and "[i]t is common cause that none of the disclaimers were brought to his attention. Although the plaintiff was aware of such disclaimers at other hotels he did not see any posted at the defendants Hotel.

[157] A court would also likely find the ticket's notice and disclaimer in the helicopter case to be equally clear and straightforward.

[158] This fact is distinguishable. The plaintiff in Naidoo was a driver who had considerable exposure to Hotels and their disclaimers of liability.

[159] It is not clear that this distinction would be convincing to other courts, given that Afrox addressed the constitutional public policy considerations and still held that contractual autonomy was paramount.

[160] Of course, this second point does not aid in the case of helicopter ride.

[161] *Barkhuizen v Napier* 2007 5 SA 323 (CC).

[162] *Barkhuizen* at para 73.

[163] The Court claimed that neither this issue, nor the constitutionality of such clauses, were properly raised before the court. In dicta, the Court noted that it did not believe that clauses exempting liability for negligently caused bodily injury or death pass constitutional muster.

As noted above, the Consumer Protection Act, has changed some of the rules in this area.[164] Relevant changes include:

- notice requirements,
- signature or initialing requirements,
- the categorical invalidity of certain type of exemption clauses, and
- general provisions that may render certain clauses invalid.

Notice

Section 49(1) requires that consumers be given notice of certain terms and conditions, in particular, exemption clauses. The Act reads:

> 49. (1) Any notice to consumers or provision of a consumer agreement that purports to—
>
> (a) limit in any way the risk or liability of the supplier or any other person;
>
> …
>
> must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).[165]

Subsections 3-5 require that the provision be written in plain language, that it be brought to the consumer's attention in a conspicuous manner before entering into the transaction, and with adequate opportunity to receive and comprehend the provision or notice.[166]

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[164] The Act defines ''consumer'' as:

> "Consumer" in respect of any particular goods or services, means—
> (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
> (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
> (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
> (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

[165] The full provision reads:

> 49. (1) Any notice to consumers or provision of a consumer agreement that purports to—
> (a) limit in any way the risk or liability of the supplier or any other person;
>
> (b) constitute an assumption of risk or liability by the consumer;
> (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
> (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

[166] The Statute reads:

> (3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.
> (4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
>
> (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
> (b) before the earlier of the time at which the consumer—
>
> (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
> (ii) is required or expected to offer consideration for the transaction or agreement.

Signing/ initialing or clear conduct

Subsection 2 further requires that in cases where the "notice concerns any activity or facility that is subject to any risk ….

> (c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision."[167]

Gross Negligence

Section 51 (1) (c)(i) forbids making an agreement subject to terms or conditions that "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."[168]

General Provisions

Among other things, Section 51 also forbids a supplier from making 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 this Act;[169]
> >
> > …
>
> (b) it directly or indirectly purports to—
>
> > (i) waive or deprive a consumer of a right in terms of this Act;[170]

> (5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

[167] The full text of subsection 2 reads:

> (2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—
>
> > (a) of an unusual character or nature;
> >
> > (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
> >
> > (c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

[168] Supplier is defined in the Act as: "**'supplier'** means a person who markets any goods or services"

[169] Among the many purposes of the Act listed in section 3, the Act includes:

> *(d)* protecting consumers from—
>
> > (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
> >
> > (ii) deceptive, misleading, unfair or fraudulent conduct;

[170] Consumers rights to fair, just and reasonable term and condition under Article G. Section 48(1) further provides that: A supplier must not—

> *(a)* offer to supply, supply, or enter into an agreement to supply, any goods or services—

(ii) avoid a supplier's obligation or duty in terms of this Act;[171]
(iii) set aside or override the effect of any provision of this Act; or
(iv) authorise the supplier to—
(aa) do anything that is unlawful in terms of this Act; or
(bb) fail to do anything that is required in terms of this Act;

Arguably, clauses that exempt liability for negligence violate both 51 (a) and (b). However, given that only gross negligence was categorically excluded, it may be difficult to convince a judge that clauses that have been upheld under the common law for years as being consistent with public policy are now effectively contrary to public policy under the Act.[172]

The relevant general provisions governing the rights of consumers and the duties of suppliers[173] reduce to the general requirement for those terms and conditions be fair, reasonable and just.[174] Article 48(2) provides further guidance regarding the meaning of these terms as it states: "…a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or

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(i) at a price that is unfair, unreasonable or unjust; or
(ii) on terms that are unfair, unreasonable or unjust;
(b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
(i) to waive any rights;
(ii) assume any obligation; or
(iii) waive any liability of the supplier,
on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

[171] Section 22 requires information to be proved in plain language.
[172] Note that many thought that section 39 of the Constitution of the Republic of South Africa would change the way Courts viewed exemption clauses. See, e.g. Kevin Hopkins 'The Enforceability of Exemption Clauses: Are They In Line with Constitutional Values? (June 2007) *De Rebus* 24. The *Afrox* case is strong evidence that the South African Judiciary is not easily swayed. See, e.g. D Bhana & M Pieterse, *Towards a reconciliation of contract law and constitutional values : Brisley and Afrox revisited*(2006) 123 SALJ 865. The recent High Court case of *Naidoo* (2012) is an exception.
[173] Note that the Act contains numerous provisions that provide rights and duties that are not likely relevant to this case.
[174] See article 48(1).

(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Conclusion

Assuming that the wedding parties did not sign or initial clause 3 on the back of the ticket, and did not act in a way that a court would find indicated acknowledgement of the notice, awareness of the risk and acceptance of the provision, then the clause should not be enforceable. Further, even if a court were to find that such awareness and acceptance existed (for example, like in the case of *Naidoo* (2012) above), both the court's reasoning in *Naidoo,* and the general provisions of the Act would indicate that the provision is unfair, unreasonable and unjust because it is one-sided, and the terms are so adverse to the consumer as to be inequitable.