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Hospital disclaimers: *Afrox Health Care v Strydom*

1. Background

In *Afrox Healthcare v Strydom* [1] the Supreme Court of Appeal had to adjudicate on the enforceability of hospital disclaimers. The question arose as to whether a clause contained in the hospital's admission form, which exempted the hospital from liability for the negligence of its staff, was enforceable against an aggrieved party. Most of the private hospitals in South Africa include this type of clause in their admission forms.[2] According to Strauss, the reason for this is that our society is becoming increasingly litigious.[3]

Originally, hospitals were charitable institutions run mainly by various denominations of the Christian faith. Being a charitable institution, the law protected the hospital as such. The essence of the modern hospital is, however, to provide patient care of the highest possible quality. Were it to fall short of this expectation, the modern patient will not hesitate to take legal action against the hospital.[4]

Claims against healthcare providers are on the rise, in terms both of the number of claims and the amounts so claimed.[5] Running a good hospital is a very expensive undertaking, and even if reasonable care is taken, the risk of a mishap occurring is ever-present. A hospital owner would, therefore, try to limit its liability by means of insurance or otherwise.[6]

The question is, however, whether it is in the public interest that the hospital should be able to limit its liability at the expense of the patient.[7]

2. Previous case law

In *Burger v Medi-Clinic Ltd*,[8] a South African Court was, for the first time, required to decide on the enforceability of a disclaimer clause[9] contained in the hospital's consent form. The indemnity clause was worded in very wide terms, and was upheld by the trial judge. The aggrieved patient appealed to the provincial appeal court and argued that the disclaimer was null and void

1 2002 (6) SA 21 (SCA).
2 Van den Heever 2003:47.
3 Strauss 2003:10.
4 Osode 1993:290-292.
5 Strauss 2003:10.
6 Strauss 2003:10.
7 In the case of a private hospital, the patient pays for the professional care.
8 Unreported 1999 case referred to by Strauss 2003:10.
9 Also known as exemption, exception or indemnity clauses.

R-M Jansen & B S Smith, Department of Private Law, Faculty of Law, University of the Free State, PO Box 339, Bloemfontein 9300.

as it was contrary to public policy. The court, by applying a narrow interpretation to the wording of the clause, reversed the judgment. The court held that the clause consequently only covered incidents:

> arising out of or related to the administration of the anaesthetic or the operation.[10]

In view of the court's narrow interpretation of the wording, the court found that it was unnecessary to deal with the issue of public policy.

3. *Afrox Healthcare v Strydom*

3.1 Facts

The appellant was the owner of a private hospital in Pretoria. The respondent was admitted to the hospital in order to undergo an operation and the requisite post-operative treatment. Upon being admitted to the hospital, the respondent was required to sign an admission form which constituted the conclusion of a contractual agreement between the parties. However, the admission form contained an exemption clause (Clause 2.2)[11] which, in practical terms, implied that the hospital was indemnified from all liability towards the patient with regard to negligence.[12]

After the operation, complications set in allegedly as a result of the negligent conduct of a nurse who applied bandages too tightly, resulting in the blood circulation to a post-operative area being cut off and leading to the respondent suffering damage.

The respondent instituted action in the Transvaal High Court,[13] and the appellant raised clause 2.2 as a defence. Unlike in the *Burger* case, the trial

10 The appellant's case was that the nursing staff discharged him from hospital without first contacting his doctor, despite the fact that they had full knowledge of his symptoms, which caused him to fall and injure himself at home. Due to the narrow interpretation of the disclaimer, this fell outside its scope. It is customary for our courts to interpret exemption clauses narrowly or restrictively. In this regard, see Van Dokkum 1996:251.

11 Clause 2.2: "Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende 'n afhanklike van die pasiënt) weens skade of verlies van watter aard ookal (insluitende gevolgskade of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die Pasiënt of enige siekte (insluitende terminale siekte) opgedoen deur die Pasiënt wat ookal die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuim deur die hospitaal, werknemers of agente."

12 Van den Heever 2003:47. The clause will, however, not indemnify the hospital from liability towards the dependants of a deceased breadwinner — see *Jameson's Minors v CSAR* 1908 TS 575.

13 *Strydom v Afrox Healthcare Ltd* [2001] 4 All SA 618 (T).

judge in *Strydom v Afrox Healthcare Limited* [14] had to deal with the public policy aspect. The court referred to *Venter v Credit Guarantee Insurance Corporation of Africa Ltd* [15] which laid down important considerations in this regard.[16] Public policy generally favours the utmost freedom of contract, and the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases.[17] In view of Section 39[18] of the Constitution,[19] the principle of "public policy or *contra bones mores* has infused within it the principles of equity, fairness and justice within the context of social and moral fibre of society".[20] The court *a quo* stressed that every case will have to be decided on its own merits.[21] In this case, the hospital provided a service which is accorded to the respondent as a fundamental right.[22] In view of this, the hospital had a duty to point out this condition in the contract and the consequences thereof to the respondent.[23] The appellant failed to inform the respondent and the court held that the disclaimer clause was *contra bones mores*,[24] and thus found in favour of the respondent.

The appellant appealed against this decision, resulting in the Supreme Court of Appeal having to decide the matter.[25]

3.2 Arguments raised by the respondent

The respondent averred that Clause 2.2 is not enforceable against him on three main grounds:

- It is contrary to public policy;
- It is in conflict with the principles of good faith; and
- The admission clerk had a legal duty to inform him of the clause in question, and that this had not been done.

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14 [2001] 4 All SA 618 (T).
15 1996 (3) SA 966 (A).
16 619 C: the following must be considered:
    (i) Has there been full disclosure of relevant factors?
    (ii) Was the other party satisfied with the terms of the offer?
    (iii) Were the terms accepted?
    (iv) Were the rights of the other party compromised or was there potential prejudice?
17 623 E.
18 Which enjoins every court to develop common and customary law.
19 Act 108/1996.
20 624 F.
21 624 F. See also 627 I-628 A where the court declares that this case must be distinguished from those cases where entertainment is provided, such as joy rides and horse rides, where notice boards warn customers that they use the facilities at their own risk.
22 Constitution: Section 27(1): the right to have access to health care.
23 626 H.
24 626 H.
25 SCA decision: 33 A-C.

3.2.1 Public policy

The respondent's public policy argument was based on the following grounds:

a) Unequal bargaining position

The court stated that the fact that the parties were on an unequal footing when the contract was concluded would not necessarily imply that such a clause was in conflict with public policy, but that it was a factor which had to be considered. However, the court held that *in casu* there was absolutely no evidence to suggest that the respondent was in a "weaker" bargaining position than the appellant.[26]

b) The nature and ambit of the hospital staff's conduct

The respondent claimed that while the hospital had a duty to provide treatment in a professional and careful manner, clause 2.2 excluded liability to such an extent that it could even be construed as to exclude liability for gross negligence, which is contrary to public policy. The court acknowledged Strauss's work[27] as authority for this proposition, but held this issue to be irrelevant, since gross negligence had not been relied on in the respondent's pleadings.[28] However, even if it were to be regarded as being contrary to public policy, this would not bring about the automatic invalidity of the clause, but would rather mean that the clause should be interpreted restrictively so as to exclude gross negligence.[29]

c) The hospital as a provider of medical services

The respondent averred that providers of medical treatment/services should be prohibited from excluding their liability by means of an exemption clause. As a basis for this reasoning, the respondent relied on section 27(1)(a) of the Constitution.[30]

The court, referring to *Brisley v Drotsky*,[31] where it was stated that:

> In its modern guise 'public policy' is now rooted in our Constitution and the fundamental values it enshrines,

held that the values underpinning the Constitution thus had to be taken into account. The indemnity clause did, however, not offend these values. A private hospital can insist on remuneration for medical services or impose legally enforceable conditions for providing health services.

The court rejected the argument that the indemnity clause would promote negligent and unprofessional conduct by nursing staff. This argument is based on a *non sequitur*, as nursing staff are bound by their professional

26 35 B-C.
27 Strauss 1991:305.
28 35 E-G.
29 35 G.
30 Act 108/1996. The relevant Constitutional provision states that: "Everyone has the right to have access to (a) health care services, including reproductive health care."
31 2002 (4) SA 1 (SCA).

code, and are still subject to the statutory authority of their professional bodies. Furthermore, the court found that negligent conduct would hardly serve to promote the (private) hospital's reputation and competitive edge.[32]

Furthermore, the court held that section 27(1)(a) is not the only value to be taken into account — constitutional values work both ways. Referring to *Brisley v Drotsky,* once more the court held that contractual freedom is also a constitutional value.[33] This value, in turn, embodies the principles underlying the maxim "*pacta sunt servanda*" or "agreements are to be observed". Consequently, it is in the public interest that contracts entered into freely and earnestly (by parties who have the requisite capacity) should be enforced.[34]

3.2.2 Good faith

The court rejected the argument that the indemnity clause was contrary to the principles of *bona fides*. Furthermore, abstract ideas such as good faith, equity, reasonableness and the like were not in themselves legal rules, but rather constituted the basis for legal rules. The court had no discretion in this regard, and could only operate on established legal rules, not on such abstract concepts.[35]

3.2.3 Misrepresentation and mistake

The respondent's final alternative was that, at the time of signing the admission document, he was unaware of the content thereof as the admission clerk had not drawn his attention to the content of the clause.

The court held that exemption clauses have become a standard feature of most contracts, and could, objectively speaking, be expected. There was no legal duty on the admission clerk to point out the indemnity clause to the patient in advance.[36] As a general rule, a contracting party who signs a written agreement without first reading it does so at his/her own risk, and will be bound by the agreement.[37]

The court (with five judges on the bench) unanimously upheld the appeal (with costs) by finding that the exemption clause was indeed enforceable against the respondent.

32 371 I-J, 38 A.

33 38 B-C: In the words of Cameron JA "contractual autonomy is part of freedom", and thus that the court should exercise "perceptive restraint" in striking down contracts (or refusing to enforce their provisions).

34 Referring to *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* 1964 (4) SA 760 (A).

35 40 G-J, 41 A-B.

36 42 A-D.

37 There are certain exceptions to this rule, one of which arises when a legal duty is placed upon one of the parties to disclose certain information pertaining to the contract: Kerr 2002:104,105.

4. The extent of hospital liability

Generally speaking, if a patient suffers damage due to negligence, the patient's remedy will lie against the wrongdoer (or his/her insurance company), or against the hospital itself in terms of vicarious liability.[38] However, exemption clauses have today become a standard feature of most private hospital's admission forms,[39] and admission to the hospital is often made conditional upon the signing of the admission form (and consequently the acceptance of exemption).[40]

If such an admission form is signed, the exemption clause may greatly limit the patient's remedy. However, the hospital will have a discretion as to whether or not to invoke the clause.[41]

South African courts uphold the maxim of *caveat subscriptor*,[42] and, thus, will at most interpret these clauses as restrictively as possible.[43] However, if the clause is drafted in clear, explicit terms, this will be of little help to the patient.

The only remedy available to the patient is that he or she may sue for damage suffered as a result of intent, or (possibly) gross negligence.[44]

Notwithstanding this, the patient may recover damages from the doctor or nurse (in their personal capacities) as they are not parties to the contract.[45]

5. Should these clauses be enforced?

Strauss has said that:

> The patient clearly is in a disadvantageous position and it may be argued that from the point of view of public policy the validity of exemption clauses is an undesirable feature deserving of the attention of the South African Legislature.[46]

Furthermore, Strauss is also of the opinion that the argument which applies to a doctor exempting himself by agreement with a patient (which agreement cannot be possible as it effectively implies that the patient empowers the doctor to perform negligently[47]) should also apply to hospitals in respect of personal injury to a patient.[48]

38 Burchell and Schaffer 1977:109.
39 Van den Heever 2003:47.
40 Strauss 1991:305; Claassen and Verschoor 1992:102.
41 Burchell and Schaffer 1977:109.
42 "Let the signatory be on his guard."
43 Christie 2001:210; Van der Merwe *et al* 2003:274, 275.
44 Claassen and Verschoor 1992:102; Strauss 1991:305.
45 Burchell and Schaffer 1977:109.
46 Strauss 1991:305. See also Claassen and Verschoor 1992:103.
47 Strauss and Strydom 1967:324, 325.
48 Strauss 1991:305 (at footnote 55).

Retief makes it clear that she definitely does not support exemption clauses in private hospitals:

> It is, however, unacceptable that big institutions, corporations or other groups with unrestricted financial resources and adequate insurance, can refrain from fulfilling their responsibilities by exempting themselves from liability in the easiest possible way.[49]

According to Retief, such exemption clauses could be *contra bones mores*, and/or in conflict with public policy. She is of the opinion that such clauses should be declared invalid by the courts, or that the legislature (or hospitals themselves) should intervene, as liability could be imposed by way of direct, institutional or corporate liability.[50]

She refers to *Newman v East London Town Council*,[51] where the Council had attempted to absolve itself from liability by way of an exemption clause. The court held that the Council was not protected by the exemption clause as the Council "cannot shelter themselves behind the terms of their contract".[52]

In the light of the *Newman* case, she concludes that:

> It is a pity that the South African law had not progressed much in a century's time.[53]

Burchell and Schaffer state that the trouble with such a clause is that it "makes the use of liability insurance an anachronism", unless the patient is nevertheless admitted to the hospital despite his/her refusal to sign the admission form.[54]

Van den Heever is also of the opinion that exemption clauses should not allow a hospital to escape the responsibility of providing acceptable medical care:

> Hospitals should take responsibility for sub-standard negligent provision of services, organisational failures, and systemic defects … The present untenable position in which a victim of a medical accident finds himself should, in the public interest and with due regard to considerations of public policy, be appropriately addressed either by the court, legislator or the hospitals themselves.[55]

49 Retief 1997:474.
50 Retief 1997:474 and 475.
51 1895 12 SC 61.
52 73.
53 Retief 1997:475.
54 Burchell and Schaffer 1977:109.
55 Van den Heever 2003:48.

6. Returning to the *Afrox* case: Some comments

6.1 Public policy

As exemption clauses may often result in abuse, the law has to employ a means of ensuring that these "traps" do not "operate unchecked".[56] Christie states that the means employed by the law is the criterion of "public policy".[57]

In the *Afrox* case the Supreme Court of Appeal confirmed that "public policy is now rooted in the Constitution" and that Constitutional values had to be taken into account.[58] However, no mention was made as to whether important fundamental rights such as access to (professional) health care services[59] and the right to have a dispute adjudicated by a court law,[60] may be waived. Due to the nature of these rights and the special circumstances of the case, this question should have received the court's attention.[61]

When interpreting the Bill of Rights, a court may consider foreign law.[62] It is submitted that the Supreme Court of Appeal should have taken note of the fact that similar disclaimers have been outlawed by the legislators of other countries, such as England and certain American states. In Germany, such clauses were held to be contrary to public policy.[63]

6.2 Unequal bargaining position

According to Van der Merwe, exemption clauses:

> have become the object of suspicion, inasmuch as they are said to enable contractants who are in a strong bargaining position to exploit their weaker co-contractants.[64]

An exemption clause may fail for lack of consensus between the parties. If there is consensus, the clause will be invalid where one of the parties has abused the other party's circumstances to such proportions that consensus has in effect been improperly obtained.[65]

Van den Heever opines that any patient who is admitted to hospital for serious illness, trauma, or even for elective surgery (the cause of which often results in the patient believing that he or she has no choice but to undergo the requisite treatment) is not in an equal bargaining position with the hospital, as he or she will often be incapable of negotiating the terms of

56 Christie 2001:209.
57 Christie 2001:209; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775: 779.
58 37 C-E.
59 Constitution: Section 27(1)(a).
60 Constitution: Section 34.
61 Manning 1983:133.
62 Constitution: Section 39(1)(c).
63 Strauss 2003:11.
64 Van der Merwe *et al* 2003:274.
65 Van der Merwe *et al* 2003:274, 275.

his or her admission under these circumstances. The same holds true for family members (signing on behalf of a patient) who, under such stressful and traumatic circumstances, are more concerned about their loved ones receiving the assistance they need than worrying about the fine print.[66]

Is true consensus really possible under these circumstances? It is submitted that it is not, and may even be an example of the above-mentioned abuse of circumstances mentioned by Van der Merwe, requiring the clause to be invalidated.

Contractual freedom, being a constitutional value, must, as a matter of public policy, be observed if the contract was entered into freely.[67] What about a critically ill or injured patient (or family members who have to sign on their behalf)? Can such a person really be said to conclude the agreement freely?

6.3 Misrepresentation and mistake: Duty to assist the patient

According to Van den Heever,[68] one cannot compare exemption clauses in commercial contracts (where, possibly, financial considerations are the main concern) to exemption clauses in hospitals where human life and health are at stake.

Medical treatment, *per se*, implies a unique standard of care, exposure to high risks, stressful circumstances, and crucial decision-making — a combination of which will literally result in a "life and death" type of situation. With respect, one could hardly compare this to a commercial contract which might involve the reparation of gutters!

Furthermore, it is important to bear in mind that a large proportion of the South African population is seldom, if ever, exposed to commercial contracts. This factor, coupled with language difficulties, implies that many south Africans would not expect to encounter such a clause (let alone understand the implications thereof).

In the light of the above-mentioned, could it thus not be expected that at the very least, a private hospital should be placed under a legal duty to draw a patient's attention to, and explain the consequences of, the exemption?

66 Van den Heever 2003:47.

67 *Afrox Healthcare v Strydom*: 38 C-D. In explaining the principles underlying this maxim, Brand JA referred to *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767 A where it is stated "die elementêre en grondliggende algemene beginsel dat kontrakte wat *vryelik* en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word." [Emphasis added].

68 Van den Heever 2003:48.

6.4 Medical aid schemes and public/State hospitals

It may be true that the exemption clause does not directly undermine a person's right to health care services as contained in section 27(1)(a) of the Constitution. The reasoning behind this is quite simply that everyone is entitled to receive health care from a state hospital. However, what is the point of belonging to a medical aid scheme? Surely, it cannot be expected of people who contribute religiously to these schemes to do so without receiving the obvious advantage of being treated in a private hospital (or at least having the choice of being admitted to a private hospital in the secure knowledge that he or she will receive the best possible care)?

The admission forms of public/State hospitals in the Free State Province do not contain exemption clauses. This is in accordance with regulation 12(2)(1)[69] promulgated under the *Public Financial Management Act*,[70] which provides that "an institution *must* accept liability for any loss or damage suffered by another person which arose from an act or omission of any official as a claim against the State".[71] It is submitted that if admission forms of state hospitals contain exemption clauses, this regulation will be contravened.

6.5 Personal liability

Insofar as nurses might still incur personal liability for their negligent acts, it is submitted that such a nurse could be regarded as a veritable "man of straw" when compared to a private hospital or clinic which has unlimited financial resources and adequate insurance.

Furthermore, the consequences of a private hospital indemnifying itself with such ease could result in the nurse's indemnity insurance skyrocketing, while the private hospital is in a better position to bear this burden.

6.6 Gross negligence

Most authors seem to be of the opinion that a patient may claim for gross negligence.[72] In the *Afrox* case it was mentioned that a clause which allows for gross negligence would probably be interpreted to exclude gross negligence. However, it was decided in *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*,[73] that the exclusion of liability for gross negligence is permissible.[74] Thus greater clarity is required in this regard.

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69 Government Gazette 25 May 2002, No. 23463:49.

70 Act 1/1999, Section 76(h), provided that the requirements for vicarious liability are present.

71 Emphasis added.

72 Strauss 1991:305; Burchell and Schaffer 1977:109; Claassen and Verschoor 1992:102.

73 1978 (2) SA 794 (A).

74 Neethling *et al* 2001:267; Van der Walt and Midgley 1997:49.

6.7 Negotiating with the hospital

It has been suggested that a patient, upon being admitted, should negotiate the terms of the exemption with the hospital, and delete those portions of the exemption clause with which he or she feels uncomfortable. Realistically, one has to question the type of bargaining power which such a patient may exert. Which hospital will be prepared to accept such a limitation of its indemnity? It is submitted that, in the light of the *Afrox* case, very few will.

7. Conclusion

Private hospitals can agree between themselves, on the basis of their commitment to the community, to do away with exemption clauses. This option, however, seems unlikely. It is significant to note that the defendant in the *Afrox* case amended the exemption clause to include negligence even before the *a quo* proceedings.[75]

To date, there is no indication that this case will be brought before the Constitutional Court. The judgment of the Supreme Court of Appeal was not, however, well received amongst patient-rights groups.[76] It may be assumed that pressure will be brought to bear on State departments in South Africa to draft legislation to put before Parliament in order to negate the effect of the *Afrox* case.[77]

If this is not done, Robert Orben's somewhat cynical words may, sadly, be true:

> Thanks to modern medicine we are no longer forced to endure prolonged pain, disease, discomfort and wealth.

75 *Strydom v Afrox Healthcare Limited* [2001] 4 All SA 618: 627 H-I.
76 Strauss 2003:11.
77 Strauss 2003:11.

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