



Exemption Clauses in Contracts – Fine Print Can Void Them

"... he did not think that he was binding himself 'to all sorts of fine print that I can't even read.'" (Extract from judgment below, describing evidence given by the customer during the trial)

For suppliers of goods or services, incorporating a strong, clearly worded exemption clause (a clause excluding or restricting your liability to the customer) into your contracts is an essential part of risk management. Just be aware of the restrictions that our laws place on them.

As a recent Supreme Court of Appeal (SCA) judgment shows, your first hurdle in enforcing a disputed exemption clause could be to convince a court that the consumer did in fact contract on the basis of that condition –

“In fine print” and “not conspicuously legible” – so not part of the contract

- A shipping company agreed to transport from America to South Africa an overhauled aircraft engine.
- It failed to make delivery to its customer after the engine was destroyed in transit in the U.S. The shipment had not been insured, and the shippers told the customer that according to their terms and conditions for ocean freight shipments, they were only liable to pay US \$500 (about R6,000 at the time) per shipment.
- The customer was having none of that and sued the shipper in the High Court for the engine's full replacement value of R386,140-30. The shipper relied on a series of wide-ranging clauses, incorporated in its standard trading conditions, which limited its liability.
- The High Court ordered the shipper to pay up on the basis of consumer protections contained in the Consumer Protection Act (CPA) which make it compulsory to word exemption clauses “in plain language” and to draw them “to the attention of the consumer ... in a conspicuous manner...”.
- The shipper appealed to the SCA, which, in dismissing the appeal, held that it was not necessary to consider the CPA question because the customer hadn't contracted on the basis of the standard trading conditions in the first place. The customer regarded his contract as formed by an initial exchange of emails, and only afterwards was he asked to sign a credit application in order to open an account. As he did not require credit, he regarded all that as merely a matter of formality to capture his details and allocate him an account number.
- The shipper, held the Court, did not explain to the customer that the credit application contained provisions that excluded or limited the shipper's liability for loss or damage. “Furthermore, the standard trading conditions and the relevant clauses which [the shipper] seeks to rely on appear **in fine print**, and are **not conspicuously legible**. They appear on the second and third pages of the credit application, which **can only be read with extreme difficulty and concentrated effort**. Importantly the credit application was sent without the conditions being attached and were described by [the shipper] as needing to be completed so that 'we can start the process.'" (Emphasis supplied).
- The shipper must pay up in full, plus interest and (no doubt substantial) costs.

As a supplier, if you want your exemption clause to be accepted in court ...

In addition to a general inclination by our courts to consider the principles of ubuntu, fairness, good faith and public policy when interpreting contracts, bear in mind the CPA's requirements (summarised above) and the need to incorporate your exemption clause clearly and unambiguously into your contract **before** it is concluded.

As a consumer, read the fine print!

“Education is when you read the fine print. Experience is what you get if you don't.” (Pete Seeger)

Although, as is clear from the above, you might be able to circumvent an exemption clause, our law will generally hold you to all the terms and conditions of your agreements. The safest course therefore will always be to heed the old legal principle “caveat subscriptor” (“let the signer beware”), so read the fine print, and in any doubt take professional advice before you sign anything!

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