

Can I Contract Out of Liability? - Exclusion of Liability Clauses - (J. Carr-Hartley - Partner)

Lawyers are often asked to either prepare a contract or to review a contract which contains a clause or clauses excluding liability on the part of one of the parties to the contract. In addition, we are often requested to provide opinions on whether a clause in a contract will afford a party protection against liability.

An exemption clause (also sometimes known as an exclusion of liability clause) seeks to protect the seller of goods or the provider of services from liability for loss or damage occasioned by his own acts or omissions or those of his employees, servants or agents. Frequently these clauses seek to exempt the party from any loss or damage “from whatsoever cause arising”.

The interpretation of contractual exemption clauses or exclusion of liability clauses has generated a great number of cases and judgments over the years, but very few in Botswana. These judgments, from various jurisdictions, have shown that judges have, often by ingenious devices of interpretation, tried to ameliorate the harsh consequences of these clauses whilst retaining the basic rule of contract, that the parties are bound by the contract they have entered into – *pacta sunt servanda*.

The Court of Appeal recently handed down a judgment on exclusion of liability clauses which provides clarity on the way these clauses will be approached in Botswana. The judgment was handed down by the Court of Appeal in the case of **Goldwing (Pty) Ltd v Automated Security (Pty) Ltd**.

In the Goldwing judgment, the Court of Appeal found that:

- Exclusion of liability clauses will not be enforced if they are contrary to public policy, such as where a party seeks to exclude liability for his own fraud;
- A party can protect himself against claims caused by his negligence and that of his employees provided that the clause is clear and further provided that he does not benefit from the negligent act or omission;
- A party can exempt himself from liability for mal-performance of a contract (even if that mal-performance goes to the root of the contract) but cannot protect himself against the non-performance of his obligations under the contract;
- Exemption clauses are to be narrowly or restrictively interpreted.

The effect of these findings by the Court of Appeal is that, if the terms of the exemption clause are clear and unambiguous, then the Court should give the clause its clear meaning and exempt the party from liability. This must be correct. The exemption clause is, after all, nothing more than just another clause in a contract. There is no special magic in an exemption clause and its meaning must be ascertained in the same way as any other clause in the contract. The Court of Appeal, however, made it clear that if the exemption clause is not clear or is in any way ambiguous, then the clause will be strictly interpreted and will likely not offer protection.

In addition, and as indicated above, the Court of Appeal also found that a party can exempt himself from liability for mal-performance of a contract but cannot protect himself against the non-performance of his obligations under the contract. This means that if a party tries to perform his obligations under the terms of a contract which contains an exemption clause but, despite those efforts, he fails to perform or is only able to partly perform his obligations then he will be able to rely on the protection afforded by the exemption clause. If, however, the party does not even try to perform his obligations at all then he will not be protected by the exemption of liability clause. The Court of Appeal used the example, below, to demonstrate this principle, namely:

“If A contracts with B to fix B’s borehole but exempts himself in his contract from liability for loss or damage caused directly or indirectly by ‘any act or omission of himself or his servants, including negligent acts, from whatever cause arising’. If he travels to the borehole and fails, despite his best efforts, to fix it he will have breached the contract, but he will not be liable. If, however, he fails to go to the borehole at all, he again commits a fundamental breach of the contract, but now he will be liable.”

As a consequence of the clarity provided by the Court of Appeal judgment it appears clear that a party can contract out of liability by the express terms of a contract, provided that the language employed to do so is plain. Even liability for negligence may be excluded if the words used in the exemption clause

specifically exempt the party from liability for negligent acts or omissions in express and unambiguous terms.