IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 8197/2012

6/10/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

3/10/14 .....
DATE SIGNATURE

In the matter between:

SUZETTE DEACON **Plaintiff**

and

PLANET FITNESS HOLDINGS (PTY) LTD **Defendant**

Heard: **11, 12 August 2014**
Delivered **6 October 2014**

JUDGMENT

A.A.LOUW J

Introduction

[1] On 9 January 2009 the plaintiff signed a membership agreement with the defendant. In terms of that agreement she was entitled to use the Centurion Gate Planet Fitness gymnasium (the gym).

[2] On 2 March 2009 as she exited the gym she tripped and fell at the "Alltech drop arm barrier" (the barrier). On the grounds set out hereunder she claims that she was injured and suffered damages in the amount of R600 000 which is now claimed from the defendant. By agreement and my order the quantum and merits were separated. I thus only have to deal with the liability or not of the defendant.

[3] The drop arm barrier has its arm in the horizontal position when it is closed. When, on exit, somebody pushes a button the arm falls downwards into the "housing" where the motor is situated. Thus in the "open" position the arm is in a vertical position and out of sight.

[4] The following description by an expert of how this barrier operates was agreed on between the parties and I thus quote from the expert notice:

> *"4. The Barrier was designed to provide access or exit control and the Barrier will be in a closed position when not in use.*
>
> *5. Access or exit control is provided by a push button or card reader. In the case of the Defendant's gym, access was provided with a push button.*

6. *When the push button is pressed, the barrier drops and the pedestrian who exits through the Barrier breaks a protection beam which is an infrared beam that shines across the opening of the Barrier.*

7. *The Barrier will restore to its home position by means of a trigger from the protection beam once the pedestrian has passed through the Barrier.*

8. *The protection beam cannot be adjusted in any manner and the Barrier is designed to permit only one pedestrian to exit at a time.*

9. *Mr Millward [the expert] considered a video recording of the incident that took place on or about 2 March 2009 when Plaintiff tripped and fell at the exit of the Defendant's gym.*

10. *The Barrier installed at the exit was an Alltech Drop Arm Barrier.*

11. *The Barrier was installed according to the manufacturer's specifications and the Barrier functioned normally and according to specifications in the manner in which it was designed."*

[5] A short video clip illustrating how the plaintiff tripped and fell was shown in court. It appears that she exited right behind her son (she was able to touch him) when the barrier swung upwards hitting her right leg more or less in the middle of the lower leg, as a result of which she fell.

[6] The manual of the barrier contains the following notice:

> *"Only one person at a time should pass through the barrier – no tailgating permitted."*

[7] The plaintiff testified that it was only her eighth visit to the gym, she was not aware of the fact that only one person could exit at a time and had never checked behind her how long it took for the barrier to rise from its vertical position in the housing. She testified that she always exercised at quiet times of the day and also had not seen how the arm operated when a person exited in front of her. She testified that she had "the feeling" that there would be enough time for her to exit behind her son.

The contract

[8] On the back of the application for membership in small print are the following relevant clauses:

> *"**LIMITATION OF LIABILITY***
>
> *Under no circumstances will Planet Fitness, its officers, directors, shareholders, employees, agents and representatives (and the sucessors, heirs and assigns of the foregoing) be liable for any consequential, indirect, special, punitive or incidental damages, whether foreseeable or unforeseeable based on claims of the Member arising out of breach or failure of express or implied warranty, breach of contract, misrepresentation, negligence, strict liability in delict or otherwise, whether based*

on this membership contract, any commitment performed or undertaken under or in connection therewith or otherwise.

In no event will the aggregate liability which Planet Fitness may incur in any action or proceeding exceed, the lesser of, the aggregate of the membership fees paid to Planet Fitness in terms of this membership contract for the period of 6 months preceding the date of notification of any claim.

In the event where any third party is successful in any claim against Planet Fitness, which exceeds Planet Fitness' liability in terms of this membership contract, then the member, by entering into this membership contract, indemnifies Planet Fitness, and shall reimburse Planet Fitness, on demand for all payments, damages and costs (including but not limited to legal fees on attorney and client scale).

USE OF THE FACILITIES

It is specifically recorded that use of the equipment, sporting and other facilities of the clubs ("the equipment") are strictly at the risk of the member. The member shall use the equipment with all reasonable skill and care and in accordance with the manufacturer's suggested or stipulated specifications as laid down in any documentation or manual and hereby undertakes to pay Planet Fitness for all and any damage to the equipment

caused by the member or persons using the same with the member's authorisation.

WARRANTY

I warrant and represent (being a material representation) that I am physically and medically fit to proceed with the normal routine of exercise and I will defend at my expense, indemnify and hold Planet Fitness harmless against any damages or expenses, that may occur, and pay any costs, damages or legal fees and costs awarded against Planet Fitness resulting from a breach of this clause.

Before exercising in any exercise programme, one should consult with a physician and only upon obtaining medical clearance should one participate in an exercise routine. Planet Fitness is not liable for any injury or death occurring directly or indirectly from any training. Improper use of the equipment, sporting and other facilities of the clubs may result in serious harm and injury (including death). Please ensure that you are well informed by a training specialist before participating in supervised or unsupervised training. Due to the high risk of injury use of a spotter when using free weights is recommended.

The member hereby indemnifies and holds harmless Planet Fitness, its officers, directors, shareholders, employees, agents

and representatives and the successors, heirs and assigns of the foregoing from and against any and all claims, demands, actions, causes of action, suits, proceedings, losses, damages costs and expenses (including but not limited to attorney's fees on an attorney and own client scale) arising out of or in connection with this membership contract, any act or omission of Planet Fitness, any obligation or representation or warranty of Planet Fitness hereunder, without limitation claims arising from the use by the member of the sporting and exercise equipment, facilities and services of the clubs or any act, error or omission of Planet Fitness or the member in connection therewith.

GENERAL

.....

In the event that any of the terms of this membership contract are found to be invalid, unlawful or unenforceable, such terms will be severable from the remaining terms, which will continue to be valid and enforceable."

The pleadings

[9] The plaintiff elected to sue in delict. Thus the particulars of claim contain no reference to the contract and the limitation of liability clause. In this regard Van der Walt and Midgley state the following:

> *"If the defendant contractually excludes liability for negligent conduct, the plaintiff is not entitled to evade this limitation by suing in delict."* [1]

[10] The first element to be proved in a delictual claim is of course wrongfulness. In this regard the particulars of claim are extremely vague and the only allegation is the following:

> *"The Defendant owed the Plaintiff a duty of care by virtue of the fact that the Plaintiff attended the gym as well as the particular circumstances that existed at the time."*

The plaintiff's written argument also does not deal with wrongfulness but only with negligence.

[11] I suppose one is expected to gather what the duty of care was by having regard to the grounds of negligence in para 6 of the particulars of claim which reads as follows:

> "
>
> *6.*
>
> *The defendant and/or its employees employed at the gym breached the duty of care owed to the Plaintiff in that they, acting within the course and scope of their employment with the Defendant were grossly negligent alternatively negligent due to the fact that they:*

[1] *Principles of Delict* (3rd edition) 2005 para 55

6.1. Failed to avoid the incident when through the exercise of the necessary care and skill they both could and should have done;

6.2. Failed to warn clientele that only one person could exit the mechanical gate at the time;

6.3. Failed to warn clientele that the mechanical arm situated at the exit would close if more than one person attempted to exit;

6.4. Failed to put up any explanatory notices as to how to operate the mechanical arm situated at the exit;

6.5. Failed to warn the clientele of the dangers inherent in the mechanical arm situated at the exit."

[12] Apart from denying wrongfulness and negligence, the defendant also relies on the limitation of liability clause quoted above. I shall further herein refer to this clause as the "exclusion clause."

[13] To this plea the plaintiff made the following points in her replication. Firstly that the exclusion clause is void for vagueness. The ground for this plea is that the second paragraph under that heading stipulates a limited liability whilst the first paragraph excludes all liability. In my view the second paragraph is intended as a backstop in case it is found that the first paragraph does not provide sufficient protection to the defendant. In any event, that paragraph is severable from the rest of the contract in terms of the clause quoted above under the heading "General".

[14] Secondly it is pleaded that this clause is against public policy and inimical to the values enshrined in the Constitution of the Republic of South Africa and thus unenforceable. It is further pleaded that this clause not only has the tendency but also the result of depriving the plaintiff of her right to approach a court. This is also said to be inimical to public policy.

[15] The defendant's rejoinder in para 2 reads as follows:

> *"2.1. To the extent that the "limitation of liability" clause relied upon by the Defendant deprives Plaintiff of the right to approach the above Honourable Court for redress, Defendant pleads that the limitation of the Plaintiff's right to access to court is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:*
>
> *2.1.1 The nature of the right;*
>
> *2.1.2 The importance of the purpose of the limitation;*
>
> *2.1.3 The nature and extent of the limitation;*
>
> *2.1.4 The relation between the limitation and its purpose; and*
>
> *2.15 Less restrictive means to achieve the purpose."*

Wrongfulness

[16] The wrongfulness will therefore have to be adjudicated in the light of the following allegations which are common cause:

a) the defendant failed to warn clientele that only one person could exit the mechanical gate at a time;

b) that the mechanical arm would close if more than one person attempted to exit; and

c) that the defendant failed to put up any explanatory notices as to how to operate the mechanical arm.

I reject the allegation in para 6.5 of the particulars of claim that there were any inherent dangers in the mechanical arm.

[17] The question to be answered is therefore whether the legal convictions of society would have required the defendant to take any of the actions set out in the aforegoing paragraph.

[18] It is so that *"the enquiry into the negligence issue is so intertwined with the duty issue that much of what is considered towards the proof of wrongfulness also goes towards the proof of negligence."*[2] Although this is so it is still necessary to recognise the conceptual difference between wrongfulness and negligence. This has been emphasised by recent SCA decisions.

[2] Van der Walt & Midgley above para 64.

[19] In *Minister of Safety and Security v Van Duivenboden*[3] the following was said:

> *"[12] Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in* Kruger v Coetzee, *namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume*

[3] 2002(6) SA 431 (SCA) para 12

that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable." (my emphasis, footnotes omitted)

[20] One is also reminded of the basic principles of the law of delict, in the *Telematrix* case[4] where the following was said:

"[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that 'skade rus waar dit val'. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.

[13] ... In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that

[4] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006(1) SA 461 (SCA) paras 12 and 13

> *the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test 'in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt' (contrary to what is acceptable in social relations according to unwritten law)."* (my emphasis, footnotes omitted)

[21] A multitude of factors can be relevant in deciding wrongfulness in a specific set of circumstances. Van der Walt & Midgley[5] say the following:

> *"One may also owe a legal duty to some people but not to others. It must therefore be established that a defendant owes a legal duty not to cause harm to the plaintiff. Relevant in this regard are, where appropriate, the origin of the duty; the intention of the legislature; the norms and values of the Constitution; the nature and extent of the harm; whether the loss is finite; whether the number of potential plaintiffs is limited and identifiable; the foreseeability of the harm; the nature of the defendant's fault; the availability of protective measures; and to whom they are available; any special skills and responsibilities; the ease with which the measures could have been implemented, their cost, proportionality to the risk of harm, and the likelihood of their success; the relationship between the parties; whether any other practical and effective remedies are available; considerations of convenience; and whether any*

[5] Above para 63

general considerations of public policy and fairness would favour the denial of a remedy." (my emphasis)

[22] The barrier is a simple apparatus comparable to the doors of a lift or an escalator. We are all familiar with barriers and turnstiles in shops, at sports grounds and train stations which are all designed to provide access to only one person at a time. These are regular features of modern society and I cannot see why the plaintiff would have to be warned about the barrier.

[23] It is so, as argued by counsel for the plaintiff, that to put up notices would have cost the defendant virtually nothing. The question still is whether it was legally required to do so. In my view not. The defendant could not have foreseen that the plaintiff would exit in such a careless manner whilst, on her own evidence, she did not have knowledge as to how the barrier operated. I shall under the next heading elaborate on the central constitutional values which inform public policy.

[24] Lastly, under this rubric, I refer to two aspects of the plaintiff's evidence which perhaps relate more to negligence, but as noted above these questions are intertwined. When it was put to her that she had no basis for believing that two people could exit simultaneously i.e. that the barrier would stay down long enough, she replied that she just had a "feeling" that it would because she and her son were together. Secondly, on a question I asked, she replied that she had no reason to assume that the arm would not come up so rapidly.

[25] Absent the legal duty as alleged by the plaintiff, it is not necessary to enquire into negligence as "negligence in the air" does not exist.

The exclusion clause

[26] Under the new constitutional dispensation our highest courts made interesting and challenging pronouncements in regard to the freedom to contract and the role of public policy, good faith and fairness in the law of contract. These developments have been comprehensively dealt with by Brand JA in an article in the *South African Law Jounal*[6].

[27] *Brisley v Drotsky*[7] dealt with a typical *Shifren* - type non-variation clause. In the course of finding that such a clause is not against public policy the court made the following elucidating statements:

> *" ... Daar bestaan wesenlike beleidsverskille in die benadering tot kontrakte en dié wat op delikte van toepassing is. In eersgenoemde geval reël die partye hulle regsverhouding vrywilliglik en ag hulle hulself gebonde aan hulle wilsuitinge. Hulle bepaal die aard en omvang van hulle regsverhouding. In die geval van delikte het die partye geen seggenskap in die skep van hulle regsverhouding nie en bepaal die gemeenskapsoortuiging of 'n regsverhouding moet bestaan en wat die inhoud daarvan moet wees. Indien hierdie beslissings [this is a reference to the minority judgment of Olivier JA in* Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO

[6] Brand "The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution" 126 (2009) *SALJ* 71
[7] 2002(4) SA 1 (SCA)

1997 (4) SA 302 (HHA). This judgment held "... dat oorwegings van goeie trou 'n selfstandige, onafhanklike grondslag bied vir die tersydestelling of die nie-toepassing van kontraktuele bepalings en beginsels van die kontraktereg.". *This judgement of Olivier JA was followed by two other Cape judges.] ongekwalifiseerd aanvaar word, sal dit 'n toestand van onaanvaarbare wanorde en onsekerheid in ons kontraktereg skep."*[8]

"... Om eensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda *grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter."*[9]

In a separate concurring judgment Cameron JA stated the following:

"[93]... What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions

[8] Para 21
[9] Para 24

of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.

[94] On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint."

[28] The effect of this judgment is summarised as follows by Brand JA in the abovementioned article:

"As to the role of good faith, reasonableness and fairness the majority held that:

(a) although these abstract values are fundamental to our law of contract they do not constitute independent, substantive rules that courts can employ to intervene in contractual relationships;

(b) although these abstract values perform creative, informative and controlling functions through established rules of contract law, they cannot be acted upon by the courts directly; and that,

(c) when it comes to interference with contractual relationships, courts can only do so if permitted by the rules of hard law and, although these abstract values support and justify the rules of hard law, they do not constitute rules of hard law themselves; and further that

(d) *past experience has shown that acceptance of the notion that judges can refuse to enforce a contractual provision, merely because it offends their personal sense of fairness and equity, gives rise to intolerable legal and commercial uncertainty."*[10]

[29] *Barkhuizen v Napier*[11] dealt with a time-limitation clause in a contract of insurance. The appellant contended that a clause in the contract which required him to institute action within 90 days of the repudiation of his claim, is contrary to public policy and therefore unenforceable.

[30] In regard to public policy Ngcobo J who wrote for the majority said:

"[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda *to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."*[12]

"[51] In general the enforcement of an unreasonable or unfair time-limitation clause will be contrary to public policy. Broadly

[10] Note 6 above at 81
[11] 2007(5) SA 323 (CC)
[12] Para 30

speaking the test announced in Mohlomi is *whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of* ubuntu. *It would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.*

[52] In my judgment the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy."[13]

[31] Dealing with the role of fairness in contracts he stated:

"[57] The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, *which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to*

[13] Paras 51-52

which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.

[58] The second question involves an inquiry into the circumstances that prevented compliance with the clause."[14]

[32] The contents of public policy is described as follows:

"[73] Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled, 'is the general sense of justice of the community, the boni mores, *manifested in public opinion."*[15]

[33] In regard to these developments in our law Brand JA[16] concludes:

"If we have learnt anything from what happened in the past in South African courts, it is this: imprecise and nebulous statements about the role of good faith, fairness and equity, which would permit idiosyncratic decision-making on the basis of what a particular judge regards as fair and equitable, are

[14] Paras 57-58
[15] Para 73
[16] Brand (2009) p89 - 90

dangerous. They lead to uncertainty and a dramatic increase in often pointless litigation and unnecessary appeals. Palm-tree justice cannot serve as a substitute for the application of established principles of contract law."

[34] The only judgment I have been referred to which dealt with an exemption clause on a constitutional basis is *Naidoo v Birchwood Hotel.*[17] In not upholding the validity of the exemption clause in the context of a guest at a hotel Heaton-Nicholls J decided the case only on the basis of the second question refer to in *Barkhuizen.*[18] Thus the case was not decided on the objective term of the contract but on the subjective or relative situation of the contracting parties.[19]

[35] It is interesting to note that Moseneke DCJ in a minority judgment held that the only question to be answered in deciding whether a contractual stipulation is valid is the objective test. He put it as follows:

"[96] In my view the enquiry must be characterised differently. The appropriate test as to whether a contractual term is at odds with public policy has little or nothing to do with whether the party seeking to avoid the consequences of the time-bar clause was well-resourced or in a position to do so. The question to be asked is whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend public policy. In the context of this case the question to be posed

[17] 2012 (6) SA 170 (GSJ)
[18] See para 58 quoted above
[19] *Barkhuizen* above para 59

is whether the provision itself unreasonably or unjustifiably limits the right to seek judicial redress. Ordinarily the answer should not rest with the peculiar situation of the contracting parties, but with an objective assessment of the terms of their bargain."[20]

[36] Fortunately, for the purposes of this judgment I do not have to decide on these *"...difficult and complex questions concerning the development of the common law of contract..."*.[21]

[37] As I held that there was no wrongfulness the plaintiff's action cannot succeed.

[38] I therefore make the following order:

The action is dismissed with costs.

A.A. LOUW

Judge of the High Court

[20] *Barkhuizen* above para 96
[21] *Barkhuizen* para 74