

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: 72/05

In the matter between:

BAREND PETRUS BARKHUIZEN

Appellant

and

RONALD STUART NAPIER

Respondent

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION:

1.

The Appellant insured his 1999 BMW 328i with a syndicate of Lloyds Underwriters of London, represented in South Africa by the Respondent.

2.

In the Certificate of Insurance, the Respondent informed the Appellant as follows:

“Important: Carefully examine this Policy

Immediately on receipt please examine this Policy and if it is not in accordance with your application kindly return it at once to the office of issue.”¹

3.

The policy wording contained, *inter alia*, the following provision:

“9.2 This Policy or any section of it may be cancelled by you by giving immediate written notice or by us giving 30 days written notice to the postal address on the Schedule or to the Broker, except as provided in 9.1 above or in the case of any excluded event as per General 13.1 and 13.2, when cancellation is immediate.”²

¹ Certificate of Insurance p15 lines 22 – 24,
² Clause 9.2 p17 lines 24 – 26.

4.

On 22 October 1999 the Respondent informed the Appellant as follows upon the issue of the revised policy wording:

*“Enclosed is a new Schedule of Insurance and **revised** policy wording including excess payments which become effective on 1 December 1999.*

Should you have any queries with regard to the above, please contact your broker or Hamford.”³

5.

On 24 November 1999 the vehicle was involved in an accident.⁴

6.

On 2 December 1999 the Appellant gave notice to the Respondent of the occurrence of the incident.⁵

³ p7 lines 26 – 30.

⁴ Stated case p60 lines 4 – 6, para. 2.2.

⁵ Stated case p60 lines 7 – 8, para. 2.3.

7.

In concluding the aforesaid agreement of insurance and in giving notice of the occurrence of the incident, the Appellant was duly represented by insurance brokers Burger & Lloyd.⁶

8.

The Respondent rejected liability on 7 January 2000.⁷

9.

The Appellant served summons on the Respondent more than 2 (two) years later on 8 January 2002.⁸

10.

Clause 5.2.5 of the general requirements of the policy wording, provided as follows:

⁶ Particulars of claim p3 lines 12 – 13, para 3 and p4 lines 10 – 11, para. 4.2..

⁷ Stated case p60 lines 9 – 10, para. 2.4.

⁸ Stated case p60 lines 11 – 12, para. 2.5.

“CLAIMS PROCEDURE AND REQUIREMENTS:

5.2.5 If we reject liability for any claim made under this policy, we will be released from liability unless summons is served... within 90 days of repudiation.”⁹

THE CONSTITUTIONAL ISSUE:

11.

The Respondent relied on the provisions of clause 5.2.5 of the insurance agreement and accordingly pleaded that the Respondent was released from liability because the Appellant failed to have summons served on the Respondent within 90 (ninety) days of repudiation.¹⁰

12.

In a replication, the Appellant advanced the following:

12.1 The time limitation clause was contrary to public policy.

⁹ p17 lines 4 – 5.

¹⁰ p43 lines 11 – 16 - p44 lines 1 – 14, para. 1.

12.2 The time limitation clause deprived him of his right to have a justiciable dispute decided in a court of law and accordingly it infringed the provisions of Section 34 of the Constitution.¹¹

13.

The question whether the provisions of clause 5.2.5 are contrary to public policy was not persisted with.¹²

14.

In the Supreme Court of Appeal two questions were raised. The first was the extent to which the constitutional provisions apply between contracting parties. The second was, if the constitutional provisions are applicable, whether the provisions of Section 34 of the Constitution render the time limitation clause unconstitutional.¹³

¹¹ SCA Judgment para. 2 p193 – 194; Plea para. 1.6 p53 – 56; Stated case p59.

¹² Judgment: Court *a quo* p65 lines 9 – 14.

¹³ SCA Judgment para. [5] p196, lines 4 - 7.

15.

In regard to the first question the Supreme Court of Appeal held that the terms of the insurance agreement are subject to constitutional rights.¹⁴

16.

The aforesaid finding is not the subject of this application for leave to appeal.

17.

The only constitutional issue remaining is therefore whether time limitation clauses in short term insurance agreements are unconstitutional.¹⁵

THE APPELLANT'S CONSTITUTIONAL CHALLENGE:

18.

The Appellant challenged the constitutional validity of clause 5.2.5 of the insurance agreement in the High Court on the narrow basis set out in his replication.¹⁶

¹⁴ SCA Judgment para.[6] p196 lines 10 – 12.

¹⁵ SCA Judgment para. [1] p193; Para [5] p196.

¹⁶ p54 lines 17 – 18 - p56 line 6.

19.

The only facts placed before the Court *a quo* was set out in a stated case.¹⁷

20.

The aforesaid facts informed the Respondent in the Courts *a quo* of the case it had to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case.

21.

The Appellant relies in the application for leave to appeal on allegations of fact not previously dealt with or proven.

22.

In particular the Applicant relies on inadmissible evidence of alleged facts regarding standard form contracts and unequal bargaining power.

¹⁷ p59 – 60.

23.

In the premises the Respondent is prejudiced in its opposition of the application for leave to appeal. The Respondent is not in a position to test the correctness of the said evidence in a normal trial and it requires from the Respondent to meet new allegations of fact in an appeal procedure.

24.

In disregard for the rules and procedures of this Honourable Court the Appellant simply assumes that he is entitled to rely in his argument on the inadmissible allegations of fact. There is not even an intimation in the Appellant's heads of argument that an application is made to receive same on appeal.

25.

It has been decided in this Honourable Court¹⁸ that, although Section 22¹⁹ confers a wide discretion on a Court of Appeal to receive further evidence on appeal, it is clear that courts do not regularly grant leave to do so. They will, as a general matter, grant such leave where special grounds exist, where there will be

¹⁸ Prince v President, Cape Law Society & Others 2001 (2) SA 388 CC at 399 A – F and paras [21] to [22].

¹⁹ High Court Act 59 of 1959.

no prejudice to the other side and where further evidence is necessary in order to do justice between the parties.

26.

The Appellant had to raise the constitutionality of the provisions of clause 5.2.5 at the time he instituted the legal proceedings. In addition, the Appellant had to place before the Court information relevant to the determination of the constitutionality of clause 5.2.5 of the insurance agreement. The said information had to be placed before the court of first instance. The placing of the relevant information before the Court of first instance would have warned the Respondent of the case it had to meet so as to allow it the opportunity to present factual material and legal argument to meet that case. The Respondent had to be left in no doubt as to the nature of the case it had to meet and the relief that was sought.²⁰

27.

It follows that the Appellant ought not to be allowed to present any argument based on any alleged facts not dealt with or proven in the courts *a quo*.

²⁰ Prince v President, Cape Law Society & Others (*supra*) at 399 D – F para [22].

THE PROVISIONS OF SECTION 34 OF THE CONSTITUTION:

The ambit of the right:

28.

Section 34 of the Constitution provides as follows:

*“34. **Access to courts** – everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*

29.

On a number of occasions this Honourable Court has emphasised the importance of the right enshrined in Section 34 of the Constitution. The right is of cardinal importance requiring active protection and Courts have a duty to protect *bona fide* litigants.²¹ It is the foundation for the stability of an orderly society and

²¹ Beinash & Another v Ernst & Young and Others 1999 (2) SA 116 (CC) in para. [17] at 123D - G; Price Waterhouse Coopers Inc v National Potato Co-Op Ltd 2004 (6) SA 66 (SCA) para. [43] at 79 A – D; Moise v Greater Germiston Transitional Local Council; Minister of Justice and Constitutional Development Intervening (Women’s Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC) in para. [23] at 499 G – H.

it ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. It is a bulwark against vigilantism and the chaos and anarchy which it causes.²²

30.

The right is fundamental to a democratic society that cherishes the rule of law.²³

31.

It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed.²⁴

32.

The focus of the right is to provide an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions which requires not only that individuals should not be permitted to

²² Chief Lesapo v North West Agricultural Bank & Another 2000 (1) SA 409 (CC) in para. [22] at 418 B - H.

²³ First National Bank of South Africa Ltd v Land & Agricultural Bank of South Africa & Others; Sheard v Land & Agricultural Bank of South Africa & Another 2000 (3) SA 626 (CC) in para. [6] at 629 G – 630 A - B.

²⁴ Chief Lesapo v North West Agricultural Bank & Another (*supra*) para. [11] at 415 D.

resort to self help, but also that potentially divisive social conflicts must be resolved by Courts, or by other independent and impartial tribunals.²⁵

33.

It is submitted that it follows from the aforesaid that the right is aimed at preventing a state in which individuals do not have resort to resolving their justiciable disputes.

34.

Accordingly, as long as there is a right to approach a Court of competent jurisdiction for the relief claimed, the requirements of the section are met.²⁶

The limitation of the right:

35.

The mere limitation of a period within which action can be instituted does not amount to an infringement of the provisions of Section 34 of the Constitution.

²⁵ SCA Judgment para. [26] p212 lines 8 – 12 to p213 lines 1 – 2 and Zondi v MEC for Traditional & Local Government Affairs 2005 (3) SA 589 (CC) in paras. 61 – 63 at 612 F – H to 613 A - E.

²⁶ Dormehl v Minister of Justice & Others 2000 (2) SA 987 (CC) para. [4] at 990.

The Appellant at all times had an unrestricted right to access the courts within the 90 day period.

36.

In the Moise²⁷ and Mohlomi v Minister of Defence²⁸ decisions claims for delictual damages arising from personal injury were involved. This fact provided the essential setting for both decisions and it is within that framework that the composite scheme of the applicable legislation was created with the effect of creating a substantial obstacle to the claimants' rights of access to Court.

37.

The Appellant contends that the principles expressed in the decisions of this Honourable Court in Mohlomi and Moise applies directly to contractual time limitation clauses.

38.

Rules limiting the time within which litigation may be launched serve a valuable purpose curbing inordinate delays and the harmful consequences of

²⁷ Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) (*supra*).

²⁸ 1997(1) SA 124 (CC).

procrastination, but a limitation that leaves insufficient time to exercise the right of access to Court may be unconstitutional.²⁹

39.

The aforesaid findings were made against the background of legislation requiring written notice as a precondition to the institution of legal proceedings and a limited period after the occurrence of a delict to institute legal action against the State. The requirement of written notice and the limited period within which to institute legal action was part and parcel of a composite scheme that amounted to a real impediment to the prospective claimants right of access to a Court.³⁰

40.

In casu, the Appellant is in a different position. In the first instance the Respondent had no relationship with the Appellant before the insurance agreement was concluded. The time limitation clause is contained in the very agreement that defined the ambit of the right in creating it. Secondly the time limitation clause does not form part of a composite scheme in the agreement and

²⁹ Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) (*supra*) at 494 F – 495 A – B.

³⁰ Mohlomi v Minister of Defence (*supra*); SCA Judgment para. [17] p205 lines 3 – 8.
Moise v Greater Germiston TLD: Minister of Justice Intervening (*supra*) para [13] at 496 D.

is a simple pre-condition to enforce the agreement. Failing fulfillment of the pre-condition, the Appellant acquired no right at all.

41.

It is submitted that it follows that the finding in the Supreme Court of Appeal is correct that the rationale of the Mohlomi and Moise decisions are that, where a Plaintiff has a pre-existing right to legal redress – such as compensation for personal injury - the legislator may not limit the right of access to Court by superimposing an unreasonable time bar or other unreasonable clog on the institution of legal proceedings.³¹ It is submitted that the said decisions presuppose that those claimants have an existing right of compensation or redress but that a composite scheme in legislation creating a time bar that unfairly impedes the right to access a Court is unconstitutional.

42.

In the premises contractual time bar clauses and time bar provisions in legislation can not be equated. To do so would be to improperly characterise the right at

³¹ SCA Judgment para. [19] p206 lines 11 – 15 - p207 lines 1 – 2.

issue in the current matter and to omit to recognise that the source of the time bar is not statutory but contractual.³²

43.

To differentiate between a statutory time bar and a contractual time limitation is to recognise the principle that rights differ in their nature and in how they originate and consequently how they are enforced and protected. To equate the different statutory time bar provisions and the contractual time limitation clause would lead to imposing on the Appellant's contract with the Respondent a protection that was not designed for the parties' situation at all.

44.

It follows that the question whether the statutory abridgment of access to court to enforce an existing right is justifiable can not be equated with the question whether an apparently freely concluded contractual term is constitutionally suspect. It would also be to pre-suppose that the Appellant had a pre-existing right to insurance.

³² SCA Judgment p216 lines 4 – 7.

45.

In the premises Section 34 of the Constitution does not preclude the creation or conferral of rights subject to a time limit for their enforcement.

The Appellant's factual position:

46.

The factual setting to the decisions in Moise and Mohlomi was stated as follows by Didcott J in Mohlomi:³³

“That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial

³³ Para. [14] on 131 F – G:

or geographical reasons. The severity of Section 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second.”

47.

In stark contrast to the aforesaid, the position of the Appellant differs materially.

48.

The Appellant is in the following position:

- 48.1 The Appellant freely and voluntarily concluded the insurance agreement.
- 48.2 The Appellant had no pre-existing entitlement against the Respondent to enforce the payment of any claim.
- 48.3 The insurance agreement contained, as a pre-condition to enforce payment on a claim that the Appellant institute his claim within the period

mentioned in the time limitation clause. Failing this, he acquired no right at all.

48.4 The Appellant was informed of and aware of the said pre-condition to institute a claim within the period mentioned in the time limitation clause.³⁴

48.5 The Appellant was accordingly aware of and properly informed about his legal rights and what he should do in order to enforce it.³⁵

48.6 The Appellant was represented by an insurance broker in concluding the insurance agreement and when notice was given of the loss.³⁶

48.7 The Appellant was accordingly in a position that he had access to professional advice, assistance and a fair opportunity to seek judicial redress.

48.8 The Appellant insured a BMW motor vehicle. The vehicle is seemingly appurtenant to a reasonably affluent middle-class lifestyle.

³⁴ See paras. 2 - 4 above.

³⁵ Gregorio v Intrans Corp 1994 CanLII 2241 (ON C.A.) where the following is stated:

“The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. A belated notice is valueless.”

³⁶ See para. 7 above.

48.9 The Appellant is in a position to have brought this action in the High Court of South Africa, to have defended an appeal to the Supreme Court of Appeal and to bring an application for leave to appeal in this Honourable Court.

48.10 It is submitted that it is a fair inference from the aforesaid that the Appellant was at all relevant times in a position to obtain professional legal advice and assistance and to seek judicial address.

49.

The Appellant can accordingly not rely on the disadvantages experienced by the potential claimants referred to in the Moise and Mohlomi decisions. To the contrary, it is submitted that the Appellant's factual position warrants a finding that he, in particular, ought to be held bound to the terms of the agreement he voluntarily concluded.

The context of the time limitation clause in the insurance agreement:

50.

A conclusion that the time limitation clause is unfair does not present as self evident. The Appellant did not adduce any evidence to indicate that the 90 day

period is unreasonable. The evidence is simply too scant to assess that question.

51.

Although the period is shorter than the statutory prescription period of 3 years, the clause certainly does not exclude the court's jurisdiction entirely. In fact, the jurisdiction is not excluded at all. The period within which the action must be instituted is simply curtailed.³⁷

52.

The time limitation clause does not form part and parcel of a composite scheme constructed by the insurance agreement.

53.

It is a simple pre-condition requiring the Appellant to institute legal action within 90 days after date of repudiation failing which he would have no claim.

³⁷ An agreement to exclude the jurisdiction of the courts entirely is in any event contrary to public policy in terms of the principles of the common law. Schierhout v Minister of Justice 1925 (AD) 417 at 424.

54.

It is in the premises not a pre-condition that can be said to be a real impediment to the Appellant's access to a court.

55.

In the event that if the Appellant was not prepared to accept the pre-condition, he always had the option to cancel the insurance agreement or a part thereof immediately upon notification.³⁸

56.

The time limitation clause is in any event not an absolute defence to an insurance claim brought outside the prescribed period. The Appellant has the common law contractual remedies available in circumstances permitting a particular remedy to be invoked. In the instance of statutory time bars no common law remedy can be invoked to escape the harsh consequences thereof.

³⁸ Insurance agreement clause 9.2 p17 lines 24 – 26.

Consumer protection:

57.

It is submitted that it is relevant to bear in mind that specific measures have been introduced by the legislator to protect insureds.

58.

Insureds have the benefit of consumer protection. It is contained, *inter alia*, in the Policyholder Protection Rules (Short Term Insurance)³⁹ enacted with the objective to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interest of the parties and in the public interest.⁴⁰

59.

The following relevant rule is contained in the Policyholder Protection Rules:

³⁹ Published in Government Notice R1128, Government Gazette 26853.
⁴⁰ Rule 2 of the Policyholder Protection Rules.

“REJECTION OF CLAIMS:

7.4(a) An insurance party involved shall ensure that where any decision has been made as to the rejection of any claim under a policy, or as regards the quantum of a claim which is in dispute, the policyholder concerned is in writing informed of the reasons for the decision and that the policyholder may within a period of not less than 90 days after the date of the relevant decision make representations to the relevant insurer in respect of such decision. The 90 days referred to may not be included in any time barring period contained in the policy for the institution of legal action.”

60.

It follows that the time limitation clause is extended in the event of a complaint by an insured with the insurer. The period is accordingly not enforced pending the outcome of further representations regarding the validity of a repudiation.

61.

An Ombudsman for Short Term Insurance is in office to protect the interest of policyholders. In *“The Ombudsman’s Brief Case”*⁴¹ he informed, *inter alia*, as follows:

“Because the Ombudsman has the power as well as the duty to apply equity, this office will still request the Insurer to investigate a claim even if it is time barred. If it transpires that the Insurer was wrong in its original rejection of the claim, the office will endeavour to persuade the Insurer to meet the claim. We have in the past had no difficulty in persuading Insurers to pay these time-barred claims. We would not be able to make a ruling. However, in the decision of Wimbledon Lodge (Pty) Ltd v Gore N.O. & Others 2003 (5) SA 315 at 321 SCA, the following is stated:

‘No one is allowed to improve his own condition by his own wrongdoing’.

On this basis, if an Insurer has wrongly rejected the claim, the Insurers have readily admitted the claim notwithstanding breach of the time-barring provisions contained in the Policy.”

⁴¹ A newsletter from the Ombudsman for Short Term Insurance (issue 4/2005) published on its website <http://www.osti.co.za> under the heading *“Time Barring”*. A copy thereof is annexed to the Heads of Argument, as **Annexure “A”**.

62.

In the premises it is submitted that it can safely be stated that the Appellant was never isolated from the mainstream of the law, or unaware of or poorly informed about his legal rights and that he could enforce it at all times.

STANDARD FORM CONTRACTS AND UNEQUAL BARGAINING POWER:

63.

In view thereof that the Appellant apparently does not rely on the infringement of the broader constitutional values of freedom, equality and dignity it is not clear on what basis the new allegations of fact pertaining to standard form contracts and unequal bargaining power are relevant to the determination of the constitutional issue.

64.

In support of the constitutional challenge of clause 5.2.5 of the insurance agreement, the Appellant relies almost exclusively on the content of an article written by Kevin Hopkins (“Hopkins”).⁴²

⁴² The South African Law Journal 2002 (119) 155 “Insurance Policies and the Bill of Rights:

65.

In the said article Hopkins advanced arguments based on alleged facts pertaining to unequal bargaining power in general and standard form contracts in general.

66.

In the event that the Appellant is allowed to advance argument based on the alleged new facts the Respondent is compelled to deal with the constitutional challenge founded on the alleged facts by making inferences from the scant set of proven evidence available.

67.

Standard form contracts is described as contracts between members of the public and companies or public bodies that provide a service to the public on standard contractual terms.⁴³

⁴³ Rethinking the Sanctity of Contract Paradigm".
The Law of Contract 4th Edition R H Christie p204.

68.

It was not contended by the Appellant in the court of first instance that:

68.1 the insurance agreement was entered into on standard contractual terms.

68.2 that the insurance agreement was not entered into on the basis of true consensus after a process of bargaining.

68.3 that it was not open for the Appellant to negotiate certain terms of the insurance agreement with the Respondent, including clause 5.2.5.

69.

In addition the Appellant did not contend in the court of first instance that he was in a position of unequal bargaining power towards the Respondent.

70.

The available evidence suggests that the Appellant was not in a position of unequal bargaining power towards the Respondent and that the insurance

agreement can, *in casu*, not be regarded as a standard form contract. In this regard:

70.1 The Appellant apparently is a middle-class person who insured a BMW motor vehicle with the assistance of an insurance broker.

70.2 The Appellant did not give evidence that he did not accept the time limitation clause.

70.3 The Appellant did not give evidence to the effect that he was unwilling to conclude the insurance agreement with the time limitation clause.

70.4 The Appellant did not give any evidence to the effect that he is a previously disadvantaged person and that he was affected by any racial or other discriminatory measures in the past.

70.5 The Appellant did not give evidence that he was desperate to enter into the insurance agreement with the Respondent and had no other options available to insure his vehicle.

70.6 The Appellant did not give evidence that he approached the Respondent to obtain insurance cover and that the terms contained in the policy

wording was the only basis upon which the Respondent was prepared to provide insurance cover.

71.

Notwithstanding the above, the upshot of the Appellant's argument is founded solely on the inadmissible allegations of general facts emanating from the article written by Hopkins. It is set out as follows in the application for leave to appeal:⁴⁴

"This is the reason why debtors in a strong bargaining position try to insist on the inclusion of time limitation clauses in their contracts. Conversely, creditors in weak bargaining positions have little option but to contract on these harsh and oppressive terms. The considerable disparity in bargaining power that exists between an insurance company and the insured individual is what makes an insurance policy such a good example of a standard form contract".⁴⁵

⁴⁴ para. 14 – 15 p8 – 9.

⁴⁵ Application for leave to appeal p151 lines 9 – 15 para. 32.

72.

This is a classical example of a party raising the factual foundation for his challenge on the constitutionality of an issue only on appeal, without laying a proper foundation for such a challenge in the papers or the pleadings.⁴⁶

73.

Evidence in the Court of first instance by the Appellant to substantiate the aforesaid allegations of fact could have been met by the Respondent with evidence about one or more of the following materially relevant issues:

- 73.1 The question whether the Respondent procured the Appellant's business on the Respondent's initiative.
- 73.2 The question whether the Appellant approached the Respondent to obtain insurance cover.
- 73.3 The question whether the Respondent was willing to negotiate certain or all of the terms contained in the policy wording with the Appellant and/or his insurance broker.

⁴⁶ Prince v President: Cape Law Society & Others (*supra*) para. [22] at 399 E – F.

- 73.4 The question whether the Appellant was desperate to obtain insurance cover from the Respondent.
- 73.5 The question whether the Appellant was unable to obtain any insurance cover on different terms and conditions.
- 73.6 The question whether the Respondent regarded the provisions of clause 5.2.5 as dispensable within the scheme of the insurance agreement.
- 73.7 The question whether the Respondent was prepared to insure the Appellant at all, or on different terms, in the event of an agreement to exclude the provisions of clause 5.2.5 from the insurance agreement.
- 73.8 Evidence regarding the reasonableness to institute a claim within a period of 90 days.
- 73.9 The question whether short term insurance is compulsory for the Appellant.

74.

As a matter of logic it is untenable to pre-suppose that every insured is in an unequal bargaining position towards the insurer at the conclusion of an insurance agreement. The financial position and status of the insured, the type of insurance and the specific insurance product, whether the insured is an individual or a legal entity, the importance for the insured to obtain insurance and the importance for the insurer to procure the business will differ in every matter. Each case will accordingly be dealt with on its own merit. To suggest otherwise is patently wrong.⁴⁷

⁴⁷ Christie (supra) at 20 – 21; National Westminster Bank plc v Morgan [1985] 1 AC 686 at 707 – 708:

“Lord Denning M.R. believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been ‘inequality of bargaining power’ ... He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in Allcard v Skinner, 36 Ch.D. 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court’s decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment. Nor has counsel for the Respondent sought to rely on Lord Denning M.R.’s general principle: and, in my view, he was right not to do so. The doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions ‘not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act’ ... And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power.”

75.

In the present case the evidence is so scant that it can only be speculated what the Appellant's bargaining position in relation to the Respondent was. It is submitted that no finding can accordingly be made regarding the Appellant's bargaining position.

76.

In the premises the critical question whether the Appellant was in effect forced to contract with the Respondent on terms that infringed his constitutional rights to dignity and equality in a way that required the development of the common law of contract so as to invalidate the term can not even get off the ground. The broader constitutional challenge on the grounds that the time limitation clause infringes the Appellant's constitutional rights of dignity and equality is accordingly without merit.

77.

In the premises it will be requested that the application for leave to appeal be dismissed with costs, including the cost of two counsel.

DATED AT PRETORIA ON THIS THE ____ DAY OF APRIL 2006.

P G CILLIERS

S ODENDAAL