IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 72/05

SCA case no: 569/04

In the matter between:

BAREND PETRUS BARKHUIZEN Appellant

and

RONALD STUART NAPIER Respondent

APPELLANT'S HEADS OF ARGUMENT

Kindly take notice that the appellant hereby furnishes his heads of argument.

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INTRODUCTION

(i) The legal issue before this court

1. This is an issue of fundamental importance to the short-term insurance industry. It concerns the enforceability of 'time limitation clauses' (also sometimes called 'time bar clauses') which are prevalent in almost if not all short-term insurance policies and used by almost if not all companies that offer short-term insurance products.

2. In this particular matter the time limitation clause was contained in an insurance policy underwritten by Lloyds of London. The clause reads as follows:

> If we reject liability for any claim made under this policy we will be released from liability unless summonses served… within 90 days of repudiation.

3. Time limitation clauses, such as the clause in question in this matter, curtail the period in which legal action must be instituted. They provide an insured party with a limited time period, specified in the policy, within which to institute legal proceedings in the event of a repudiation by the insurance company. Their effect is to cause the loss of the right to enforce an obligation after the contractually stipulated time period lapses.

(ii) The constitutional issue involved

4. The constitutional issue before this Court is whether or not time limitation clauses contained in short-term insurance policies, if enforced, amount to a limitation of the insured's right of access to court as contained in section 34 of the Constitution. The appellant will argue that they are.

5. Then, whether or not, given section 36 of the Constitution, such limitation (if found to exist) is reasonable and justifiable in a free and open democratic society based on human dignity, equality and freedom. The appellant will argue that it is not.

6. This two-part enquiry will be evaluated against the other constitutional values that may in fact provide a constitutional logic to the sanctity of contract rule. The appellant will argue that no matter how highly our society values the sanctity of contract, it should never be used to facilitate the unreasonable and unjustifiable limitation of a constitutional right.

BACKGROUND

(i) A brief history of the matter

7. The constitutionality of time limitation clauses in short-term insurance policies was first scrutinised for constitutional validity in the Transvaal Provincial Division where his Lordship Mr Justice de Villiers held that they were unenforceable on the grounds that they amounted to an unreasonable and unjustifiable limitation of an insured's right of access to court in terms of section 34 of the Constitution.

8. The respondent in this matter appealed the decision of the TPD to the Supreme Court of Appeal which reversed the decision by holding that the clause does not in fact violate section 34 of the Constitution at all. It was thus held by the SCA to be an enforceable contractual clause – this was the judgment of his Lordship Mr Justice Cameron (with their Lordships Mpati DP, van Heerden JA, Mlambo JA, and Cachalia AJA concurring).

(ii) The argument raised in the application for leave to appeal

9. The argument raised in the application for leave to appeal can be summarised as follows:

a) It has always been a well established common law rule that contracts which violate public policy are unenforceable;

b) Public policy represents the legal convictions of the community;

c) The legal convictions of the community (and by implication public policy) in the law of contract was at one time epitomised by the sanctity of contract rule – but this was the position before South Africa acquired a

Bill of Rights;

d) The new constitutional era of South African law has had a significant impact on the development of public policy doctrine in the law of contract;

e) The legal convictions of the community have now been 'codified' in the set of constitutional values enunciated in the Bill of Rights;

f) The Bill of Rights therefore, in post-constitutional South Africa, is the most reliable statement of public policy that we have;

g) Time limitation clauses constitute an unreasonable and unjustifiable limitation of the constitutional right of access to court as contained in section 34 of the Bill of Rights;

h) These clauses are therefore in violation of public policy and ought therefore to be unenforceable.

10. The above also represents an overview of the argument that will be made to this Honourable Court at the hearing of the application for leave to appeal (together with the merits).

THE APPLICATION FOR LEAVE TO APPEAL

(i) The decision of Cameron JA in the Supreme Court of Appeal

11. The Supreme Court of Appeal's judgment can be summarised as follows:

a) The common law of contract is subject to the Constitution, meaning that courts are obliged to take fundamental constitutional values into account

whilst performing their duty to develop the law of contract in accordance with the Constitution;

b) The founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms give a constitutional basis to the sanctity of contract rule because they find expression in the liberty that people have to regulate their lives by freely engaging in contractual arrangements;

c) The courts acknowledge, however, that these founding constitutional values may result in a contract being unenforceable where it is evident that the contract was not entered into freely and voluntarily because of a radical inequality of bargaining power between the contracting parties;

d) Time limitation clauses in short-term insurance policies do not amount to a limitation of the constitutional right contained in section 34 of the Bill of Rights and do not therefore deny aggrieved insured parties a right of access to court;

e) There is also no evidence to suggest that people who seek short-term insurance cover do not contract freely with short-term insurance companies and their agreements ought therefore to be governed by the sanctity of contact rule because they are concluded by the insured person in the exercise of his/her constitutional right to dignity, equality and freedom; and

f) Time limitation clauses in short-term insurance policies are therefore valid and enforceable.

12. I submit that the Supreme Court of Appeal was wrong to find as it did. In particular, it was wrong to find that time limitation clauses contained in short-tem

insurance policies do not amount to a limitation of an insured person's right of access to court. The Supreme Court of Appeal did not get to question the (un)reasonableness of time-limitation clauses in the section 36 sense because it in the absence of a limitation of the constitutional right there was no need to engage with the reasonableness and justifiability of such clauses.

(ii) The difficulties with the Judgment of Cameron JA

13. It is respectfully submitted that the Supreme Court of Appeal's finding that public policy in the enforcement of contracts is rooted in the Constitution must be accepted as correct. It is also submitted that not just a select few provisions in the Constitution that inform the public policy doctrine but that all of them contribute to our understanding of what public policy is. Sometimes, as in the instant case, there are conflicting values and in such a case a balance needs to be struck between those constitutional values which provide a constitutional logic to the sanctity of contract rule on the one hand (like freedom, dignity and equality); and those constitutional rights which may be limited by the enforcement of the contract on the other (like the right of access to court).

14. It therefore seems to me that the balancing act is essentially concerned with two distinct groups of constitutional rights. But the constitutional values of freedom dignity and equality are not prevalent in all contracts. In standard-form contracts (such as insurance policies) there is very little evidence of any of these constitutional values – and thus the constitutional logic to upholding the sanctity of contact rule is considerably weaker in instances where the parties d not freely contract with one another, or where the bargaining power in the contracting process is unequal or where the autonomy of one of the contractants is undermined.

15. Insurance polices are not negotiated and there is a massive disparity of bargaining power in the contract-making process between an insurer and an

insurance company. It is submitted that it is incorrect to afford too much weight to the constitutional values that appear to provide a constitutional logic to the sanctity of contract rule because in standard-form contracts those values are not in any event respected (although they probably are in most contracts where the parties contract on an equal footing and where the terms are open to negotiation).

16. The Supreme Court of Appeal also, with respect, erred in finding that section 34 of the Constitution is not limited by such contractual provisions. This is dealt with more fully in that part of these heads of argument dealing with interpreting the right contained in section 34 of the Constitution.

17. For the Court's convenience I will now indicate how it is that I respectfully submit contractual time limitation clauses are in violation of public policy and why they do in fact constitute a limitation of the right in section 34 of the Constitution.

THE ARGUMENT ON APPEAL

18. Section 34 of the Constitution states that:

> Everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent or impartial tribunal or forum.

19. The crucial question before this Court is thus whether the time limitation clauses found in short-term insurance policies, such as the Lloyds policy I this case, do in fact amount to a limitation of section 34 of the Constitution. I respectfully submit that the Supreme Court of Appeal was wrong to find that they do not.

(i) The nature of time limitation clauses

20. In this particular matter the time limitation clause was contained in an insurance policy underwritten by Lloyds of London. The clause reads as follows:

> 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.

21. Time limitation clauses, such as the clause in question in this matter, curtail the period in which legal action must be instituted. They provide an insured party with a limited time period, specified in the policy, within which to institute legal proceedings in the event that the insurer repudiates. Their effect is to cause the loss of the right to enforce an obligation after the contractually stipulated time period lapses.

22. According to Van der Merwe et al Contract: General Principles (1993) at 396, a contractual term which imposes a time limit on the exercise of a contractant's right to sue in terms of an agreement is 'subject to the ordinary principles of the law of contract and is not a matter for prescription.'

23. The courts, following this logic, have consistently applied the sanctity of contract rule when assessing the enforceability of these kinds of provisions. Consequently, an insured who finds that s/he no longer has a claim against the insurer (because it has prescribed under this contractual clause) has, under the common law, no legal remedy.

24. In the absence of a time limitation clause in an insurance policy, the right to enforce obligations in the insurance contract would have been governed by the Prescription Act 68 of 1969. The point is that time limits restricting the creditor's right to pursue a claim against the debtor are, in the absence of contractual

provisions to the contrary, determined by the legislature. The time limitation clause provides us with an example of where the creditor's right to sue has been contractually limited.

25. It seems as though extinctive prescription traditionally has its rationale in the promotion of certainty, in particular, certainty in the affairs of debtors who are entitled to assume that if no claim is made within a certain time then no claim will be made at all. This point was succinctly made by the Appellate Division in Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984 (1) SA 571 (A) at 578.

> [Extinctive prescription's] main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did, then whether it has been discharged.

26. But there are other reasons too. Didcott J in Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC) at par 11 had the following the say on some other reasons supporting the rule on extinctive prescription:

> Rules that limit the time during which litigation may be launched are common in our legal system as well as in many others. Inordinate delays in litigating damage the interests of justice. They protract disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They

thus serve a purpose to which no exception in principle can cogently be taken.

27. A party wishing to claim for a loss suffered in contract would have three years within which to do so in terms of the Prescription Act (supra). That is to say, if an insurer were to repudiate the insured's claim submitted in terms of a policy without a time limitation clause, the insured would have to issue summons within three years of the repudiation failing which his / her claim would be forever barred. A prescribed claim represents a lost opportunity of recovering a debt. The position in short-term insurance is governed by the contract itself. The time limits imposed in the contract shorten the time that the insured would have had to claim under the existing statutory provisions. Prescribed debts do not support claims and consequently prescription is an absolute defence to any legal action instituted by a creditor outside of the prescribed time period.

28. Minimizing or limiting the time period within which an insured has to claim indemnity or to challenge a repudiation under the policy is a useful way for insurance companies to reduce the possibility of having to pay out on a claim. Claims not submitted timeously don't have to be considered and repudiations (even incorrectly repudiated contracts) can't be challenged if the challenge is late.

29. The time limitation clause in insurance policies has frequently relieved insurers of their contractual obligation to indemnify in circumstances where, but for the clause, they would have had to pay up. It is potentially redeeming for debtors to have such clauses in their agreements with creditors; and it is potentially fatal to the claims of creditors where such clauses exist in their contracts with debtors.

30. 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.

31. The extinctive prescription effect of the time limitation clause has never been successfully overcome – such is the vehemence of contractual supremacy and such is the stamina, endurance and strength of the sanctity of contract rule in our common law.

(ii) The public policy enquiry

32. Public policy represents the legal convictions of the community – those values held most dear by society. Van Zyl J in Compass Motors Industries (Pty) Ltd v Callguard 1990 (2) SA 520 (W) at 528-529 held that:

> …it appears that public policy can not be separated from concepts such as justice, equity, good faith, and reasonableness. All are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations.

33. Contract law is fundamentally different to other branches of private law in one major respect – the aim of achieving equity and justice has had to try and survive in the shadow of the sanctity of contract rule which has very often inspired decisions that have achieved anything but equity and justice. According to the sanctity of contract rule, a court will not release a contracting party from the consequences of an agreement entered into merely because it may be unfair or harsh. The common law position is that it is irrelevant as to whether the contract is fair or not – the parties must live with what they have agreed to.

34. The sanctity of contract rule has had a significant impact on the jurisprudence of the enforcement of contracts. The primary reason for this is that the rule requires that the courts must respect the autonomy of the contracting parties and give

effect to their wishes. The attitude of the courts is that the parties to a contract must be free to choose the terms and the manner of their agreement for themselves - Innes CJ in Wells v South African Alumenite Company 1927 AD 69 at 73, commenting on the enforceability of a particularly oppressive contract held that 'no doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them.'

35. There is one extremely important qualification to the sanctity of contract rule – the requirement that a contract must be legal to be enforceable. Legality includes the concept of public policy. It thus follows that under the common law a contract that is contrary to public policy will be unenforceable.

36. As to what is public policy - Voet, cited on numerous occasions by our courts with approval, once said that 'all honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which redound to the public injury, nor yet things base or shameful, such as a clash with good morals or entice or wrongdoing' (The Selective Voet, being the Commentary on the Pandects *(Paris ed of 1829)* at 2.14.16).

37. Smalberger JA, in Sasfin v Beukes 1989 (1) SA 1 (A) explained that contracts which are 'clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience' ought to be regarded as being *contra bonos mores* or against public policy. Public policy thus represents the legal convictions of the community – it represents those values held most dear by society.

38. In the law of contract, however, public policy seemed to acquire its own meaning. Innes CJ in Wells v South African Alumenite Company (supra) captured the essence of public policy in contract law when he held that 'if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that

their agreements when entered into freely and voluntarily shall be held sacred and shall be enforced by our courts of justice.' Thus the sanctity of contract rule became the epitome of public policy in contract law.

(iii) The Bill of Rights as a statement of public policy

39. The application of the Bill of Rights to private law disputes has been a controversial topic in our law. One of the early cases, Knox D'Archy Limited v Shaw 1995 (12) BCLR 1702 (W), illustrates this controversy - the court had the following to say on the matter (at 1710) '…the Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions.'

40. Under the common law contracts contrary to public policy are unenforceable - this is how the doctrine of public policy has contributed to the development of the common law. And public policy has traditionally been seen as the sanctity of contract rule in the law of contract. But the Bill of Rights contains certain fundamental rights (and core values) – these came to be incorporated in the Constitution because normatively they represent the values that society holds most dear. They are, according to the legal convictions of the community, to be held as sacrosanct. They do, therefore, provide us with a very reliable statement of public policy.

41. It is thus argued that the Bill of Rights represents the most reliable statement of public policy that we have – this point has been confirmed by the Supreme Court of Appeal in Afrox Health Care v Strydom 2002 (6) SA 21 (SCA) and again by the Supreme Court of Appeal in my own case (Napier v Barkhuizen) against which this appeal is being sought.

42. Thus the sanctity of contract rule represents the old (pre-Constitutional) notion of public policy in the law of contract, whilst the Bill of Rights represents the new (post-Constitutional) notion of public policy in the law of contract.

43. The public policy enquiry (under the influence of the Bill of Rights) will follow a similar method to the ordinary constitutional analysis of rights and can only effectively be done by considering: first, what the constitutional provision means (an interpretation of the right in the bill of rights); second, whether enforcement of the contract would amount to a limitation of the constitutional right; and third, whether notwithstanding the infringement there is nevertheless good reason for retaining the provision in the contract.

(iv) Interpreting section 34 of the Constitution

44. The Constitutional Court, in the context of a legislative challenge, has already held that measures which seek to curb the time that plaintiffs have within which to institute litigation are a limitation of this constitutional right - see Mohlomi v Minister of Defence (supra).

45. In the Mohlomi case the plaintiff instituted a civil claim in the Witwatersrand Local Division against the defendant (Minister of Defence) for damages suffered after he had been intentionally shot by a soldier. The defendant filed a special plea to the effect that the plaintiff's claim was barred on account of the provisions contained in s 113 (1) of the Defence Act 44 of 1957 which effectively required that action against the state be instituted within 6 months, which had not been done.

46. This Court in that matter held that s 113(1) limited the plaintiff's constitutional right of access to court but since constitutional rights are capable of being limited if there is good reason for doing so (section 36 of the Constitution) the only question that remained was whether or not it was reasonable and justifiable that claims

against the state prescribe after only 6 months when all other claims prescribe after three years.

47. Section 34 guarantees to all people that they have a right to have their disputes resolved by a court of law if such disputes are capable of being resolved by a court of law. The Supreme Court of Appeal in this case found that the time limitation clauses do not limit this right, because inter alia they do not prevent an aggrieved party from accessing a court, they simply tell an aggrieved party that if he wants to access a court then he needs to do so within a certain time – in this case 90 days.

48. The Supreme Court of Appeal in this case also held that although section 34 of the Constitution guaranteed a right of access to court for people who have disputes, the right was not broad enough to include people who had a contractual dispute with an insurance company in circumstances where a time limitation clause existed if the dispute was brought out of time.

49. The Supreme court of Appeal reasoned as follows:

> The plaintiff here had no pre-entitlement against the insurer. The insurer did not injure his person, damage his property or violate his reputation or his dignity, nor did it commit any other wrong against him. Outside the contract, it owed him no money. Before the contract was concluded, it had no relationships with him at all. It offered him insurance cover which he agreed to take on clearly specified terms. Those terms defined the rights he derived from the agreement by specifying that there would be no liability unless summons were served within 90 days of repudiation of a claim.

50. It is respectfully submitted that the reasoning of the Supreme Court of Appeal is conceptually flawed. The right of access which people have is not a right of

access prescribed in a contract. The right of access to court which all people enjoy is one that has been given to them by the Constitution. To therefore suggest that one can limit one's own right of access to court in a contract would be to suggest that one can in fact contractually waive a constitutionally guaranteed right.

51. The Bill of Rights is an instrument designed to set a minimum standard of conduct which is expected in all human dealings. It also prescribes a minimum set of rights to which all human beings are entitled. These standards were set in order to protect us all from exploitation by others who may be in a position to do so. These rights need to be respected by everybody if human rights are to mean anything at all.

52. Even insurance companies are bound to respect the fundamental human rights of the people with whom they do business. It can surely not be acceptable in a state such as ours, which places such a high premium on human rights and indeed on our Bill of Rights, to allow large corporate entities to draft standard-form contracts in complete disregard for these rights. This is the reason (to guard against exploitation) that many foreign jurisdictions regulate the use and enforceability of 'time-limitation clauses' in insurance policies.

53. In some jurisdictions the position is regulated by legislation whilst in others the courts have done so by virtue of their authority to render unconscionable contracts unenforceable or those which violate public policy.

54. The question is whether or not a provision which limits the amount of time which one has to access a court in order to have a dispute resolved amounts to a limitation of section 34.

55. This Court has already held in Mohlomi v Minister of Defence (supra) that a statutory time limitation for instituting a claim against the Defence Force did

amount to a limitation of the claimant's right of access to Court in terms of section 34 of the Constitution. It stands to reason that if the time that one has to access a court is limited then the right of access to court must ipso facto also be limited.

56. For the Supreme Court of Appeal to find that the right is not limited simply because the right of access to court is not denied misses the point, I submit. Constitutional law recognises that a right in the Bill of Rights is infringed when it is limited – there is no need for the right to have been denied completely. I therefore concede that my right of access to court has not been denied but my right of access to a court has most certainly been limited. And any limitation of a constitutional right must, in terms of section 36 of the Constitution, be both reasonable and justifiable (that much is clear from the textual wording of s 36).

57. Even the Prescription Act (supra) is a limitation of s 34 of the Constitution – but it is a limitation that can probably, quite easily, be justified under s 36 of the Constitution.

58. By way of analogy (and *reductio ad absurdum*) one can ask the question: what would the Supreme Court of Appeal have found had the insurance policy said that the insurer only has 90 hours instead of 90 days to access the Court. Surely, on the Supreme Court of Appeal's own logic the right would still not be violated because once again the insurer is not denied the right of access to court – s/he simply needs to make sure that they get there within 90 hours. What then if the contract had said that I only have 90 minutes? The point being made is that any limit on the time that an insured has to access a court is a limitation of the constitutional right of right of access to court. The Constitution speaks about the need to justify a 'limitation' of a constitutional right – when one's right of access to court is in any way limited (for example by a shortened time period within which to access it) then the constitutional analysis needs to move into the domain of section 36 of the Constitution.

59. The Supreme Court of Appeal, however, never questioned the reasonableness and justifiability of these time limitation clauses because it didn't find that such clauses limit the constitutional right. In other words, in the absence of a limitation of the right no enquiry into reasonableness was ever conducted.

60. It is respectfully submitted to this Honourable Court that section 34 is limited by these clauses and that such a limitation can not be regarded as reasonable and justifiable.

(v) Limiting the infringement in terms of section 36 of the Constitution

61. The constitutional question is 'when' or 'under what circumstances' is it acceptable to allow the common law to uphold a contractual time limitation clause. The answer to that question is contained in the provisions of s 36(1) of the Constitution.

62. It is trite that the party seeking to uphold a law or contractual provision which effectively limits the constitutional rights of another bears the onus of establishing that the limitation is reasonable and justifiable. In that regard see Iain Currie & Johan de Waal The Bill of Rights Handbook (5 th ed) at 188. Notwithstanding this, there is little justification or reasons that may justify the limitation in the papers currently before the court. In the circumstances the appellant in these heads of argument has sought to address the question as it does hereunder.

63. It is clear from the jurisprudence of this Court that the five enumerated factors are not comprehensive and nor are they mandatory - see S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC). They are simply intended to assist the courts in establishing whether or not a limitation of a constitutional right is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. In developing the common law, these issues are equally relevant since public policy will be heavily influenced by

whether or not the contract is reasonable and justifiable in a society like ours.

64. The answer to any limitations question is that a constitutional right ought to be capable of limitation where the objective behind the limitation is designed to reinforce the values that animate the constitutional process. This reply, in dealing with the common law, is somewhat incomplete without the added corollary that public policy must regard the underlying limitation as sufficiently important to outweigh the constitutionally protected right. The corollary places an extremely onerous burden on insurers – one that will not, it is submitted, be easily discharged.

65. This answer takes the limitations enquiry into two broad areas of the public policy debate. The first area involves looking at the substantive policy criteria. Appropriate substantive questions to ask, in the context of time limitation clauses in insurance policies, are: What is the nature and purpose of these clauses? What function do time limitation clauses serve? Is the objective behind limitation clauses sufficiently important to justify limiting a fundamental right? The second area of the public policy enquiry involves looking at proportionality criteria. Appropriate proportionality questions to ask, in the context of time limitation clauses in insurance policies, are: Is the limitation of the right rationally connected to the objective that the clause in the policy is intended to achieve? Does the clause in the policy invade the right more than it needs to? Could insurance companies use less restrictive means to look after their interests? Is the harm suffered by the insured as a result of the clause in the policy disproportional to the benefit that the insurer receives by retaining the limitation clause in the policy? For a discussion of the reasons why short-term insurers use time-limitation clauses and the justification for having them is discussed in Kevin Hopkins Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm 2002 (119) *South African Law Journal* 155. Much of the argument submitted here comes from that piece.

66. The types of questions being asked in the preceding paragraph, it will be noted, correspond very closely with the five factors originally identified by Chaskalson P in S v Makwanyane 1995 (3) SA 391 (CC) now incorporated into s 36 (1), namely: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Substantiveness in the public policy enquiry

67. It seems as though insurance companies would have to begin with a factual synopsis indicating what purpose the time limitation clause serves in the insurance policy. The question now, under a constitutional enquiry seems to be whether or not any good reason does in fact exist.

68. Limitation clauses share much in common with the extraordinary prescriptive provisions that we find in legislation governing the special time limits for instituting action against the State.[1] Statutory limitation provisions, as a distinct form of extinctive prescription, do not affect substantive rights, but merely serve to bar a legal remedy from being instituted in a court. They are thus procedural impediments to bringing a matter before court. Contractual limitation clauses have been treated in the same way - they provide the defendant with an absolute defence to any legal action on the merits. There is no room for the plaintiff to seek condonation, even where there is good reason for being out of time. Under constitutional scrutiny, however, it is submitted that insurers will have to delve into substantive reasoning in order to justify the existence of these infringing contractual provisions - public policy would so demand.

[1] Looking back, these legislative provisions can be found in, for example: s 13 of the Archives Act no. 6 of 1962; and s 32A of the Black Administration Act no. 38 of 1927; and s 90 of the Correctional Services Act no. 8 of 1959; and s 89 of the Customs and Excise Act no. 91 of 1964; and s 26 of the Intelligence Services Act no. 38 of 1994; and the Expropriation Act 39 of 1951. There are more – this list is not exhaustive, it merely names a few that I am aware of.

69. A useful starting point would be to examine the purpose behind limitation provisions (the purpose of a rule on prescription, generally, has already been covered in earlier parts of this affidavit). Because of the similarity that time limitation clauses in insurance policies bear to statutory limitation provisions, it would make sense to begin with an enquiry into the rationale behind the shortened time periods designed to protect the State.

70. Prior to the constitutional dispensation the State relied upon policy considerations to justify legislating special limitation provisions. The argument in favour of shorter limitation periods being applicable to the State center mostly on the practical difficulties encountered by the State in litigation. The State, it is appreciated, conducts a wide variety of activities which, as Max Loubser Extinctive Prescription (1996) at 176 correctly points out, continually expose it to a massive number of civil claims. One need only think about the size of the individual state departments like labour, transport and the police, to get an idea of the enormous amount of litigation that the State is frequently embroiled in. The sheer volume of litigation requires a vast amount of manpower (employees) and substantial financial resources to pay the employees and to fund the litigation.

71. The issue of manpower and employees is apparent at two levels. The first level is involved with the large number of people that the State needs to employ specifically to investigate, manage and supervise the claims (brought both by and against the State). The second level involves only claims brought against the State where it is vicariously liable for the wrongdoings of its employees. The problem here is the difficulty that the State has in defending claims because (i) those responsible for causing harm do not have a direct incentive to vigorously defend their actions because they are not personally responsible to the plaintiffs; and (ii) the State, as an employer, has a very large and constantly changing workforce which makes the management of witnesses in litigation proceedings awkward. As a result of these difficulties, one can understand that reasons of public utility and public benefit exist for curtailing the extent of State litigation –

because State litigation is ultimately funded with public money.

72. These considerations, coupled with the unavoidable reality that the State's extensive resources make it a very popular target for claims, underlie the special protection that the State requires. Limitation provisions are a means of achieving this end. This special protection enables the State to "avoid the practical difficulties and the public expense involved in the investigation and defence of claims arising from incidents that occurred a long time ago".[2]

73. Although sound policy reasons exist in respect of the State's case, the question remains whether the same policy reasons are available to private corporations (like insurance companies) faced with litigation. In other words, the question is: Should insurance companies be entitled to the same measure of protection that the State enjoys? In this regard see Kevin Hopkins Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm (supra).

74. This question can only be adequately answered by first considering three other issues. First, do insurance companies encounter the same difficulties encountered by the State when confronted with actual or potential litigation? Second, if it is found that they do, then are the same policy considerations that apply to the State also applicable to insurance companies? Third, if the policy considerations are not also applicable to insurance companies then does some other possible justification exist?

75. To deal with the first (whether insurance companies encounter the same difficulties that the State experiences when confronted with litigation) we need to distinguish between the two institutions on function. The use of terminology may assist here. The term 'state' is used in a variety of senses, each emphasizing a different function. For present purposes it can be viewed as the organised

[2] See also: Law Commission Project 42, October 1985 – and the report entitled *Investigation into Time Limits for the Institution of Actions against the State.*

authority of a nation of people, and in particular the persons or bodies that are vested with authority to act on behalf of the people. In this context the State has a wide variety of functions: it creates law; it resolves disputes; it keeps the peace and maintains order; it also regulates the economy and engages in commercial activity; and it provides social services to the public. It is evident that the State has a great variety of functions and it employs a great number of people to carry out the execution of these functions.

76. In sharp contrast to the vast and complex nature of the State, a short-term insurance company is radically more simple in structure, composition and function. Insurance companies are concerned with one activity only – their core business. They are far smaller both in terms of the work that they do and the number of people that they employ. Insurance companies are, beyond doubt, far less complex in nature generally. Collectively, of course, the short-term insurance industry is a massive institution, but individual insurance companies (each company being a separate legal entity) are a comparatively small part of the industry as a whole. As a consequence of all these factors, it seems difficult to see how an insurance company can be exposed to the type of litigation problems that face the State and warrant the protective use of time limitation provisions.

77. The sole purpose behind the business of a short-term insurance company is profit-motivated. Insurance companies are profit driven institutions. Potential litigation from within their own client-base and the corresponding risk of being sued on contractual obligations is a hazard inherent in the business.[3] This places insurance companies in a very different position to that of the State which is a non-profit entity with a public-purpose function. The State's business is also the business of the public – it has community benefit. The insurer's business is its

[3] Short-term insurance companies do have litigation departments, but the litigation departments are specifically geared to handle the claims of the company's clients (either to defend the insured in a civil action or else to assist the insured in a recovery action). And so litigation is part of the business of a short-term insurer, but this type of litigation is unaffected by the limitation clause in the policy. The limitation clause is designed to protect the insurance company against legal action instituted against it by its own clients – usually because of a refusal to indemnify.

own – it is purely for self-benefit. When the State is harmed, or when the State harms, then it is ultimately the public that is called upon to finance the redress of the harm. This is significant because litigation can not be said to be an inherent risk or hazard of the State's business nor is it usually in the public's best interests.

78. To conclude the substantive policy critique: It is clear that the reasons in support of the special protection afforded to the State by limitation provisions are simply not present in the case of short-term insurance companies.

Proportionality in the public policy enquiry

79. It has been said by Max Loubser (supra) at 22-24 that the policy considerations in limiting the period of prescription for the recovery of contractual debts to three years is premised primarily on protecting the debtor. The protection is two-fold: first so that the debtor does not have to defend old claims that are stale because they have existed for a long time; and second so that the debtor can have certainty in the expectation that the slate has been wiped clean of obligations towards creditors. In order for the debtor to achieve this protection, a creditor is effectively punished for not instituting a recovery action within the three-year period. In summary, and in the words of Loubser, the 'primary consideration is fairness to the debtor.'

80. The position of short-term insurance companies needs to be considered in relation to these factors. Insurance companies incorporate time limitation provisions into their policy wording to protect themselves against adverse litigation. These clauses have been very successful in doing just that under the common law. There can be little doubt as to their rationality. But from a proportionality perspective there are two important questions: Does the limitation clause invade the right of access to court more than it needs to in order for it to achieve this purpose? Could insurance companies use less restrictive means to look after their interests?

81. It seems that these two questions amount to essentially the same thing – and this refers to the 'reasonableness' of limiting the insurer's exposure to liability to a mere 90 days. The first point to note is that the law already offers insurance companies a measure of statutory protection in that creditors are obliged to institute their claim within three years. The second point to note is that the right of access to court of a potential plaintiff is radically reduced from three years to a mere three months.

82. The 'substantive' enquiry considered not whether any good reason existed to reduce the statutory three-year period, but rather whether any good reason existed to justify insurance companies enjoying the same measure of protection as the State. This has to a large extent been dealt with in the 'substantiveness' enquiry. The conclusion was that they are not. It has not been determined what would constitute a justifiable limitation period for the State – it has only been determined that a 6 month period amounted to an unjustifiable invasion of the right of access to court as afforded to all people under s 34 of the Constitution. For this reason it is submitted that if the 6 month limitation period afforded to the State (under the provisions of section 113(1) the Defence Act) was deemed to be an unjustifiable invasion then clearly the three month limitation period afforded to short-term insurance companies (which is a far greater invasion) will similarly be incapable of justification. From a proportionality point of view it seems difficult to imagine that insurance companies will be able to establish, where the State has failed, that even more restrictive access to court ought to be permissable.

(vi) Other relevant constitutional values

83. It has been submitted in the preceding discussion that there may be conflicting values in the Bill of Rights which need to be considered in the public policy enquiry. For example, as mentioned earlier, there may in fact be a constitutional logic to the sanctity of contract rule – something eluded to by Cameron JA in Brisley v Drotsky 2002 (4) SA 1 (SCA) and again in this matter in the judgment of

the Supreme Court of Appeal (again by Cameron JA).

84. It is submitted that if one is going to contend that the Constitution (as a whole) informs the public policy doctrine, then one can't afford to be selective – the whole Constitution must be considered, including not only the rights in the Bill of Rights (like section 34) but also the values of freedom, dignity and equality. Freedom and dignity are broad enough to include contractual freedom and contractual autonomy. But what about equality? In the context of contracts that would surely depend on the bargaining power of the contracting parties – see Kevin Hopkins The influence of the Bill of Rights on the enforcement of contracts *De Rebus* August 2003 at 22.

85. The private law's endorsement of inequality is probably best illustrated in standard-form contracts - where one of the parties transacts from an overwhelming position of strength. When the sanctity of contract rule is used to uphold harsh and oppressive standard-form contracts then the private law is in effect facilitating an abuse of power by the party in the stronger bargaining position. In this situation it is difficult to see how the founding constitutional values (including freedom and equality) can really support the Supreme Court of Appeal's decision.

86. It is submitted that standard-form contracts, such as insurance policies, are not concluded in the free exercise of the constitutional values (there is in particular no real equality) that insured parties have been afforded. In this regard it is respectfully submitted that the view expressed by the Supreme Court of Appeal in this matter is incorrect.

87. For many of the same reasons given in other jurisdictions (dealing with the justification for the law's erosion of the sanctity of contract rule in other countries), there is also a need in South Africa to limit the power given to large corporations to bind consumers to oppressive terms in standard-form documents. The origins

of the argument require that one contextualise the rationale for the sanctity of contract rule (which it will be argued has outlived its purpose) as a product f the free market.

88. The central features of a free market system such as ours are the dominance of private property; the dynamics of the profit motive; the existence of a free market; and the presence of competition (for a discussion on this see RM Christenson, AS Engel, DN Jacobs, M Rejai and H Waltzer Ideologies and Modern Politics (1971) at 219).

89. But the free market can only work if these elements all function together so that in the market place entrepreneurs are free to innovate, workers free to seek a higher wage and investors free to seek their highest rewards. This free market system contains self-generating and self-correcting mechanisms and it operates largely free of regulatory interference. Hence in the law of contract this laissez-faire (literally meaning 'hands off') approach was epitomised by the sanctity of contract rule which requires that the courts respect and enforce the wishes of the contracting parties. In doing this, the autonomy of the parties is acknowledged. The courts have effectively endorsed that the parties to a contract must be free to choose the terms and the manner of their agreement for themselves. The courts have also stated that they are not prepared to engage with the fairness of the agreement if properly concluded by two consenting adults – such contractants must live with that which they have agreed to. Standard-form contracts provide us with possibly the clearest example of an economico-legal tool born from the free market system.

Standard-form contracts as a product

90. When the sanctity of contract rule is used to uphold harsh and oppressive standard-form contracts, as happens on a fairly regular basis in our courts, then the private law is in effect facilitating an abuse of power by the party in a stronger

bargaining position. The unequal bargaining power makes it easy for powerful private institutions like insurance companies to infringe upon the fundamental human rights of the weakest and most ignorant members of our society.

91. These contracts, with their standardized provisions, are described by the French as *contrats d' adhesion.* The French term has passed over into English Law, and one finds Friedmann quoting Pasely to the effect that 'a contract of adhesion is a contract prepared by one party and offered to another on a take-it-or-leave-it basis' - see W Friedmann Law in a Changing Society 2 ed (1972) at 404.

92. It often happens that the weaker party is absolutely powerless and may have to surrender to the terms of the stronger party's will without the option of negotiation.

93. Todd Rakoff 'Contracts of adhesion: An essay in reconstruction' (1983) 96 *Harvard Law Review* 1173 has identified seven characteristics that define a model contract of adhesion. According to him these are: (i) the document consists of a printed form purporting to be a contract and containing many terms and conditions; (ii) the document has been drafted by or on behalf of one of the parties to the transaction; (iii) the document is presented to the adhering party with the representation (express or implied) that few, if any, of the terms will be open to negotiation, and that the drafting party is only willing to transact on those terms; (iv) the document is signed by the adhering party; (v) the drafting party routinely participates in many transactions of the type in issue; (vi) the adhering party enters few such transactions (relative at least to the drafting party); and (vii) the main obligation that the adhering party incurs takes the form of the payment of money.

The economic case for standard-form contracts

94. Whilst it is true that standard-form contracts make it easy for the party in a position of strength (like an insurance company) to abuse the bargaining power that it has,

it must nonetheless be noted that the use of such contracts is not without benefit - even to the weak.

95. One of the obvious advantages of using standard-form contracts goes to the preparation cost of the transaction. The insurance company consults with its legal advisors on the drafting of only one contract. The legal costs incurred on the drafting of this contract are spread over the number of times that the contract is used. This 'standardization' is a cost-saving device – it alleviates the need to acquire legal services (in respect of both consultation and drafting) every time an agreement is concluded. This results in a cost-saving for the insurance company when one considers the number of new clients that contract with insurers on virtually the same terms on a daily basis.

96. Standard-form contracts have advantages for not only the company but also for consumers in that they are useful devices that save time, effort and money (which may increase certainty, productivity and also control) and these advantages ultimately translate into financial benefits that are indirectly transferred to the consumer. But, there are also certain disadvantages to standard-form contracts for the consumer and these should not be ignored when we assess the value of retaining our current laissez-faire approach to them.

Assessing the economic argument

97. As has been indicated, companies that use standard-form contracts usually acquire the services of a legal advisor to draft the terms of the document. The draftsman is thus concerned with incorporating all the terms beneficial to the company – usually to the detriment of the consumer. In bi-lateral contracts the draftsman has an ethical duty to protect the interests of both parties. In this situation, however, the legal advisor acts for the insurance company alone. In an attempt to protect his/her client from all possible contingencies, a policy document is produced which more often than not exceeds the basic requirements of the

company and exploits every possible latitude that it can. The prejudice to the adhering party is usually significant.

98. The result is more than simply a contract containing harsh provisions to the detriment of the adhering party - it is objectionable because in most cases the adhering party has no bargaining power to negotiate out of the prejudice resultant from the oppressive terms of the document. Consumers are forced to either take-it-or-leave-it on the terms offered. In countries like South Africa, this take-it-or-leave-it attitude endorsed by the law is wholly inadequate and hugely damaging to the welfare of the country's vulnerable majority.

99. Whilst it is true that the exploitation of historically disadvantaged and currently unsophisticated consumers is not a problem unique to South Africa, the Apartheid legacy is such that the majority of South Africans are either burdened by poverty or else they are illiterate – both factors discriminate economically and socially in such a way that these vulnerable consumers become particularly susceptible to an abuse of power by unscrupulous insurance companies in superior bargaining positions. Other jurisdictions have taken remedial steps – this in fact the international trend and it will be submitted to this Honourable Court that South African contract law can not stand aloof of these developments. See that part of these heads of argument dealing with foreign law.

100. Professor W D Slawson 'Standard-form Contracts and Democratic Control of Lawmaking' (1971) 84 *Harvard Law Review*, 529 at 529 commenting on the American context of the early 1970's estimates that 'standard-form contracts probably account for more than ninety-nine percent of all the contracts made.' Most people, according to Slawson, have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theatre tickets, package receipts, department store charge slips, and gas station credit card purchases are all standard-form

contracts.

101. This is also largely true in the current South African context, and so it becomes apparent just how vulnerable the weakest in our society are to exploitation.

102. The Supreme Court of Appeal seemed to place undue emphasis on the fact that there was no evidence before it that there really was an inequality of bargaining power. It seemed that what was lacking from the papers, according to Cameron JA, was an empirical study that other short-term insurance companies were available to offer better products than the appellant's insurance company in this case (and on less oppressive terms).

103. This emphasis of the Supreme Court of Appeal is misplaced, it is respectfully submitted, because public policy considerations of contractual provisions focus on the clause under scrutiny. In other words: does this particular insurer use a policy which limits the constitutional rights of its clients (who have no sight of the policy, incidentally, until after the contract has been concluded). The offending clause in Sasfin v Beukes (supra) for example, was deemed to be one in violation of public policy because of what it said – the court did not adopt the attitude of the Supreme Court of Appeal in my case and ask whether Doctor Beukes (in that matter) could have contracted on less oppressive terms with another finance company. It looked only at the specific contract between Sasfin and Doctor Beukes and asked whether that particular contract violated public policy. It is submitted that this approach is preferable to the one adopted by Cameron JA in the Supreme Court of Appeal.

104. Besides, it would make no sense to suggest that it is more acceptable for insurers to disregard the constitutional rights of their clients provided that they are the only ones who do so.

105. But there is also another reason why the Supreme Court of Appeal's emphasis is

misplaced - one can argue that standard-form contracts do not represent an abuse of monopoly since if there was a demand for contracts containing 'different' clauses then some entrepreneur would by now have entered the market place to offer such a service. In other words, the counter-argument might be that such contracts do not indicate a monopoly but rather that consumers are simply not prepared to pay a higher premium for less onerous terms in their contracts. This argument may indeed be a credible one in a market place that is perfectly free. But the inequality of society and the disparity of wealth that exists in South Africa render the liberty of all contractants something of a fallacy. There is no evidence to support the argument that the oppressive terms in standard-form contracts are the ones that are competed upon in the market place by competitors.

106. The supplementary affidavit of the appellant's attorney, Rynhart Kruger, confirms that he informally 'shopped around' the market place looking at the services offered to consumers seeking short-term insurance contracts. It seems that even in a highly competitive market where alternatives are available, insurance companies compete only on the terms known better to the lay-consumer and more likely to catch their attention (such as price, premiums and excesses) rather than on the punitive and oppressive terms known mostly to lawyers (like those that limit liability or affect the incidence of the onus, or of prescription). This can probably be explained by the fact that the average consumer is more interested in (and thus more easily influenced by) the well-publicized and better-understood details of the transaction. Issues such as the premium and the excess are the consumer's proximate concern. Also, the average consumer would rarely understand the meaning and effect of a Latin phrase or a phrase couched in legalese – and so there would be little point in trying to lure the market by alleviating the effect of terms and conditions that are not in any event understood. This means that even in a highly competitive industry, such as short-term insurance, the competitors generally impose the same 'legal' terms (as opposed to 'consumer proximate-cause' terms). In this regard see Kevin Hopkins 'Inherent prejudice in standard-form contracts and the evolving idea of private law justice: a

case of democratic capitalist justice versus natural justice' 2003 *Tydskrif van Suid Afrikaanse Reg* 150.

107. Where bargaining power is a fiction (given that these non-proximate clauses are non-negotiable) I submit that a different type of potential power-abuse is prevalent in free market societies (different from the abuse of political power). In South Africa, for example, the abuse of power in the Apartheid era can be attributed to the lack of judicial constraints on the power of Parliament. Enter the constitutional revolution and the hegemony of human rights under the new system of constitutional (as opposed to Parliamentary) sovereignty. All law in South Africa now (including the common law that regulates the enforcement of contracts – and standard-form contracts by implication) must promote the values that underlie the Bill of Rights. Section 39(2) of the Constitution instructs us all to develop the common law where it is non-compliant with these values because of the duty to '…promote the spirit, purport and objects of the Bill of Rights.'

108. The old (pre-constitutional) idea of private law justice (as has always been applied to the adjudication of disputes on insurance policies) can not afford to lag behind. It is submitted that whereas the common law sanctity of contract rule once epitomised contractual justice, it must now also be constitutionally scrutinized against the values that animate the Constitution.

109. It is often the threat of some evil that induces the weak and vulnerable to contract on terms which, but for necessity, they would never have accepted. This is not, however, the cause for subjecting such contracts to constitutional scrutiny, for it is not the abuse of power *per se* that renders the agreement unconstitutional. The abuse of power is simply a means of subjecting the weak to the will of the strong in such a way that the former is either forced to consent to the infringement of a fundamental right or else forced to waive a fundamental right altogether.

110. It is respectfully submitted that no matter how highly we value the sanctity of

contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the effect of unreasonably limiting the other party's constitutional rights.

111. The Bill of Rights is a guarantee to all South Africans that their fundamental rights will be protected against infringement. The courts can simply not ignore the reality that unequal power relations also exist in the private domain. And sometimes the power wielded by large banks and insurance companies is every bit as oppressive as that wielded by the state. One of the objectives of our Bill of Rights, this court has previously held, is to protect the fundamental rights of all of our people – that objective would not be met if large corporations, like Lloyds of London, could disregard the provisions of our Constitution when transacting with people who need short-term insurance.

112. For a very interesting (and helpful) analysis of the status of contracts geneally and in particular standard-form contracts in the new constitutional era, see Deeksha Bhana & Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' 122 *South African Law Journal* 865.

FOREIGN LAW

(i) The United States of America

113. Fifty one of the fifty two states in the United States of America have adopted the Uniform Commercial Code (" the UCC"). The full text of the UCC is available at: http://www.law.cornell.edu/ucc/2/article2.htm#s2-302. Section 2-302 of the UCC states that:

> Unconscionable contract or clause.

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

114. The UCC seems to take account of both procedural and substantive unconscionability. In Craig Comb and Another v PayPal C-02-1227 JF (PVT): the United States district court for the Northern District of California held that:

> Unconscionability has both procedural and substantive components. The procedural component is satisfied by the existence of unequal bargaining positions and hidden terms common in the context of adhesion contracts [standard-form contracts]. The substantive component is satisfied by overly harsh or one-sided results that "shock the conscience." The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be. A claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose, and effect.

115. At common law, contractual terms which limit the time for instituting legal proceedings are binding only if the stipulated time is reasonable. See B. H. Glenn 'Validity of contractual time period, shorter than statute of limitations, for bringing action' 6 *A.L.R.*3d 1197.

(ii) Canada

116. Canadian courts also recognise the principle of unequal bargaining power and the doctrine of unconscionability. See Harry v Kreutzinger (1978) 9 B.C.L.R 166, 95

D.L.R. (3d) 231 (C.A.).

117. Currently there is no uniform consumer protection legislation relevant to the issue of unfair contracts. It appears that different Canadian Jurisdictions have adopted their own legislation in this regard. In Ontario, the Business Practices Act R.S.O. 1990, c.B. 18, full text available at: http://www.canlii.org/on/laws/ sta/b-18/20050627/whole.html describes contracts which are deemed to be unconscionable and therefore unenforceable, as, for example, those where a "proposed transaction is excessively one sided in favour of someone other than the consumer" (section 2.2v.) or where "the terms and conditions of the proposed transaction are so adverse to the consumer as to be inequitable" (section 2.2vi.).

118. The Saskatchewan Consumer Protection Act S.S. 1996, c. C-30.1, full text available at: http://www.canlii.org/sk/laws/sta/c-30.1/20060213/whole.html, similarly prohibits unfair practices and prohibits "taking advantage of a consumer by including in a consumer agreement terms or conditions which are harsh, oppressive or excessively one sided" (section 6(q)).

119. The Alberta the Fair Tading Act R.S.A. 2000, c. F-2, full text available at: http://www.canlii.org/ab/laws/sta/f-2/20060217/whole.html, provides a list of unfair practices such as the inclusion "in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided" (section 6(3)(c)). The Alberta Law Reform Institute issued a discussion paper in 2003 titled "Standardizing Limitation Periods for Actions on Insurance Contracts, full text available at url: http://www.law.ualberta.ca/alri/pdfs /final_rprts/FR90.pdf. One of the Law Reform Institute's recommendations contained in the discussion paper is that insurance companies should not be able to contractually impose shorter prescription periods in insurance contracts (recommendation 5). The Institute found that:

> [81] The main concern associated with contractual limitation periods shorter than those permitted by statute is that one party may be deprived

> of the right to bring a legitimate claim due to a very short limitation period. This may be less of a problem in a situation where both parties are of equal bargaining power and are similarly sophisticated. In such a situation it may be said that there is no need to depart from the principles of freedom of contract, and if one party wishes to relinquish its right to bring an action within a longer period the state should not interfere. This position is less tenable where one party has little, if any, opportunity to negotiate the terms of a contract.
>
> [82] The insurance contract is a classic example of the party who is in the better bargaining position imposing a detrimental limitation period on the more vulnerable party. An insured is in no position to negotiate the actual terms of the insurance contract; at best, an insured is limited to negotiating the cost of the policy. It is virtually a universal practice throughout the insurance industry to contractually incorporate limitation periods for those types of insurance for which there are no limitation periods in the Insurance Act. The insured cannot simply look for another insurance company who will provide a policy which does not contain limitation periods shorter than those prescribed by the Limitations Act.

120. The Quebec Civil Code full text available at url: http://www.canlii.org/qc/laws/sta/ccq/20060213/whole.html, provides that:

> 1435.… In a consumer contract or a contract of adhesion [standard-form contract] however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer ….
>
> 1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

> An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith….

121. In British Columbia, the Business Practices and Consumer Protection Act SBC 2004, full text available at: http://faculty.law.ubc.ca/biukovic/supplements/businessPAconsumerPA.htm, requires a court to consider all the surrounding circumstances including procedural matters and "the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable" (section 8(3)(e)).

122. Currently, British Columbia is proposing a new Consumer Protection Act which will combine a number of the current consumer protection statutes and will include provisions based on the UK Regulations (the regulations in the United Kingdom are discussed below. The discussion paper for British Columbia has been posted at http://www.bcli.org/pages/projects/unfairterms/Unfair_Contract_Terms_Interim_Rep

(iii) The United Kingdom

123. The concept of inequality of bargaining powers and its impact on contract law was first discussed in the judgment of Lord Denning in the English Court of Appeal decision in Lloyds Bank Ltd. v Bundy [1975] 1 Q.B. 326, [1974] 3 All E.R. 757 (C.A.). Lord Denning described the concept as being one of several recognized exceptions to the general rule that valid contracts are enforceable (effectively 'the sanctity of contract rule) .

124. Under the current dispensation, the Unfair Terms in Consumer Contracts Regulations of 22 July 1999 (Statutory Instrument 1999 N°2083) ("the Regulations"), full text available at: http://www.legislation.hmso.gov.uk, provide that a consumer is not bound by a standard term in a contract if that term is unfair

and they give the Director General of Fair Trading powers to stop the use of unfair standard terms by businesses, if necessary by obtaining a court injunction. A wide range of consumer bodies can also mount a legal challenge to contracts whose terms are unfair.

125. The Regulations define a 'consumer' as any natural person acting outside the course of business. Consequently, the Regulations potentially cover all contracts entered into by private persons as consumers. 'Standard terms' are defined as terms that are devised by companies in advance and not negotiated with individual consumers. While the Regulations therefore do not apply to any term that could be shown to have been individually negotiated, they do apply to any standard terms in the contract (like the time-limitation clauses in issue here).

126. Whether a standard term in a contract will be regarded as unfair depends on the answers to two questions. Firstly, whether the term creates a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer - or, in other words, whether it unduly weights the contract against the consumer and in favour of the company. And secondly, whether that imbalance amounts to a breach of the requirement of good faith. Schedule 2 to the Regulations gives some guidance on what is meant by the `requirement of good faith'. The most important issue to be considered in determining this is the relative bargaining strengths of the consumer and the company.

127. The Courts are tasked with determining whether a term is fair or unfair. In assessing fairness, a court is directed by the Regulations to take account of all the circumstances attending the making of the contract. Also, an 'indicative and illustrative list' of several types of standard contract terms which may be considered unfair is contained in Schedule 3 to the Regulations. This list is not exhaustive and is modelled on the Annex to the EU Directive (which is discussed below) .

128. The effect of a Court finding that a standard term in a contract is unfair is that the consumer will not be bound by that term. The fact that a business will not be able to enforce an unfair term against a consumer does not mean however that the rest of the contract will be unenforceable provided it is capable of continuing to exist without that term.

(iv) The European Union

129. Consumers in the European Union ("the EU") are protected against unfair terms whenever they conclude a contract with a company anywhere in the European Union and the European Economic Area.

130. In terms of the Council Directive 93/13 of 5 April 1993 "on unfair terms in consumer contracts" (published in the Official Journal of the European Communities No. L 95 of 21 April 1993), ("the EU Directive"), full text available at url: europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct01_en.pdf, a contract term is in principle regarded as unfair if it causes a significant imbalance in the party's rights and obligations arising under the contract, to the detriment of the consumer. Article 3 of the EU Directive provides that:

> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

131. Besides the general definition of unfair terms in Article 3, the Annex to the EU Directive contains an indicative and non-exhaustive list of terms normally considered as unfair:

> Terms which have the object or effect of:
>
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

132. In order to protect consumers against the use of unfair terms, the EU Directive obliges the member states to apply appropriate and effective means to prevent the continued use of such terms.

133. The protection provided by the EU Directive concerning unfair terms must be incorporated into the domestic legislation of each member state. Moreover the Member State may reinforce or supplement this protection in the context of its domestic legal order.

(v) Germany

134. The German Bill of Rights has indirect application into the horizontal relationships of its citizens. It is considered to constitute a comprehensive value system and all private law is accordingly interpreted in the spirit of the Bill of Rights. See M Habersack and R Zimmermann 'Legal Change in a codified system: Recent developments in German Suretyship law' (1999) 3 *Edinburgh LR* 272 at 277. In this regard, see the Bürgschaft case, BVerfG 19 October 1993, BVerfGE 89, 214, where the validity of a contract was challenged on the grounds that it was contrary to the spirit of the Grundnorm. The Grundnorm is a fundamental constitutional

principle central to German constitutional jurisprudence. The principle places a high premium on the protection of human dignity, and consequently, all law should reflect due respect for the protection of the dignity of the human person. This is contained in s 1(1) of the German Constitution. In the Bürgschaft case, the German Constitutional Court upheld the argument that freedom of contract should not be able to obscure a misuse of power by market-controlling enterprises against subordinate contractual parties. The Court went on to say that, in cases where a structural imbalance of bargaining power leads to a contract which is exceptionally onerous for the weaker party, the civil courts are obliged to intervene. A failure to do so would violate the spirit of the Grundnorm. It was the inequality of the parties' contractual power that contributed most to the court's decision to invoke the provisions of the Grundnorm. For a discussion on the Bürgschaft case see HA Strydom 'Freedom of Contract and Constitutional Rights: A noteworthy decision by the German Constitutional Court' 1995 THRHR 58 at 696. See also Julia Braun, 'Policing Standard form Contracts in Germany and South Africa: A Comparison', *University of Cape Town, unpublished minor dissertation* (2006), for a very insightful discussion on the impact of the Constitution on the law of contract in South Africa and Germany.

135. According to Habersack and Zimmermann, the German Constitutional value system has been incorporated into specific provisions of the Bürgerliches Gesetzbuch, the German Civil Code ("the BGB"). Full text is available at: lawspace.law.uct.ac.za:8080/ dspace/bitstream/2165/242/1/BraunJ_2005.pdf

136. According to the BGB, standard terms and conditions do not automatically form part of a contract. Section 305(2) provides that, in order to be valid and enforceable, standard-form terms and conditions must be incorporated into the contract in the following manner: firstly, the person proposing the contract must expressly draw the consumer's attention to any standard terms and conditions applicable to the contract. Secondly, the consumer must be given an opportunity to review them and thirdly, the consumer must agree that the standard term and

condition will apply to the contract.

137. The BGB provides for three different types of regulation for standard form terms: automatic prohibition and invalidation of specifically listed terms (section 309); possible prohibition of specifically listed terms subject to a reasonableness test (section 308); and a general prohibition of standard terms which are unreasonable and contrary to the requirements of good faith, this is the case where, for example, the customer's fundamental rights are limited or excluded (section 307).

(vi) Australia

138. In Australia, consumers are protected from unfair contracts by the doctrine of 'unconscionable conduct' at common law as well as the broader protection afforded by the Commonwealth Trade Practices Act 1974 ("the TPA"). Case law shows that there are three factors that need to be present for a court to intervene in a contractual situation on the basis of unconscionable conduct. Firstly, one party was at a disadvantage in relation to the other party and the latter party knew this; secondly the other party exploited or took advantage of the situation; and thirdly the resulting contract is unconscionable or oppressive. Where a Court finds that there has been unconscionable dealing, the Court is able to grant relief through its equitable jurisdiction. In doing so, the Court balances the sanctity of contract rule against the need to protect the weak in cases of inequality of bargaining power. The common law doctrine of 'unconscionability' does not address substantive issues, so that the doctrine has no impact where the terms are themselves unfair but there is no associated procedural unfairness.

139. Section 51AB of the TPA prohibits conduct which is unconscionable in relation to certain defined situations. In deciding whether a contract is unconscionable, the court may have regard to matters such as the relative bargaining power of the parties and whether the consumer could have acquired equivalent goods or

services from another party. The statutory protection is thus broader in the sense that it has regard to substantive unfairness. Under the TPA a court can make any order it deems fit including an order avoiding or refusing to enforce a contract in total or in part.

140. Australia is presently considering a reform of its current legal regime governing unfair contracts. The proposal is that it should adopt statutory provisions similar to those contained in the Regulations in the United Kingdom.

141. See the discussion paper by the Standing Committee of Officials of Consumer Affairs, 'Unfair Contract Terms' (2004), a full copy of which is available at url: http://www.fairtrading.qld.gov.au /oft/oftweb.nsf/web+pages/CD456F7C38F523684A256E240014EF7C?OpenDocument&L1=Publications.

COSTS

142. It is evident from the record that the appellant was successful in the Transvaal Provincial Division of the High Court but unsuccessful, after the respondent appealed the TPD's decision to the Supreme Court of Appeal. The order of the Supreme Court of Appeal included an order for costs (including the costs of two counsel). The appellant in this matter sought leave to appeal from this honourable court against the entire judgment of the Supreme Court of Appeal including the order as to costs.

143. Should this honourable court find in favour of the appellant (by effectively deciding that time limitation clauses such as the one contained in the Lloyd's policy in the instant matter are unenforceable on account of the fact that they violate public policy for constitutional reasons) then it is respectfully submitted that it would appropriate to award costs to the appellant.

144. Should the court, however, find for the respondent (and effectively uphold the decision in the Supreme Court of Appeal) then it is the appellant's submission that he should not be penalised with an adverse costs order in respect of the application for leave to appeal to this honourable court given that:

a) the Constitutional Court has in the past indicated that constitutional litigants with a genuine claim should not be deterred from approaching the court by the threat of an adverse costs order where a real constitutional issue is implicated; and

b) the issues raised by the appellant in this matter have been raised in good faith and are not vexatious; and

c) the issues involved in this matter are of considerable importance to all parties to short-term insurance policies; and

d) insured parties such as the appellant are all victims of the oppressive term in a policy under scrutiny and it would seem unfair to burden the appellant in this matter with the costs of attempting to liberate potentially millions of people from exploitation.

RELIEF SOUGHT FROM THIS HONOURABLE COURT

145. The appellant humbly requests an order in the following terms:

a) that the entire judgment and order (including the order as to costs) of the Supreme Court of Appeal delivered on 30 November 2005 under case number 569/04, by his Lordship Mr Justice Cameron, be reversed;

b) time limitation clauses in contracts do constitute a limitation on the right of access to court entrenched in section 34 of the Constitution;

c) whether or not they violate public policy depends on whether or not the contracting party seeking to limit the constitutional right can justify the presence of the clause in the agreement;

d) in the instant matter insufficient reason exists for short-term insurers to justify a 90-day time limitation clause in their policies;

e) such clauses are, for constitutional reasons, in violation of public policy and unenforceable;

f) the clause that is the subject of this particular dispute is unenforceable;;

g) costs;

h) further and/or alternative relief.

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