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INDEMNITY CLAUSES AND THE CONSUMER PROTECTION ACT

Many agreements, ranging from building contracts to hospital admission documents, include indemnity clauses. These clauses seek to limit the liability of suppliers wherever the supplier may cause damages, personally and/or via its employees.

While it has always been an established part of our law that one cannot be indemnified for gross negligence or fraud the Consumer Protection Act, Act 68 of 200 ("CPA") has gone a long way in bringing in extra checks and balances wherever a consumer's right to claim against a supplier may be infringed.

Section 49 of the CPA lists provisions that must be specifically brought to a consumer's attention, namely all provisions that:

- limit, in any way, the risk or liability of the supplier or any other person, or
- purports to constitute an assumption of risk or liability by the consumer, or
- purports to impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or
- purports to be an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer

In amplification of the above the CPA further protects a consumer by the incorporation of:

- Section 22 which requires information to be in a plain and understandable language;
- Section 44(3)(a) provides that a consumer agreement is "presumed" to be unfair if it has the purpose or effect of "excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier
- Section 58 which requires a supplier to inform a consumer of the intrinsic risk;
- Section 49(5) which entitled a consumer an adequate opportunity to receive and comprehend the provision or notice;
- Section 48(2) provides that unfair, unreasonable or unjust terms include those which are so adverse to the consumer as to be inequitable or where the term is excessively one-sided in favour of any person other than the consumer.

To top it all off it is unlawful and of no force and effect if there is a term in an agreement in which a person abandons his/her rights as set out in the CPA.

Should you, as a supplier wish to have a valid indemnity clause in place, the clause will have to be very carefully formulated and all the above prerequisites conformed to with the necessary proof.

From a consumer point of view, one should thoroughly read agreements and be very weary of all parts of an agreement which you are specifically requested to initial/sign as they may be indicative of an indemnity clause that you need to be aware of.



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