THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 806/2024

In the matter between:

TOURVEST HOLDINGS (PTY) LTD **APPELLANT**

and

ANU REKHA MURTI **RESPONDENT**

Neutral citation: *Tourvest Holdings (Pty) Ltd v Murti* (806/2024) [2026] ZASCA 8 (27 January 2026)

Coram: MEYER, KATHREE-SETILOANE and KOEN JJA and BASSON and CHILI AJJA

Heard: 14 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 27 January 2026

Summary: Delict – claim for damages for bodily injuries suffered when respondent fell from a moving safari truck – appellant relying on disclaimers in brochure sent to respondent's life partner before safari commenced and indemnity signed by respondent's partner – Consumer Protection Act 68 of 2008 – whether complied with – whether partner authorised to bind respondent to disclaimers –

whether disclaimers, properly interpreted, exclude liability – ticket cases and *quasi*-mutual assent – whether appellant exempt from delictual liability.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Kuny J, sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Koen JA (Meyer and Kathree-Setiloane JJA and Basson and Chili AJJA concurring):

Introduction

[1] On 17 November 2018, the respondent, Ms Anu Rekha Murti (Ms Murti), was travelling in a safari truck[1] in Botswana, as part of a Southern African safari tour arranged by the appellant, Tourvest Holdings (Pty) Ltd, trading as Drifters Adventours (Drifters). The truck had been converted to transport 17 passengers and its driver, with large side windows to facilitate viewing by its occupants. It is fitted, in the rear of the passenger compartment of the truck, with private lockers to secure the belongings of passengers.

[2] Drifters promotes the lockers as being accessible to passengers, even while the truck is being driven.[2] While the truck was in motion, Ms Murti alighted from

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[1] The safari truck is a Toyota Hino truck fitted with seating for passengers and driven by a registered professional guide.

[2] On, *inter alia*, the internet website of Drifters, prospective travellers are advised that '[e]ach Drifters Travellers has their own locker on our truck which is accessible even while driving.'

her seat to access her locker. She lost her balance and fell against a window. The window fell out of its frame. She fell through the opening on to the tar road and sustained various injuries.

[3] In the subsequent action for delictual damages against Drifters, in the Gauteng Division of the High Court (the high court), Ms Murti alleged that her injuries were caused by the negligence of Drifters and its employee, the driver of the truck, Mr Innocent Christopher Mathabela (Mr Mathabela). She alleged, as regards Drifters, that it failed to maintain the truck and ensure that the glass in the window was secure, failed to warn passengers of the dangers of moving from their seats to their lockers whilst the truck was in motion, and misrepresented that it was safe to do so. As regards Mr Mathabela, she alleged that while acting within the course and scope of his employment, he drove at an excessive speed and/or swerved without due regard to her being out of her seat and proceeding towards the lockers, and that he failed to instruct her not to leave her seat whilst the truck was in motion and her first requesting him to stop.

[4] Drifters pleaded, relying on two disclaimers, that it had contracted out of liability for Ms Murti's damages. The high court ordered that this issue be determined separately from the other issues in the trial. It found that Ms Murti was not bound by the terms of the disclaimers and also ordered Drifters to pay her costs relating to the determination of the separated issue. Drifters appeals against the order with the leave of the high court.

Background

[5] Ms Murti and her life partner, Mr Brendan Luke Hannon (Mr Hannon), live in Australia. Mr Hannon is a businessman who owns and operates three resorts, which are part of the Beachcomber group, in Fiji. He is therefore well versed with

the hospitality, travel and tourism industry. Prior to her accident, Ms Murti worked in marketing for the Beachcomber group.

[6] On 18 February 2018, Mr Hannon arranged a safari trip to southern Africa online through a travel agent, Destination International Holidays (DIH) in Australia. Mr Hannon made these arrangements without the knowledge of Ms Murti, as a surprise gift, to celebrate her birthday. The safari would commence in Cape Town, and proceed to Namibia, Botswana, Zimbabwe and conclude in Johannesburg.

[7] Following his initial online enquiry, Mr Hannon received passenger booking forms and a draft itinerary from DIH. The conditions attached to the passenger booking forms indicated: that DIH did not itself provide tours but acted as an agent for service providers; that products and services are provided on the service providers' own terms and conditions; and that these may include limitations and exclusions of liability. DIH disclaimed liability on its part for any acts, omissions, or defaults, whether negligent or otherwise, of any service provider.

[8] Mr Hannon became aware that the tour was operated by Drifters, when he received an email to that effect which required payment, which he made directly to Drifters. A Drifter/Tourvest brochure (the brochure) and an itinerary (the itinerary) were attached to the email which he received.

[9] The brochure commences with a heading, 'General Info and Important Details Regarding your tour' which was said to contain '. . . [a]ll the necessary information you need to know before travelling . . .'. Paragraph 9 thereof, under the heading 'Insurance', records:

'It is compulsory that all passengers make arrangements for adequate travel insurance to financially safeguard against unforeseen circumstances. If you need further information please

do not hesitate to contact us. Drifters do not accept responsibility for any loss, injury, damage, accident, fatality, delay or inconvenience experienced whilst on tour. *You will be required to complete and sign a full indemnity prior to your tour departure*.' (Emphasis added.)

[10] The itinerary, under a heading, 'Important Information', refers to the necessity for a sleeping bag, towel and pillow, and a valid passport to enter Namibia, Botswana and Zimbabwe. It records that before departure, clients would be required to enter into an agreement pertaining to Drifters' booking conditions and general information. Furthermore, clients are required to have their own comprehensive travel insurance.

[11] Mr Hannon could not remember whether he read paragraph 9 of the brochure, relating to insurance. Ms Murti had access to the brochure and itinerary only approximately one week prior to them departing from Australia, after she was told about the surprise holiday. She focused on the personal items, such as sleeping bags, towels, etc which she needed to take on the trip. She could not remember reading paragraph 9, although she might have done so.

[12] Ms Murti and Mr Hannon arrived in Cape Town on 3 November 2018 and proceeded to the Greenfire Lodge where they were to stay. It could not accommodate them, so they were directed to alternative accommodation nearby. They were told to later wait at a particular stop sign where the truck would pick them up for an excursion to Table Mountain. They followed these instructions and travelled to Table Mountain. However, shortly after their arrival they decided to return by taxi to their accommodation to rest.

[13] On 4 November 2018, they walked to the Greenfire Lodge, from where they later proceeded, in the truck, with other participants, on a tour of the Cape Peninsula. On 5 November 2018, they departed on the safari from Cape Town.

[14] It is not in dispute that Mr Hannon, at a stage, completed an indemnity form by inserting Ms Murti's details and appending his signature thereto. Ms Murti denies that she had any knowledge of this form, or of Mr Hannon completing and signing it, until she was confronted with it after the action in the high court had commenced, and the contents of the form were invoked as exempting Drifters from liability.

[15] The form, below the logo, 'Drifters Adventours', is headed 'Tour Registration, Disclaimer and Indemnity'. Provision is made for personal particulars, including medical insurance details and emergency contact numbers to be inserted. It also provides for the signature of the tour participant, above the following words:

'I ACKNOWLEDGE THAT I FULLY UNDERSTAND AND ACCEPT THE CONDITIONS AND GENERAL INFORMATION AS SET OUT BY DRIFTERS ON THEIR WEBSITE AND IN THEIR BROCHURE (A COPY OF WHICH I HAVE BEEN PROVIDED WITH) AND THE DISCLAIMER AND INDEMNITY PRINTED ON THE OPPOSITE SIDE OF THIS FORM.'

[16] The following appears on the reverse side of the form:

'17) DISCLAIMER

I acknowledge that during this tour I (and my dependents) will be exposed to the risks associated with Adventure Travel and elements inherent in the natural environment, as well as risks associated with long distance road travel and dangerous road conditions. In participating in this tour, I acknowledge that I (and my dependents) do so entirely at our own risk. I hereby waive any claims of whatsoever nature and howsoever arising which I or any of my dependents may have against Drifters or any third party service provider to this Drifters tour, its members, employees or representatives (collectively referred to as ''Drifters''), in respect of any damages or loss incurred or injury or death which may occur during this tour.

18) INDEMNITY

I hereby indemnify Drifters against all and any claims and liability of whatsoever nature arising from my (or my dependents) participation in this tour including participation in any activities

whilst on this tour. I agree that this indemnity will be binding on, not only myself, but also on my successors in title, my dependents, executors, administrators or assignees.

19) ACCEPTANCE

This contract between Drifters and the client will be deemed to be the only contract between Drifters and the client. The place and conclusion of contract will always be taken as South Africa and any disputes, claims, or actions brought against Drifters can only be made under South African jurisdiction and the parties agree to submit to the non-exclusive jurisdiction of the South African Courts.'

The disclaimers in the high court

[17] The high court concluded that Drifters was not exempted from liability by reason of the disclaimers in paragraph 9 of the brochure (the first disclaimer) or paragraph 17 of the indemnity form (the second disclaimer). Specifically, it held that the purported exclusion of liability in the first disclaimer was of such a general and unspecified nature that it could not, on its own, absolve Drifters of negligence of the kind alleged in the particulars of claim. As regards the second disclaimer, it concluded that Mr Hannon was not authorised to conclude the indemnity on behalf of Ms Murti and that she was otherwise also not bound by it.

Drifters' contentions

[18] Drifters argues generally, with reliance on *Inter-Continental Finance and Leasing Corporation (Pty) Limited v Stands 56 and 57 Industria Limited and Another* (*Inter-Continental*),[3] that '[t]he principles of agency recognise that the authority of one person to represent and bind another, may be express, implied or ostensible'. Hence, 'A is bound by an agreement purportedly entered into on [her] behalf by B with C, if B had authority from A to enter into that agreement on A's behalf, or if A is precluded from denying such authority'.[4]

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[3] *Inter-Continental Finance and Leasing Corporation (Pty) Limited v Stands 56 and 57 Industria Limited and Another* 1979 (3) SA 740 (W) (*Inter-Continental*).

[4] Ibid at 748E-F.

[19] It contends that Ms Murti had agreed to exempt it from liability in terms of the first disclaimer: by Mr Hannon, on her behalf having contracted and agreed when concluding the agreement for the tour whilst still in Australia, that she would be bound by the terms of the first disclaimer; alternatively that being aware that exclusionary provisions are customary in agreements of this nature, she had impliedly authorised him to bind her to the terms thereof; that she became aware or should have become aware of the first disclaimer when reading the brochure and was bound by its terms; that as she reasonably should have become aware of the terms of the first disclaimer when she read the brochure, and as with the so-called ticket cases, when departing on the tour, she was bound by it, and induced the belief with Drifters that she had agreed to be bound by it. It relies on *quasi*- mutual assent.

[20] In respect of the second disclaimer, Drifters argues that: Ms Murti had expressly authorised Mr Hannon to bind her to the contents of the indemnity form which he signed; alternatively, that he was impliedly authorised to do so as he had concluded everything else regarding the safari on her behalf, that is, he had organised everything for the tour, up to and including signing the form on her behalf, consistent with him acting as her agent; at no point did she question or object to him acting on her behalf; accordingly, she agreed to the exemption clause; that she reasonably should have known that she was to enter into an agreement regulating liability and wanting to go on the tour, she would agree thereto, whatever the terms may be; alternatively that she had conducted herself in a manner that induced the belief with Drifters that she had agreed to be bound by their disclaimer. Drifters further maintains it had done what was reasonably necessary to bring the disclaimers to Ms Murti's notice and that she was accordingly bound, according to the principles of *quasi*-mutual assent.

[21] As regards its contention that Ms Murti had agreed to the disclaimers, Drifters specifically relies on *Durban's Water Wonderland (Pty) Ltd v Botha and Another* (*Durban's Water Wonderland*)[5] and *Reyneke v Intercape Ferreira Mainliner (Pty) Ltd* (*Reyneke*),[6] arguing that by proceeding with the tour, Ms Murti's conduct was analogous to the plaintiffs in those cases and that it was reasonable for Drifters to assume her assent to the disclaimers. It contends that the high court fundamentally misdirected itself in not reaching one or more of the above conclusions.

[22] Finally, Drifters contends, with reliance on *Barkhuizen v Napier* (*Barkhuizen*),[7] that Ms Murti has not proved: either that the disclaimers are objectively unreasonable; or that the enforcement of the disclaimer will cause any injustice.

Discussion

[23] It is an established principle of our law that a person may contractually agree to limit her right to claim for a loss caused by another.[8] Drifters bears the onus of proving the conclusion of such a contract and the terms thereof.[9] The standard of

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[5] In *Durban's Water Wonderland (Pty) Ltd v Botha and Another* [1999] 1 All SA 411 (A); 1999 (1) SA 982 (SCA) 991 (*Durban's Water Wonderland*), the defendant was excluded from liability, for the injuries sustained by a child at its amusement park, due to a disclaimer contained in a notice displayed on the windows of the ticket offices in the amusement park. This Court found that the disclaimer was incorporated into the contract governing the use of the park's amenities.

[6] In *Reyneke v Intercape Ferreira Mainliner (Pty) Ltd* (108/2012) [2013] ZAECGHC 47 (23 May 2013) (*Reyneke*) the plaintiff sued for injuries sustained in a bus accident, but the bus company successfully relied upon an exemption or indemnity clause found in a ticket purchased on the plaintiff's behalf by her son.

[7] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*). In this matter, the constitutionality of a time-bar clause in a short-term insurance policy was challenged. The clause in question was to the effect that if an insured does not issue summons within 90 days of repudiating the claim, then the insurer will be released from liability. Ngcobo J, writing for the majority of the Constitutional Court, found that the clause was not unconstitutional and did not limit the right to access to court.

[8] *First National Bank of SA limited v Rosenblum and Another* (SCA) [2001] 4 All SA 355 (A); 2001 (4) SA 189 (*Rosenblum*) para 6; J L Van Dorsten 'The Nature of a Contract and Exemption Clauses' (1986) 49(2) *THRHR* 189 at 194.

[9] In *Drifters Adventure Tours CC v Hircock* [2007] 1 All SA 133 (SCA); 2007 (2) SA 83 (SCA) (*Drifters Adventure Tours*), this Court reiterated the position pronounced in *Durban's Water Wonderland*. It is different where a plaintiff sues in contract. See *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 762E-767C.

proof is on a balance of probabilities. Whether a valid contractual exclusion was concluded depends on the particular facts of each case.

[24] A disclaimer potentially exempting a defendant from liability may be included in a written document provided to the participant about to embark upon an activity for her to sign; or to be signed by her agent; or appear on a ticket or document or be displayed as to reasonably come to her attention. Assent to the terms thereof may take a number of forms: actual consensus where the participant reads and accepts the terms;[10] or tacit consensus by inference, where a participant has seen the notice or document and realised that it contained conditions relating to the activity but did not bother to read it, on the basis that she agreed to be bound by its terms, whatever they may have been;[11] or, where the participant had not actually seen the notice or document, the defendant was reasonably entitled to assume from her conduct that she had assented to the terms of the exemption and was prepared to be bound thereby, without having read it[12] (*quasi*-mutual assent).[13]

[25] Whether the disclaimers were actually known and assented to by Ms Murti and authorised, is largely an issue of credibility. Whether it is established by inference, to have reasonably came to her knowledge and that she thereafter conducted herself in a manner that induced the belief that she had authorised the disclaimers, thereby tacitly having authorised Mr Hannon to bind her to the disclaimers; or that she conducted herself in a manner consistent only with her considering herself bound by it, raises, as a preliminary issue, whether the

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[10] *Durban's Water Wonderland* at 983J-984A; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ).
[11] *George Fairmead Hotel (Pty) Ltd* 1958 (2) SA 465 (A) (*George*); *Central South African Railways v James* 1908 TS 221 (*Central SA Railways*) at 226. Cited in *Durban's Water Wonderland* at 991E.
[12] *Durban's Water Wonderland* at 991G-H.
[13] *Smith v Hughes* (1871) LR QB 597 at 607. Quoted in *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) (*Sonap Petroleum*) at 293G-H to the following effect:
'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

disclaimers were displayed with sufficient prominence to have reasonably come to her notice. These two aspects are considered seriatim under the subheadings of actual authority and the adequacy of the notification of the disclaimers.

Actual knowledge and authority

[26] As regards the first disclaimer, there was nothing to gainsay the evidence of Ms Murti that she could not specifically recall having read it. As regards the second disclaimer, there is a dispute as to when the indemnity form was completed, and whether she authorised the conclusion thereof, which required to be resolved.

[27] Ms Murti testified that: she did not sign the form; she was not aware of the existence of the form until after she had been injured and the action for compensation had commenced; the form was signed by Mr Hannon without her knowledge on 4 November 2018; and she had not authorised its conclusion. This evidence was corroborated by Mr Hannon.

[28] The evidence of Mr Mathabela, on the other hand, was that Ms Murti had completed and signed the form and returned it to him on 3 November 2018, before they departed and that she therefore knew its terms and agreed thereto. Which of the mutually destructive versions of Ms Murti and Mr Mathabela should prevail, depends on an assessment of the respective credibility of the witnesses of the two parties weighed against the probabilities.

[29] After a thorough analysis, correctly applying the test in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*,[14] the high court accepted the evidence of Ms Murti. It rejected the evidence of Mr Mathabela as improbable. It did so, for amongst other reasons, that the dates of signature inserted on the

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[14] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.

indemnity forms, varied amongst the various participants in the tour. The high court correctly found the suggestion that so many of the participants would inadvertently have inserted the incorrect date on their forms, if the forms were handed out, signed and collected on 3 November 2018, as Mr Mathabela contended, to be improbable. It is more probable that the dates varied because the indemnity forms and the signatures thereto were not all procured on 3 November 2018.

[30] Further, no one testified in corroboration of Mr Mathabela's evidence that after having allegedly collected the signed indemnity forms on 3 November 2018, he handed them to the Greenfire Lodge manager whereafter they were scanned to the head office. That evidence in electronic format, if true, would have been readily available. It was, however, not adduced and an adverse inference must be drawn from that omission.

[31] The high court correctly rejected the version of Mr Mathabela, that all the indemnity forms were signed and obtained from all the participants on 3 November 2018, finding it neither credible nor reliable. These factual findings are also consistent with Drifters' allegation in the plea, that the second disclaimer was completed on 4 November 2018.

[32] It is trite that factual findings by a trial court are presumed to be correct and are for good reasons not easily overturned, unless shown to be clearly wrong.[15] The high court had the benefit of observing the demeanour of the witnesses. There is no reason to reject its factual findings.

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[15] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706. See also *Tofa v S* (20133/14) [2015] ZASCA 26 (20 March 2015) para 8. Quoting *S v Francis* 1991 (1) SACR 198 (SCA) at 204E-D.

[33] Having rejected Mr Mathabela's evidence and there being no reason to reject the evidence of Ms Murti, which was accepted, the factual position correctly found to be established was: Mr Mathabela handed out the indemnity form on 4 November 2018, prior to the departure on the Peninsula tour, as Mr Hannon testified; Ms Murti was not present when the form was handed to Mr Hannon; Mr Hannon signed two forms, one for himself and the other for Ms Murti; and Ms Murti was not aware that Mr Hannon had signed any form, leave aside one containing a contractual exclusion of liability on her behalf.

[34] There is no credible evidence that Ms Murti was even aware of the existence of the indemnity form. Absent that knowledge, there would be no reason for her to have agreed to Mr Hannon signing any such form on her behalf. There is no evidence to gainsay their denial that Ms Murti had authorised Mr Hannon to sign the form and that she was unaware of the form and its contents. The high court's finding that Mr Hannon signed the form without her authority cannot be faulted. There is accordingly no scope for any finding of actual authority.

The adequacy of the notification of the disclaimers and the provisions of the Consumer Protection Act 68 of 2008 (the CPA)

[35] Absent actual authority, whether a disclaimer contractually exempts a wrongdoer from liability, based on the injured party having tacitly agreed to the contractual exemption contained therein, or being deemed to have agreed thereto based on ostensible authority, requires, at common law, that the disclaimer must have been displayed with sufficient prominence to reasonably come to the attention of the party against whom it is sought to be enforced. Whether the disclaimer was so displayed involves considerations of fact and is a conclusion of law.

[36] In addition to the notification required at common law, the legislature, in the CPA, has prescribed notification requirements, supplementing what the common

law provides, for the protection of consumers.[16] Ms Murti invoked the provisions of the CPA. She contends that the alleged notification to her, of the disclaimers, was inadequate. To that Drifters responds that the provisions of the CPA do not apply as the booking and payment for the tour occurred in Australia, and there was therefore no transaction, as defined in the CPA, in South Africa. It argues that even if the CPA does apply, the display of the disclaimers complied with the provisions of s 49 of the CPA. This is because they were communicated as early as three weeks before the tour began, in respect of the first disclaimer, and immediately before the tour began, in respect of the second disclaimer.[17]

[37] The CPA applies: to every transaction[18] occurring within the Republic; the promotion of any goods or services and the supply of any goods or services, within the Republic, unless not reasonably subject to a transaction to which the CPA applies, or from which it has been exempted.[19] Drifters argues: that a transaction,

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[16] '[C]onsumer' as defined in s 1of the CPA, 'in respect of any particular goods or services, means-
(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this act by section 5(2) or in terms of section 5(3);
(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services;
(d) a franchisee in terms of a franchise agreement . . .'
'[S]upplier' means 'a person who markets any goods or services'.

[17] The latter contention in respect of the second disclaimer is not supported by the evidence, as set out above.

[18] '[T]ransaction' as defined in s 1 of the CPA, means-
(a) in respect of a person acting in the ordinary course of business-
(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
(iii) the performance by, or at the discretion of that person of any services for or at the discretion of a consumer for consideration; or
(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph *(a)*.

[19] Section 5(1) of the CPA provides:
'(1) This Act applies to-
(a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
(b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless-
(i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph *(a)*; or
(ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);

as defined, requires an agreement, supply or performance, for consideration; that the transaction in this instance was concluded between Mr Hannon and DIH in Australia; that no purchase of services and no transaction was concluded between Drifters and Ms Murti; that Ms Murti paid no consideration to Drifters; and that she conceded that no contract for the supply of services existed between them. It denies that the disclaimer was part of any consumer agreement concluded in South Africa, contending that the brochure contained the 'notice', and that its contents was conveyed to Ms Murti in Australia, after the agreement between Mr Hannon and Drifters had been concluded.

[38] These contentions are wrong. The agreement concluded by Mr Hannon with Drifters conferred the benefit of a safari tour, which Mr Hannon had purchased, upon Ms Murti as a third person extraneous to that agreement. Once she accepts the benefits of the tour agreement concluded by Mr Hannon, Drifters would become obliged to supply the service of the safari tour to her as a third-party beneficiary of the agreement.

[39] On the evidence Drifters became obliged to deliver on their obligations and Ms Murti became entitled to expect the benefits, when she presented herself at the start of the tour in Cape Town,[20] on 3 December 2018, The agreement entitling her to participate in, enjoy the benefits stipulated in the agreement in her favour, and enforce the tour against Drifters, was established in Cape Town.

[40] It is significant also that the indemnity agreement, foreshadowed in the brochure as an important document to be entered into to govern any liability,

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(c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and

(d) goods that are supplied in terms of the transaction that is exempt from the application of this Act but only to the extent provided for in subsection (5).

[20] There was no evidence to suggest the contrary, such as for example that the tour would commence upon embarkation on the aeroplane in Australia.

provided in paragraph 19 under the heading 'Acceptance', that the place and conclusion of the contract with the tour participant would always be taken to be South Africa. Any disputes, claims or actions could only be made under the South African jurisdiction. The first disclaimer, if binding on Ms Murti, could have only been incorporated into the *vinculum juris*, established between her and Drifters, when the tour commenced in South Africa.

[41] Furthermore, the first disclaimer would be part of a consumer agreement.[21] No consideration was payable by Ms Murti for the supply of services in terms of that transaction as payment had been made by Mr Hannon. It, however, remained a transaction in which, in exchange for consideration, Drifters would render the services of a safari tour. It was not a gratuitous agreement. The provisions of the CPA accordingly apply.

[42] Section 49[22] of the CPA provides that any notice to a consumer of a provision in a consumer agreement that purports to limit the risk or liability of a

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[21] Section 1 of the CPA provides that 'consumer agreement' means 'an agreement between a supplier and a consumer other than a franchise agreement'.

[22] Section 49 provides as follows:

'**Notice required for certain terms and conditions**

(1) Any notice to consumers or provision of a consumer agreement that purports to-
   (a) limit in any way the risk or liability of the supplier or any other person;
   (b) constitute an assumption of risk or liability by the consumer;
   (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
   (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk-
   (a) of an unusual character or nature;
   (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
   (c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer-
   (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
   (b) before the earlier of the time at which the consumer-

supplier: must be written in plain language; the fact, nature and effect of the provision must be drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer having regard to the circumstances; and the consumer must be given an adequate opportunity in the circumstances to comprehend the provision.

[43] Section 52(4)[23] of the CPA provides that if a term of an agreement fails to satisfy any requirement in section 49, a court may declare the notice void, or if it is reasonable to do so, declare the entire agreement or provision void, as from the date that it purportedly took effect. It may also sever the provision or notice from the agreement or declare it to have no force or effect with respect to the transaction.

[44] Section 58[24] of the CPA provides that the supplier of any activity or facility that, *inter alia*, is subject to any risk of an unusual character or nature, or a risk that

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(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).'

[23] Section 52(4) provides:
'If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may-

(a) make an order-
(i) in the case of a provision or notice that is void in terms of any provision of this Act-
(*aa*) severing any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or
(*bb*) declaring the entire agreement, provision or notice void as from the date that it purportedly took effect; or
(ii) in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; and

(b) make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.'

[24] Section 58(1) provides:
'**Warning concerning fact and nature of risks**
(1) The supplier of any activity or facility that is subject to any-
(a) risk of an unusual character or nature;
(b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
(c) risk that could result in serious injury or death,

could result in serious injury or death, must specifically draw the fact, nature and potential effect of that risk to the attention of consumers. It must do so in a form and manner that meets the standards set out in s 49.

[45] On Drifters' own version, the tour would involve activities with a risk of an unusual character or nature that could result in serious injury or death. Drifters expressly referenced these dangers in the second disclaimer. It was accordingly required to comply with the CPA. It however failed to do so.

[46] The provisions of the CPA apart, even at common law the first disclaimer was not displayed with sufficient prominence. The heading to it indicates to the reasonable reader that it deals with 'Insurance'. Ms Murti could not reasonably have expected it to contain a material provision absolving Drifters from all liability. She read the brochure with an interest in what she had to pack to take with her, and not that she was exempting Drifters from any delictual liability that may arise. That was not an unreasonable approach for her to have adopted. It cannot be said that under the heading of insurance, she was given reasonable notice that she was entering into an agreement exempting Drifters from all liability.

[47] Even if Ms Murti should have read the first disclaimer with more attention to detail, the first disclaimer envisages that the issue of an exclusion of liability was yet to be dealt with by the completion of a full indemnity prior to the tour departing. Drifters too contemplated that the exclusion of liability and indemnity, was yet to be concluded. Consistent with that approach, the forms containing the second indemnity were handed out on 4 November 2018. It is that disclaimer, not the first disclaimer, which Drifters intended to apply.

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must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.'

[48] Drifters failed, at a preliminary level, to establish that the provisions of the first disclaimer ought reasonably to have come to the attention of Ms Murti. The second disclaimer had not come to her attention at all. The suggestion that she should have expected disclaimers of such nature to possibly exist and agreed to be bound by their terms, whatever they may be although not displayed with sufficient prominence, is not a valid argument. It cannot be elevated to a level of a contractual exclusion of liability. Accordingly, the appeal should fail for this reason alone.

The application and meaning of the disclaimers

[49] But even if the disclaimers were to apply, properly construed, they did not exclude liability for Ms Murti's damages. The proper approach to interpretation is well established in, amongst others, *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[25] where this Court explained that 'attributing meaning to the words used in a document . . . [must have] regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. . . [C]onsideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'[26] Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. If there is ambiguity the language must be construed against the *proferens* (the party drafting a contract).[27]

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[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[26] Ibid.
[27] *Government of the Republic of South Africa versus Fiber Spinner & Wievers* (Pty) Ltd 1978 (2) SA 794 (A) at 804C.

[50] Disclaimers must be construed restrictively. In cases of doubt, an exemption clause that is reasonably capable of bearing more than one meaning should be given the interpretation least favourable to the *proferens*.[28] The concept of 'driving' in the conditions of the contract is to be interpreted with a bias against Drifters, as the *proferens*.[29]

[51] The legal position was summarised succinctly by the Constitutional Court in *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited*.[30] Mathopo J, although writing for the minority, reiterated the following trite principles, specifically regarding the interpretation of exemption clauses:

'Contractual clauses that limit liability must be interpreted narrowly, particularly if the harm in question arises outside of the contract, unless the parties expressly agree otherwise. It is a trite principle – that indemnity clauses are to be construed restrictively. Related to this – if a party wishes to contract out of liability, it must do so in clear and unequivocal terms. In the case of doubt, ambiguity or secondary meaning, the issue must be resolved against the *proferens* (the drafter of the contract). Absent a clear intention to the contrary, exemption clauses should not be construed in a way that would excuse or limit the consequences of wrongful actions undertaken outside the operation or authority of the contract. And where an exemption clause purports to exclude liability in general terms, the exemption clause must be given the minimum degree of effectiveness by only excluding liability involving the minimum degree of blameworthiness. More particularly for the purposes of this case, if a party seeks to exclude liability for theft, it must do so in express terms.[31]' (Citations omitted.)

[52] The first disclaimer, properly interpreted, did not contain an unequivocal exemption. It, in express terms, contemplated an agreement still to be concluded before the start of the safari. The first disclaimer was simply too wide and vague in its terms to be capable of enforcement, its terms would not be severable, and it

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[28] Paragraph 50 of the high court judgment. Citing *Drifters Adventure Tours* paras 9 and 13; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) (*Afrox*) para 9.
[29] *Drifters Adventure Tours* para 9; *George* at 472E-H.
[30] *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* [2023] ZACC 20; 2023 (9) BCLR 1054 (CC); (2023) 44 ILJ 2391 (CC); 2023 (6) SA 327 (CC).
[31] Ibid para 56.

would be unconstitutional and/or contrary to public policy for reasons briefly alluded to below. The finding by the high court that the provisions of the first disclaimer were not intended by Drifters to be read as the waiver of liability, separately and independently of the indemnity that participants were notified they would be required to sign before the tour departed, cannot be faulted.

[53] The clause furthermore did not exclude liability for negligence in unambiguous terms.[32] Specifically, it did not exclude liability for the negligent driving of an employee. A tour participant should be fully and timeously informed of any additional risk and the extent of the disclaimer, so that adequate alternative provision can be made.

Implied authority, the ticket cases and *quasi*-mutual assent

[54] The issue is whether, after having received access to the brochure, that is in the final week approximately before her departure from Australia, Ms Murti expressly, or by conduct indicated that she agreed to the terms of the first disclaimer or should be deemed to have so agreed. This presupposes that the terms of the disclaimer had been brought to her attention or were displayed with sufficient prominence that she should be considered in law to have agreed thereto by embarking on the tour when it commenced. I have concluded above that the disclaimer was not disclosed with sufficient prominence. This part of the judgment proceeds on the assumption that the disclaimer was disclosed adequately.

[55] There is no evidence that Ms Murti agreed to or accepted the first disclaimer. Even if she should have read it or possibly realised it contained terms relating to a disclaimer, there is no evidence of conduct on her part that suggests she agreed to exempt Drifters from liability.

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[32] *Durban's Water Wonderland* at 989G-I.

[56] There is also no scope for the application of the doctrine of *quasi*-mutual assent invoked by Drifters to establish an agreement between Ms Murti and Drifters incorporating the first disclaimer. The *quasi*-mutual assent or reliance theory was explained, as follows, in *Smith v Hughes*:[33]

'I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke*. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'[34]

[57] In *Sonap Petroleum SA (Pty) Ltd v Pappadogianis*,[35] this Court stated:

'. . . (T)he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?. . ., To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly who made that representation; and thirdly, was the other party misled thereby?. . . The last question postulates two possibilities: Was he actually misled and would a reasonably man have been misled? . . ..'[36] (Citations omitted.)

[58] Reaffirming the above, in *Van Huyssteen NO and Another v Mila Investment and Holding Company (Pty) Ltd*,[37] this Court said:

'From the foregoing the following conclusions may be drawn:

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[33] *Smith v Hughes* (1871) LR 6 QB 597.
[34] Ibid at 607.
[35] *Sonap Petroleum* fn 13 above.
[36] *Sonap Petroleum* at 239I-240A.
[37] *Van Huyssteen NO and Another v Mila Investment and Holding Company (Pty) Ltd* [2017] ZASCA 84.

The doctrine of *quasi*-mutual assent constitutes an application of the reliance theory in cases of dissent. The doctrine enables the 'contract asserter' to contend that the 'contract denier' misled him or her into the reasonable belief that the contractor denier had actually assented to the contractual terms in question.[38]

In casu, there was no such representation by Ms Murti.

[59] Similar considerations apply in the so-called 'ticket cases' where reliance is placed on the display of a notice containing terms relating to a contract.[39] Had Ms Murti read and accepted the terms of the notices in question, there would have been actual consensus and she would have been bound by those terms. Had she seen the first disclaimer and realised that it contained conditions relating to the exclusion of liability, but not bothered to read it, there might similarly have been consensus on the basis that she would have agreed to be bound by those terms, whatever they may have been.[40] That, however, was not the evidence.

[60] Two primary issues arise as regards the second disclaimer, namely whether Ms Murti can be held to its terms: as a result of her own conduct; or the conduct of Mr Hannon as her agent. Mr Hannon was not expressly authorised by her to sign the indemnity. The next enquiry is whether Ms Murti had authorised him tacitly. This would have to be established by inference,[41] on a balance of probabilities, on all the admissible facts given in evidence.

[61] Ms Murti was not present when Mr Hannon signed the indemnity form and there is no evidence that she was aware of the indemnity form and reconciled herself to Mr Hannon having signed on her behalf on 4 November 2018. The absence of evidence that she had reproached Mr Hannon for having signed the form

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[38] Ibid para 23.
[39] *Durban's Water Wonderland* at 991C-D. Citing 5 *LAWSA* 1st ed para 186.
[40] *Central SA Railways* fn 11 above.
[41] *Inter-Continental* at 748H-749A.

on her behalf without her knowledge, after the disclaimer in the form was raised with her, is not consistent only with her having tacitly authorised the second disclaimer.

[62] Tacit authority also cannot be inferred from: Mr Hannon being her life partner; that he had made all the arrangements for the tour as he had also done with tours in the past; that he paid for the tour; and that this therefore authorised him to sign and legally bind her to an exclusionary clause no matter its wording, to ensure their participation in the tour. Ms Murti is an adult individual in her own right. Her state of mind, certainly if she had knowledge of the first disclaimer, would likely be that she was awaiting a formal indemnity to be entered into with her, on terms that she would have to approve. Ms Murti's uncontroverted evidence was that she was unaware that the forms had been handed out and that one was signed for her by Mr Hannon.

[63] Drifters only has itself to blame that a full indemnity agreement, in the form of the second disclaimer, which it intended to conclude with all tour participants, was not concluded with Ms Murti. The conclusion of such an agreement is what its brochure foreshadowed and its indemnity form contemplated, by providing for signature by each individual participant. Drifters required its position to be regulated by separate, self-contained, agreements in the indemnity forms, otherwise it would not have handed out separate forms for each tour participant.

[64] It was incumbent on Drifters to ensure that it concluded separate binding agreements with each tour participant. It is an obligation that should not be approached casually, to ensure that whatever documentation was required was properly completed in respect of each participant. This process should have been closely supervised by the driver, Mr Mathabela, or another representative of Drifters and/or by at least, an identifiable witness co-signing and confirming that

the signatory to each indemnity form, was indeed the person whose particulars were inserted on the form.

[65] Even if Ms Murti should have expected that some agreement regulating the liability of Drifters was to be concluded before the departure of the tour, this does not mean, where no such form was given to her to complete, that she had authorised the conclusion of any disclaimer, whatever its wording might be, and that she is bound by the wording of the second disclaimer. Drifters may contract out of liability by an exclusionary agreement, but it bore the onus of establishing a binding and enforceable agreement between it and Ms Murti, which presupposes a meeting of minds and consensus. Such an agreement would be required to be concluded with her as tour participant, not with someone who happens to sign on her behalf. The evidence did not establish that on the day she had knowledge that an agreement was about to be entered into for an indemnity and that she granted, or should be taken to have granted, Mr Hannon an open mandate to agree to the terms of any disclaimer, whatever they may be.

[66] Finally, as regards ostensible authority, which deals with the situation where the law holds a person bound, absent actual or implied authority, on the basis that she represented that her agent or a person acting for her was authorised to represent her, Ms Murti made no representation that Mr Hannon had authority to represent her, even if just to sign the indemnity form.

[67] The present is not an instance, as in *Reyneke*,[42] where the participant expressly authorised her son to purchase the ticket, with the disclaimer it contained, for her. *Durban's Water Wonderland* is a typical ticket case where access to the water world was obtained by a child participant represented by the other parent and

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[42] *Reyneke* fn 6 above.

a guardian of the child. The facts in both *Reyneke* and *Durban's Water Wonderland* are distinguishable. Ms Murti was not aware of the terms of the second disclaimer and could not reasonably have been aware thereof, as it was not displayed to her, nor was it displayed where it could reasonably have come to her attention.

Contra bonos mores

[68] South African law does not have overarching legislation that specifies whether contractual provisions are acceptable, reasonable or enforceable. The Constitution, which precludes reliance on provisions which are not in the interests of justice,[43] unreasonable or *contra bonos mores* (against good morals) and the provisions of the CPA, bear on the issue.

[69] In *Afrox Healthcare Bpk v Strydom*,[44] this Court held:

'A contract term that is so unfair that it is contrary to public policy is unenforceable in law. . .

. . . .

The fact that exclusion clauses may be enforced in principle does not mean, of course, that a particular exclusion clause cannot be declared by a court to be contrary to public policy and therefore unenforceable. The best-known example of a case in which this in fact happened is perhaps . . . where a contract term that excluded liability for fraud was declared contrary to public policy and therefore invalid. The criterion that applies to exclusion clauses does not differ, however, from that which applies to other contract terms alleged to be invalid due to considerations of public policy. The question is always whether the enforcement of the relevant exclusion clause or other contractual clause, due to either extreme unfairness or other policy considerations, is contrary to the community's interests. (Citations omitted.)

[70] In *First National Bank of SA limited v Rosenblum and Another*, Marais JA cautioned that:

'. . . Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a

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[43] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC); *Durban's Water Wonderland.*

[44] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful.

. . . [T]he task is one of interpretation of the particular clause . . . and the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting . . . against the background of the common law and . . . with due regard to any possible constitutional implication.'[45]

[71] In *Barkhuizen*, Ngcobo J stressed that any contractual term that is opposed to the values enshrined in the Constitution would be against public policy and therefore unenforceable. He stated:

'While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it:

''employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of '''freedom of contract''', while seeking to permit individuals the dignity and autonomy of regulating their own lives.'''[46]

[72] Analysing the above approach, Mupangavanhu writes that:

'This leaves room for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have assented to the inclusion of such clauses. . . The same applies to exemption clauses: courts should not enforce such clauses if it would be unreasonable and unjust to do so.'[47]

[73] Whether the disclaimers were *contra bonos mores* has enjoyed little attention in the appeal. Had it been the determinative issue I would have been

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[45] *Rosenblum* fn 8 above paras 6 and 7.
[46] *Barkhuizen* para 70.
[47] Y Mupangavanhu 'Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)' (2014) 17(3) *PER* 1167 at 1187 fn 121.

inclined to finding any disclaimer for liability, where Drifters had expressly promoted their tours to allow participants to alight from their seats and move towards the lockers while the truck was in motion, to be contrary to public policy and *mores*, unfair and unenforceable. The appeal would be dismissed also for that reason.

Order

[74] The appeal is accordingly dismissed with costs.

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P A KOEN

JUDGE OF APPEAL

Appearances

For appellant:	A I S Redding SC
Instructed by:	Norton Rose Fulbright South Africa, Johannesburg Webbers Attorneys, Bloemfontein
For respondent:	N G D Maritz SC
Instructed by:	Joseph's Incorporated, Johannesburg McIntyre van der Post Inc, Bloemfontein.