



## INDEMNITY FORMS & NPOs

By Ricardo Wyngaard

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#### 'INDEMNITY FORMS AND NPOs'

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Many NPOs make use of indemnity forms with the aim of reducing the potential for liability. This article explores the value of indemnity forms.

Generally, it is possible for parties to contract out of liability. The signing of an indemnity form is common practice, but on its own may have limited (or no) value. Put differently, a signed indemnity form does not guarantee that a claim for damages cannot be successful against an organisation. The following aspects should, amongst other, be considered:

### Constitution

South African courts have developed additional criteria for disclaimers and indemnity provisions. For example, the language must be clear and unequivocal. Also, the courts would not abide by an indemnity clause which is contrary to public policy or contrary to the South African Constitution. The Constitutional Court has indicated that two questions that should be considered in dealing with a situation where an agreement has deprived a person's right to approach a court, namely:

1. Whether the clause is objectively unreasonable?
2. If reasonable, should it be enforced in the circumstances?

### Caselaw

The courts have in some instances found that a disclaimer or indemnity clause (which includes reference to negligence) is not a defence for a delictual claim – given the circumstances of the case. For example, in the matter of *ER24 Holdings v Smith NO [2007] SCA 55*, one of issues that the Supreme Court of Appeal (SCA) had to decide upon was whether ER24 could be held liable for the damages suffered by Ms. Staracek, who was a volunteer. ER24 argued that Ms. Staracek signed a contract in which she indemnified ER24 from any liability. The relevant clause in the contract, which Ms. Staracek signed with ER24, provided: '[Ms. Staracek] indemnifies ER24 of any claim in respect of any loss, damage or injury howsoever caused which may be sustained during the course of assisting with the operational requirements of the Company.'

The SCA held that the clause was unclear because it was not obvious if Ms. Staracek indemnified ER24 for injuries caused to a third party or to herself. This clause was more likely to indemnify ER24 for injuries caused by Ms. Staracek to third parties. The Court accordingly refused to interpret it to mean that Ms. Staracek was indemnifying ER24 for injuries to herself.

### Consumer Protection Act

Some of the provisions of the Consumer Protection Act, No. 68 of 2008 (the CPA) are also applicable to indemnity forms. For example, in terms of section 49(1) of the CPA, notice is required for certain terms and conditions.

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### Consumer Protection Act....

Section 49(1) of the CPA provides that:

- a) Any notice to consumers or provision of a consumer agreement that purports to:
  - b) limit in any way the risk or liability of the supplier or any other person;
  - c) constitute an assumption of risk or liability by the consumer;
  - d) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  - e) 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) thereof.

Also, section 49 (2)(c) of the CPA provides that if a provision or notice concerns any activity or facility that is subject to any risk that could result in serious injury or death, the supplier must, amongst other, specifically *draw the fact, nature and potential effect of that risk to the attention of the consumer*. Section 49 (5) of the CPA requires that the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the notice. Other provisions of the CPA and other laws should also be considered when preparing indemnity forms.

### Context

The context within which an indemnity form is signed, is an important consideration. In the matter of *Naidoo v Birchwood Hotel 2012 (6) SA 170*, the court considered the fact that the claimant (Naidoo), a coach driver who had transported passengers to the hotel and who stayed overnight at the hotel was a *guest in a hotel*. The court stated that: "A guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness."

### Conclusion

Indemnity forms, albeit, critical have limited value in absolving NPOs from the potential of liability. The Constitution, applicable caselaw and legislation and the contextual considerations must be considered. An effective and suitable risk management programme is an essential part of exercising the required duty of care and to minimise the potential for liability.

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