



Enforceability of indemnity clauses excluding vicarious liability for employee theft: balancing *pacta sunt servanda* and public policy

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Abstract

This study examines the enforceability of indemnity clauses that exclude vicarious liability for employee theft within South African contract law. It critically analyses the tension between the principle of *pacta sunt servanda*, which upholds the sanctity of contracts, and the evolving needs of public policy, which reflect constitutional values such as fairness, justice, and *Ubuntu*. Using the landmark *case of Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* 2023 6 SA 327 (CC) as a focal point, the research considers whether such exemption clauses can be upheld when they result in unfair outcomes for victims of employee theft.

The study adopts a qualitative methodology, analysing primary sources including case law, legislation, and the Constitution, alongside secondary academic literature. It traces the historical development of vicarious liability, evaluates the legal nature and function of indemnity clauses, and assesses how public policy considerations influence judicial decisions. The findings reveal a divergence in judicial approaches between the Supreme Court of Appeal and the Constitutional Court, contributing to uncertainty in contract enforcement.

Ultimately, the study advocates for a balanced approach that respects contractual autonomy while ensuring that exemption clauses do not compromise justice or constitutional principles. It concludes with recommendations for legal practitioners, contract drafters, and policymakers to foster fairness and predictability in commercial relationships.

Abbreviations

CCR	Constitutional Court Review
CPA	Consumer Protection Act 68 of 2008
FSI	Freight Surveillance International
IVS	Identity Verification System
ILJ	Industrial Law Journal
IJCR	International Journal of Current Research
JCM	Journal of Contemporary Management
JJS	Journal for Juridical Science
McGill L.J.	McGill Law Journal
ORTIA	Oliver Reginald Tambo International Airport
PER/PELJ	Potchefstroomse Elektorniese Regsblad / Potchefstroom Electronic Law Journal
PSLR	Pretoria Students Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANDF	South African National Defence Force
SCA	Supreme Court of Appeal
SFCs	Standard Form Contracts
StellLR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / The Journal of

Contemporary Roman-Dutch Law

TSAR Tydskrif vir Suid-Afrikaanse Reg / Journal of South African Law

UCTA Unfair Contract Terms Act 1977

UPJ Unisa Press Journal

Yale L.J. The Yale Law Journal

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CHAPTER 1

1 Background and purpose

1.1 Introduction

On June 23, 2012, a Schenker employee stole Fujitsu laptops and accessories valued at more than half a million dollars while they were responsible for their delivery. When Fujitsu requested compensation, Schenker invoked an exemption clause to refuse liability. This dispute, which reached the Constitutional Court in *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd*¹ (hereafter the *Fujitsu* case), highlights a pressing challenge in South African contract law: should indemnity clauses that exclude vicarious liability for employee theft be enforced, even when they lead to unjust outcomes?

In the *Fujitsu* case, the company is a multinational that imports, sells, and distributes laptops, computers, and accessories.² Schenker is a warehouse operator, distributor, clearing, and freight forwarding agent.³

Fujitsu South Africa has imported a consignment of computers and computer accessories from Fujitsu Germany in or around April 2012.⁴ As the logistics provider, Schenker was responsible for customs clearance and the receipt of these goods at Oliver Reginald Tambo International Airport (ORTIA). Accordingly, Schenker was also to coordinate the delivery of these goods from ORTIA to Fujitsu's premises, in line with an agreement governed by a previously written Standard Form Contract (SFC) between the two parties.⁵

Upon the goods' arrival at ORTIA, Schenker was properly notified. They then assigned their drawing clerk, Mr Lerama, whose responsibilities included collecting and securing Fujitsu's goods from customs at ORTIA.⁶

¹ 2023 6 SA 327 (CC).

² *Fujitsu* case para 2.

³ *Fujitsu* case para 2.

⁴ *Fujitsu* case para 3.

⁵ *Fujitsu* case paras 2-3.

⁶ *Fujitsu* case para 4.

On Saturday, 23 June 2012, Mr Lerama drove to ORTIA with all the necessary documents to process clearance and collect the goods.⁷ All these documents were provided by his employer, Schenker.⁸ He cleared, collected, and loaded Fujitsu's goods onto his unmarked truck.⁹ He left the airport and was never seen again.¹⁰ It was clear from the subsequent events that Mr Lerama stole Fujitsu's laptops and other accessories.¹¹

In the *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* (GJ) (unreported) case number 21830/2014 of 25 March 2020 (hereafter the *Fujitsu-Schenker* case), Fujitsu filed a delictual claim for damages against Schenker, alleging that Schenker was vicariously liable for the wrongful conduct committed by Mr Lerama when he stole the goods.¹²

In the answering statement, Schenker denied vicarious liability for the theft committed by its employee.¹³ They also argued that, if liability is established, it is excluded by an exemption clause expressed in their written contract.¹⁴ In reply, Fujitsu argued that an exemption clause of that nature is unenforceable on public policy grounds.¹⁵

The written agreement contained several exemption clauses. Some of the contended clauses are provided as follows:

Clause 17:

Except under special arrangements previously made in writing, Schenker will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should Fujitsu nevertheless deliver such goods to Schenker or cause Schenker to handle or deal with such goods without prior arrangements previously made in writing, Schenker shall incur no liability whatsoever in respect of Fujitsu's goods and, in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods.¹⁶

⁷ *Fujitsu* case para 4.

⁸ *Fujitsu* case para 4.

⁹ *Fujitsu* case para 4.

¹⁰ *Fujitsu* case para 4.

¹¹ *Fujitsu* case para 4.

¹² *Fujitsu-Schenker* case para 2.

¹³ *Fujitsu-Schenker* case para 2.

¹⁴ *Fujitsu-Schenker* case para 2.

¹⁵ *Fujitsu* case para 6.

¹⁶ *Fujitsu* case para 7.

Clause 40.1:

Schenker shall not be liable for any claims of whatsoever nature (whether in contract or delict) and whether for damages or otherwise, howsoever arising, including but without limiting the generality of the aforesaid—

40.1.1 any negligent act or omission or statement by [Schenker] or its servants, agents and nominees; and/or

40.1.3 any loss damage or expense arising from or in any way connected with the marking, labelling, numbering, non-delivery or mis-delivery of any goods; and/or

Unless—

- a) Such claims arise from a grossly negligent act or omission on the part of [Schenker] or its servants; and
- b) Such claim arises at a time when the goods in question are in the actual custody of [Schenker] and under its control.¹⁷

Vicarious liability is a well-established principle of the common law, generally described as the liability of one person for the delict of another.¹⁸ In the employment context, an employer is ordinarily liable for a delict committed by an employee acting within the course and scope of employment.¹⁹ This includes liability for theft committed by an employee in the performance of their duties. However, employers frequently rely on exemption clauses to contract out of such liability. These clauses, also referred to as indemnity, exclusionary, or waiver clauses, are powerful contractual tools that allow one party to escape responsibility at the expense of another.²⁰

The enforcement of exemption clauses raises a fundamental tension in South African contract law.²¹ On the one hand, the principle of *pacta sunt servanda* demands that agreements voluntarily entered into must be honoured,²² thereby promoting certainty and predictability in commercial dealings.²³

¹⁷ *Fujitsu* case para 8.

¹⁸ Neethling and Potgieter *Delict* 444.

¹⁹ Maseko 2018 *UPJ* 2.

²⁰ Sande *Exemption Clauses* 6.

²¹ Sande *Exemption Clauses* 1.

²² *Fleet Africa (Pty) Ltd v Polokwane Local Municipality* (LCC) (unreported) case number 720/2022 of 30 October 2023 (hereafter *Fleet Africa* case) para 18.

²³ Bradfield *Christie's Contract* 12.

On the other hand, public policy, informed by constitutional values such as fairness, justice, good faith, and *Ubuntu*, requires that courts refuse to enforce contractual terms that are unduly harsh, unreasonable, or unjust.²⁴ . Public policy reflects the community's legal convictions, those values that society holds most dear.²⁵ This tension is particularly acute when exemption clauses absolve employers of liability for intentional misconduct, such as employee theft, leaving victims without effective legal remedies.

Judicial authorities have adopted divergent approaches to this issue.²⁶ The Supreme Court of Appeal (SCA) has traditionally emphasised contractual certainty, holding that public policy values are not legal rules capable of invalidating clear contractual provisions.²⁷ By contrast, the Constitutional Court (CC) has recognised that unfair or unreasonable clauses may be unenforceable on public policy grounds, thereby prioritising constitutional values over rigid adherence to *pacta sunt servanda*.²⁸ This divergence has created uncertainty in the law, leaving lower courts to navigate between competing doctrinal imperatives.²⁹

Against this backdrop, the *Fujitsu* case provides a timely opportunity to examine the enforceability of indemnity clauses that exclude vicarious liability for employee theft. This study critically examines the historical development of vicarious liability, the role of exemption clauses in contract law, and the constitutional principles that inform public policy. It seeks to define the legal limits within which such clauses may be enforced, and to offer guidance to courts, contract drafters, and policymakers on balancing contractual freedom with justice in a constitutional democracy.

²⁴ *Afrox healthcare Bpk v Strydom* 2002 All SA 125 (SCA) (hereafter *Afrox Healthcare* case) para 8.

²⁵ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) (Hereafter *Barkhuizen* case) para 28.

²⁶ Du Plessis 2022 CCR 198.

²⁷ *First National Bank of Southern Africa Ltd v Rosenblum* 2001 4 SA 189 (SCA) (Hereafter *Rosenblum* case); *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) (Hereafter *Mohamed's Leisure* case); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 9 BCLR 892 (SCA) (Hereafter *Bredenkamp* case); *Afrox Healthcare* case.

²⁸ *Barkhuizen* case; *Botha v Rich* 2014 7 BCLR 741 (CC) (Hereafter *Botha* case); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) (hereafter *Everfresh* case); *Beadica 231 CC v Trustees of the Oregon Trust* 2021 3 SA 1 (CC) (hereafter *Beadica* case).

²⁹ Hutchison 2019 ACTA 101.

The burning issue in modern South African contract law is the extent to which a judge may refuse to enforce a valid contract clause because, in the particular circumstances of the case, he or she considers it unduly harsh, unfair, or unreasonable to do so.³⁰

The interesting part of the *Fujitsu* case is that it explores a number of critical legal concepts, some of which are not the primary focus of this study but cannot be ignored entirely. As will be evident, these legal concepts have played a crucial role in the development of our common law. They include the concurrence of the breach of contract and delict, the principle of vicarious liability, exemption clauses, the principle of *pacta sunt servanda*, and public policy.

In the *Fujitsu-Schenker* case, the high court addressed the principle of vicarious liability.³¹ The Supreme Court of Appeal in the *Schenker South Africa (Pty) Ltd v Fujitsu Services Core (Pty) Ltd* (SCA) (unreported) case number 508 2020 of 9 November 2021 (hereafter the *Schenker* case) examined the application of exemption clauses,³² while the Constitutional Court considered the application of the principle of *pacta sunt servanda* in light of public policy considerations.³³

1.2 Problem statement

Vicarious liability in employment relationships ensures that victims of employee misconduct can obtain justice. However, South African contract law permits employers to include indemnity clauses that exclude liability for such misconduct, including employee theft. These clauses, often upheld under the doctrine of *pacta sunt servanda*, may allow employers to evade accountability for severe wrongdoing, raising concerns about fairness and justice. While *pacta sunt servanda* promotes contractual certainty and autonomy, courts retain the discretion to refuse enforcement of contractual terms that conflict with public policy.

The issue, therefore, is how our courts balance the *pacta sunt servanda* principle against public policy considerations when determining the enforceability of specific

³⁰ Hutchison 2019 *ACTA* 100.

³¹ *Fujitsu-Schenker* case paras 17-30.

³² *Schenker* case para 11-22.

³³ *Fujitsu* case para 68-79; 119-141.

contractual terms that aim to exclude liability for employee misconduct, including intentional acts such as theft.

1.3 Research question

To what extent are indemnity clauses that exclude an employer's vicarious liability for deliberate employee misconduct, such as theft, enforceable under South African law, and how should courts balance the principle of *pacta sunt servanda* with constitutional public policy values?

1.4 Research aim and objectives

The study aims to evaluate the enforceability of indemnity clauses that exclude vicarious liability for employee theft in South African contract law. It seeks to balance the principle of *pacta sunt servanda* with constitutional public policy values such as fairness, justice, good faith, and *Ubuntu*, using the *Fujitsu v Schenker* case as a focal point. The ultimate goal is to provide principled guidance for courts, contract drafters, and policymakers on reconciling contractual autonomy with constitutional justice in commercial relationships.

The objectives of the study include:

- Trace the doctrinal evolution of vicarious liability in South African law, with emphasis on its application to employee theft.
- Examine the legal nature, role, and limits of indemnity/exemption clauses in excluding liability for misconduct, including fraud and theft.
- Analyse the principle of *pacta sunt servanda* and its modern limitations, particularly in light of constitutional values.
- Evaluate judicial approaches in the Supreme Court of Appeal and Constitutional Court, highlighting divergences and their implications for legal certainty.
- Assess the influence of constitutional values (fairness, justice, good faith, *Ubuntu*, equality in bargaining) on contract enforceability.

- Consider statutory interventions, especially the Consumer Protection Act 68 of 2008, and comparative insights from English law (UCTA 1977).
- Provide practical recommendations for contract drafters, organisations, and policymakers to ensure indemnity clauses promote commercial certainty without undermining justice or constitutional principles.

1.5 Research method

This study will employ a qualitative research methodology. This approach aims to organise, correct, and clarify a selected legal topic by analysing existing primary and secondary legal sources. Primary sources will include the Constitution, legislation, and case law. Secondary sources will consist of textbooks, journal articles, academic dissertations, legal publications, and internet sources that contain relevant provisions for our study.

1.6 Scope of study

This study examines the enforceability of indemnity clauses that absolve employers from vicarious liability for employee theft under South African contract law. Grounded in the tension between the doctrine of *pacta sunt servanda*, which advocates for contractual certainty and autonomy, and constitutional principles such as fairness, justice, good faith, and *Ubuntu*, the research investigates whether such clauses are consistent with public policy.

The inquiry is prompted by the landmark *Fujitsu* case, which raises the question of whether exemption clauses that absolve custodians of goods from liability for employee theft should be enforced despite their potentially unjust consequences.

Through a qualitative doctrinal analysis of primary sources, including case law, legislation, and the Constitution, as well as secondary sources such as textbooks and academic commentary, the study examines the historical development of vicarious liability, the function of exemption clauses, and the evolving judicial approaches of the Supreme Court of Appeal and the Constitutional Court.

By situating the debate within the broader framework of public policy and constitutional principles, the research endeavours to assist courts, contract drafters, and policymakers in balancing contractual freedom with justice within a constitutional democracy. This approach aims to improve commercial certainty while concurrently safeguarding against unconscionable contractual provisions.

1.7 Conclusion

This chapter has set the foundation for the study by outlining the background, purpose, and central problem under investigation. The dispute in the *Fujitsu* case illustrates the pressing tension in South African contract law between the principle of *pacta sunt servanda* and the constitutional values that inform public policy.

While contractual certainty and autonomy remain fundamental to commercial relationships, exemption clauses that absolve employers of vicarious liability for employee theft raise significant concerns about fairness, justice, and equity. The differing judicial approaches of the Supreme Court of Appeal and the Constitutional Court further complicate this landscape, creating uncertainty about the enforceability of such clauses.

Against this backdrop, the chapter outlines the research problem, formulates the guiding research question, and specifies the study's aims and objectives. It also clarifies the methodological approach.

The subsequent chapters will build on this foundation by examining the doctrinal evolution of vicarious liability, the role and limits of exemption clauses, and the constitutional values that shape public policy, ultimately aiming to provide principled guidance on balancing contractual freedom with justice in a constitutional democracy.

CHAPTER 2

2 Liabilities

2.1 Concurrent liability: contract and delictual liabilities

Concurrent liability arises when the same set of facts gives rise to both contractual liability, based on the terms of the agreement, and delictual liability, based on a breach of duty of care or a wrongful act.³⁴ In the *Fujitsu* case, Fujitsu sought to hold Schenker vicariously liable in delict for the theft of laptops by its employee, while Schenker relied on a contractual exemption clause excluding liability for such losses.³⁵ The *Fujitsu* case illustrates the doctrinal tension inherent in concurrent liability between contract and delict.

In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) Ltd* 1985 1 SA 475 (A) (hereafter the *Lillicrap* case), a fundamental question concerning delictual liability, and more particularly its relationship with liability for breach of contract, was raised.³⁶ The defendant sought damages in delict against consulting engineers for negligent design and supervision, despite the existence of a contractual relationship.³⁷ The Appellate Division addressed whether a professional firm could be held liable in delict for negligent performance of duties arising from a contract.³⁸

The court held that where the negligence complained of arises directly from the breach of a contractual duty, the proper remedy lies in contract rather than delict.³⁹ Allowing a delictual claim in such circumstances would undermine the contractual framework and risk duplicating remedies.⁴⁰ The judgment thus restricted concurrent liability, establishing that delict should not be used to circumvent contractual limitations or exclusions.⁴¹ This case remains a cornerstone of South African law, marking a doctrinal boundary: delictual liability is not automatically available where the parties' relationship

³⁴ Hutchison "Breach of Contract" 12.1.

³⁵ *Fujitsu* case para 10.

³⁶ *Lillicrap* case page 12-13.

³⁷ *Lillicrap* case page 9.

³⁸ *Lillicrap* case page 18-19.

³⁹ *Lillicrap* case page 33-34.

⁴⁰ *Lillicrap* case page 39.

⁴¹ *Lillicrap* case page 39.

is governed by contract, unless independent wrongful conduct beyond the contract can be shown.

The majority in the *Fujitsu* case upheld the exemption clause, reasoning that freedom of contract and commercial certainty justified enforcing the agreed exemption clause, even where it displaced a delictual remedy.⁴² The minority, however, cautioned that public policy and constitutional values of accountability and fairness should prevent contractual terms from shielding intentional wrongdoing.⁴³

The case demonstrates that concurrent liability in South African law is not absolute: a valid contractual exclusion may neutralise delictual claims unless it is found to be contrary to public policy. This outcome underscores the unresolved tension between contractual autonomy and the protective function of delict, raising the broader normative question of whether delict should serve as a constitutional safeguard against unfair contractual exclusions or whether the primacy of contract should prevail.

2.2 Vicarious liability

In South African delict law, vicarious liability is a doctrine that holds one party responsible for another's wrongful acts, even if the latter is not personally at fault.⁴⁴ This type of liability typically occurs within specific relational contexts, most notably between employer and employee,⁴⁵ which is the primary focus of this study.

The general rule is that an employer is liable for delicts committed by an employee acting within the course and scope of employment.⁴⁶ Courts have justified this allocation of responsibility on policy grounds, as illustrated in *Oudehoutkloof Boerdery (Pty) Ltd v Venter* (ECG) (unreported) case number 1649/2018 of 16 September 2021 (hereafter *Oudehoutkloof* case):

⁴² *Fujitsu* case para 123.

⁴³ *Fujitsu* case para 77.

⁴⁴ Botha and Millard 2012 *De Jure* 240.

⁴⁵ Neethling and Potgieter *Delict* 444.

⁴⁶ *The Minister of Safety and Security v Nancy Msi* (SCA) (unreported) case number 273/2018 of 28 March 2019 (hereafter the *Msi* case) para 9.

I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.⁴⁷

Yet the doctrine is not merely a technical rule of risk allocation. In the constitutional era, its rationale must be understood in light of values such as *Ubuntu*, fairness, and social solidarity.⁴⁸

Vicarious liability reflects the idea that those who benefit from the enterprise of another should also bear responsibility for harms arising from it, thereby promoting accountability and the protection of victims.⁴⁹ *Ubuntu*, with its emphasis on human interdependence and communal responsibility, reinforces the fairness of holding employers answerable for the conduct of employees acting in furtherance of their business.⁵⁰

Determining whether conduct falls within the scope of employment is not always straightforward.⁵¹ While fulfilling contractual duties clearly qualifies, South African jurisprudence also recognises more complex cases in which employees deviate from their obligations but continue to be sufficiently engaged in their employer's enterprise.⁵² These borderline cases highlight the tension between protecting victims and limiting unfair burdens on employers.

This chapter examines the historical development of vicarious liability, its current doctrinal stance, and engages with critical viewpoints, including constitutional values, that influence its future course.

2.2.1 Historical development of vicarious liability

Because South Africa has a mixed legal system, the development of our modern vicarious liability cannot be credited to a single legal system.⁵³

⁴⁷ *Oudehouthloof* case para 10.

⁴⁸ Swartz and Itumeleng 2015 *IJCR* 15292.

⁴⁹ Swartz and Itumeleng 2015 *IJCR* 15285.

⁵⁰ Roets *Doctrine of Vicarious Liability* 12.

⁵¹ Roets *Doctrine of Vicarious Liability* 58.

⁵² Neethling and Potgieter *Delict* 445.

⁵³ Small *Vicarious Liability in South Africa* 7.

2.2.1.1 Roman law

The modern general principle of vicarious liability was not known in Roman law.⁵⁴ However, it represented the master's liability principle, which asserts that a master is accountable for the wrongful acts committed by their servant.⁵⁵ In other words, the head of the family, or *paterfamilias*, was responsible for the wrongdoings committed by his child or slave.

Under the principle of master's liability, the injured party could bring a noxal action (*noxalis actio*) against the master. In such an action, the master was obligated to either pay monetary compensation to the victim or escape liability by surrendering the slave to cover the damages, according to the doctrine of noxal surrender.⁵⁶ Noxal liability illustrates the principles of Roman compensatory law, which emphasise retribution and penalties. However, the requirement to establish fault was essential in Roman law; thus, it was rare for an individual to be held liable if they were not at fault themselves.⁵⁷

This emphasis complicates justifications, particularly during the free servant or slave era, when taking legal action against a master for their slave's wrongdoings was challenging. The dominant rule was that legal action could not be taken against a master for wrongdoings committed by their slave unless it could be proven that the master was at fault.⁵⁸

However, there were instances in which masters were held accountable for their servants' wrongful actions, which reveals that, although Roman law did not have a universal vicarious liability rule, the concept of holding masters responsible for their servants' behaviour without personal fault was recognised.⁵⁹ Therefore, the concept of master's liability for the delicts of others, as derived from Roman law, may have paved the way for the modern principle of vicarious liability.⁶⁰

⁵⁴ Small *Vicarious Liability in South Africa* 7.

⁵⁵ Swartz and Itumeleng 2015 *IJCR* 15284.

⁵⁶ Swartz and Itumeleng 2015 *IJCR* 15284.

⁵⁷ Small *Vicarious Liability in South Africa* 8.

⁵⁸ Small *Vicarious Liability in South Africa* 10.

⁵⁹ Small *Vicarious Liability in South Africa* 13.

⁶⁰ Swartz and Itumeleng 2015 *IJCR* 15284.

2.2.1.2 Roman-Dutch law

The modern-day principle of vicarious liability did not exist in Roman-Dutch law.⁶¹ However, it established a specific judicial system to address a master's liability for their servants' wrongful acts: liability up to the wages owed, no liability at all, or joint and several liability.⁶²

According to these systems, if a servant harms a third party outside their scope of employment, the master is obliged to compensate the victim using the servant's wages; if the harm occurs during the servant's duties, both the slave and the master are jointly liable for the damages (liability in *solidum*).⁶³ However, a small group of Roman-Dutch law writers argued that a master could never be held liable for a servant's actions under any circumstances.⁶⁴

Roman-Dutch law ultimately expanded the principle of liability in *solidum* into a broader modern concept of vicarious liability. The historical basis of liability in *solidum* stemmed from negligence in the employee selection process.⁶⁵ This principle gained considerable authority to the extent that it can be recognised as the dominant doctrine in Roman-Dutch law.⁶⁶ It is argued that old Roman-Dutch law writers held differing opinions on the subject, indicating that the Roman-Dutch law on vicarious liability lacked clarity.⁶⁷

2.2.1.3 English law

The early medieval English law concept that a master was accountable for all their servants' wrongdoings transitioned into the doctrine that the master's liability was limited to acts they authorised or later ratified. By the late seventeenth century, this restrictive view gradually expanded to a broader approach, eventually evolving into modern vicarious liability.⁶⁸

However, the shift from home-based industry to larger production units challenged the idea that a master could closely supervise their servants. This was due to the increasing

⁶¹ Small *Vicarious Liability in South Africa* 13.

⁶² Small *Vicarious Liability in South Africa* 13.

⁶³ Small *Vicarious Liability in South Africa* 14.

⁶⁴ Small *Vicarious Liability in South Africa* 14.

⁶⁵ Small *Vicarious Liability in South Africa* 15.

⁶⁶ Small *Vicarious Liability in South Africa* 15.

⁶⁷ Small *Vicarious Liability in South Africa* 13.

⁶⁸ Small *Vicarious Liability in South Africa* 17.

risks associated with the developing industry, which demanded a broader range of responsibilities than before.⁶⁹

Nevertheless, the English law general principle that a master is responsible for the wrongful acts of their servants in the absence of personal fault was established in 1826.⁷⁰ By the mid-20th century, it was widely acknowledged that an employment relationship was both necessary and sufficient to establish an employer's vicarious liability, provided the act occurred within the scope of employment.⁷¹

While many references exist to Roman law and Roman-Dutch law, South African courts mainly relied on English law to shape the modern principles of vicarious liability.⁷² South African vicarious liability law reflects the principles of English tort law.⁷³

2.3 General principles

Vicarious liability is a principle of faultless accountability under which one person is responsible for the unlawful acts of another. It is usually understood as the strict liability of one party for an illegal act committed by another.⁷⁴

In an employment relationship, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of their employment.⁷⁵ However, there are requirements to establish this faultless liability against the employer: An employment agreement between the employer and employee at the time the wrongful act is committed; a wrongful act committed by the employee; and a wrongful act committed within the course and scope of employment.⁷⁶

In the *Melamu v Legal Expenses Insurance Southern Africa t/a Legalwise* (GP) (unreported) case number 2015/19909 of 19 August 2021 (hereafter the *Melamu*

⁶⁹ Small *Vicarious Liability in South Africa* 17.

⁷⁰ Small *Vicarious Liability in South Africa* 18.

⁷¹ Small *Vicarious Liability in South Africa* 18.

⁷² Small *Vicarious Liability in South Africa* 19.

⁷³ Swartz and Itumeleng 2015 *IJCR* 15285.

⁷⁴ Neethling and Potgieter *Delict* 444.

⁷⁵ *Stallion Security (Pty) Ltd v Daleen van Staden* 2019 40 ILJ 2695 (SCA) (hereafter *Stallion* case) para14.

⁷⁶ Botha and Millard 2012 *De Jure* 229.

case), the court held that there must be an existing contractual relationship between the parties (employer-employee contract) to establish vicarious liability. The terms of such a relationship must be clearly outlined.⁷⁷ The existence of an employment contract is fundamental to sustaining a cause of action for vicarious liability.⁷⁸

An employee is defined as:

(a) any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration; (b) any other person who in any manner assists in carrying on or conducting the business of the employer.⁷⁹

An employee is a person working under an employment contract or agreement, offering their services to an employer for payment. They are expected to perform personal duties as outlined in a specific job description. The employer has significant control over how the work is performed and can direct and supervise the employee.⁸⁰

The employee acts within the scope of employment if they perform their duties in accordance with the terms of their employment contract; on the other hand, the employee acts outside the scope of employment if they disengage entirely from their duties and promote only their own interests.⁸¹

However, courts have clarified that applying the general principle of vicarious liability does not imply that every action an employee takes during work, especially when pursuing personal goals, automatically falls outside the scope of employment.⁸²

Liability also arises when an employee's wrongful actions are closely linked to the company's business activities, making it difficult to determine which actions fall within or outside the scope of employment.⁸³ The judiciary acknowledged the significance of

⁷⁷ *Melamu* case para 11.

⁷⁸ *Melamu* case para 13.

⁷⁹ Section 213 of the *Labour Relations Act* 66 of 1995.

⁸⁰ *McGregor et al Labour Law Rules* 20.

⁸¹ *Neethling and Potgieter Delict* 447.

⁸² *Oudehouthloof* case para 16.

⁸³ *Botha and Millard* 2012 *De Jure* 230.

this doctrine, resulting in its review and adjustment to better align with the constitutional framework.⁸⁴

An independent contractor is a person who enters into a contract to provide services to a client or customer. Typically, they run their own businesses, manage their work schedules, and handle their taxes and financial matters on their own.⁸⁵

An employer is not liable for the wrongful acts of independent contractors unless the employer is directly responsible.⁸⁶ Additionally, the employer is only responsible for the negligence of their independent contractor if the employer has a legal obligation to take measures to prevent harm to the public.⁸⁷

2.4 Vicarious liability for employee theft

The prevailing position is that when an employee entrusted with goods commits theft, it is considered an improper manner of fulfilling their duties, thereby potentially rendering the employer liable to third parties for such thefts.⁸⁸

In the *Commissioner of South African Revenue Services (SARS) v TFN Diamond Cutting Works (Pty) Ltd* 2005 5 SA 113 (SCA) (hereinafter the *TFN Diamond* case) the court held that;

Negligence is but a form of fault. So, too, is intention. Suppose liability were to attach to SARS in consequence of its employee's negligent failure to safeguard the diamonds. Why, it must be asked, would it escape liability if he acted intentionally? Put simply, the duty of the SARS employee was to keep the diamonds safe. In that he failed. It follows that SARS cannot escape liability for the theft committed by its employee.⁸⁹

SARS was accordingly found to be vicariously liable for the theft committed by its employee.

⁸⁴ Roets *Doctrine of Vicarious Liability* 51.

⁸⁵ McGregor *et al Labour Law Rules* 21.

⁸⁶ *Melamu* case para 15.

⁸⁷ *Melamu* case para 16.

⁸⁸ Swartz and Itumeleng 2015 *IJCR* 15287.

⁸⁹ *TFN Diamond* case para 9.

2.5 Judicial development in case law

When an employee commits a delict that is entirely or partly related to the employer's business, the principle of vicarious liability usually does not pose any problems.⁹⁰ Problems occur when an employee deliberately commits a wrongful act for personal gain.⁹¹ Cases in which employees stray from their authorised duties to pursue their own interests and purposes are called deviation cases.⁹²

The High Court discussed the judicial development of vicarious liability in deviation cases in the *Fujitsu-Schenker* case.⁹³ It was held that one of the earliest cases concerning the establishment of an employer's vicarious liability in South Africa was *Feldman (Pty) Ltd v Mall* 1945 AD 733 (hereafter the *Feldman* case).⁹⁴

The legal question in the *Feldman* case concerned the extent to which an employer could be held vicariously liable for an employee's wrongful conduct when the employee deviated from their duties.⁹⁵ The Appellate Division needed to determine whether the deviation was significant enough to place the employee outside the scope of employment, thereby absolving the employer of responsibility. The court analysed the nature of the deviation and whether the employee's conduct remained connected to the employer's business, thereby justifying liability.⁹⁶

Under common law, when an employee leaves their job to address personal matters, the employer's liability to third parties depends on the specific facts of each case. If the employee's departure from duties amounts to mismanagement or negligence and directly causes harm, the employer can be held liable. Conversely, if the damages to third parties stem from the employee's unrelated personal activities rather than their work, the employer is not vicariously responsible.⁹⁷

⁹⁰ *Stallion* case para 15.

⁹¹ *Stallion* case para 15.

⁹² Botha and Millard 2012 *De Jure* 231.

⁹³ *Fujitsu-Schenker* case paras 20 - 29.

⁹⁴ Botha and Millard 2012 *De Jure* 229.

⁹⁵ *Feldman* case 1945 AD 733 pages 742-743.

⁹⁶ *Fujitsu-Schenker* case para 21.

⁹⁷ *Fujitsu-Schenker* case para 22.

The appellant division in the *Feldman* case found the employer liable for damages arising from the employee, who, while attending to a delivery for the employer and using the employer's vehicle, stopped to consume alcohol en route and then caused a collision.

The court ruled that the employee had never entirely forsaken his employer's work, as he consistently retained custody and control of the vehicle on the employer's behalf; therefore, the employer was liable for his negligence.⁹⁸

In *Minister of Police v Andre Rabie* 1986 1 SA 117 (A) (hereafter the *Rabie* case), the court held that:

A master is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them.⁹⁹

There is no universal rule for determining whether an employee's act falls within or outside the scope of employment; it primarily depends on the specific facts of each case.¹⁰⁰ Therefore, the key question is how to establish whether the wrongful act falls within the scope of employment, is reasonably incidental to it, or is outside its bounds.

In the *Rabie* case, the court formulated a standard test for determining vicarious liability in deviation cases. The court in the *Stallion* case referred to the standard test and provided as follows:¹⁰¹

It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.¹⁰²

This standard test was clarified further as follows:

- a. If an employee is seeking, albeit improperly, to advance his or her employer's interests, the employer may be vicariously liable. This is a subjective test. On the

⁹⁸ *Fujitsu-Schenker* case para 21.

⁹⁹ *Rabie* case para 8.

¹⁰⁰ Botha and Millard 2012 *De Jure* 231.

¹⁰¹ *Stallion* case para 16.

¹⁰² *Rabie* case paras 7 - 8.

subjective test, there would be no vicarious liability if the employee were acting solely in their own interests.

- b. Even if there is no vicarious liability on the subjective test, the employer may still be liable if, objectively, there is a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer.¹⁰³

Such development has led the Supreme Court of Appeal to assert that the primary question has always been whether the wrongful conduct was sufficiently connected to the employer's business to justify the imposition of vicarious liability.¹⁰⁴

The employer will not be liable if the employee commits the act solely for their own purposes, unless there is a sufficiently close connection between the wrongful conduct and the employer's business.¹⁰⁵ In evaluating the sufficiently close connection, a criterion for the court to consider is whether the employer created the risk of the harm that occurred.¹⁰⁶

It was established that a master who carries out his duties through a servant is responsible for preventing harm to others if the servant shows negligence, inefficiency, or untrustworthiness. Because he has created this risk for his own gain, he must ensure that no harm occurs due to the servant's improper actions or negligence in performing his duties.¹⁰⁷

In the *Fujitsu-Schenker* case, the court established a sufficiently close link due to the risk of harm posed by the employer (Schenker), arising from permitting the employee unrestricted access to the SAA security cargo area, providing them with a specific security clearance, and the relevant customs and clearance documentation.¹⁰⁸

Further development of the law, particularly the objective part of the standard test, approached with the spirit, purport, and object of the Constitution in mind, was observed in *K v Minister of Safety and Security*¹⁰⁹ (hereafter the *K* case).¹¹⁰

¹⁰³ *Oudehouthloof* case para 14.

¹⁰⁴ *Fujitsu-Schenker* case para 25.

¹⁰⁵ *Fujitsu-Schenker* case para 25.

¹⁰⁶ *Fujitsu-Schenker* case para 26.

¹⁰⁷ *Rabie* case paras 9 – 10.

¹⁰⁸ *Fujitsu-Schenker* case para 29.

¹⁰⁹ 2005 6 SA 419 (CC).

¹¹⁰ *Fujitsu-Schenker* case para 24.

It has been established that when an employee has subjectively dissociated themselves from the employer's affairs, and a court must decide whether, objectively, a sufficiently close connection remains between the employee's actions and the employer's business, the questions that need to be answered are not purely factual, but rather mixed questions of fact and law.¹¹¹

The legal question concerns what degree of close connection is necessary to establish vicarious liability. In addressing this issue, a court should consider the importance of upholding the spirit, purpose, and objectives of the Bill of Rights.¹¹²

When applying the objective test, the court must clearly explain its reasoning regarding whether there is a sufficient link between the wrongful conduct and the employment relationship.¹¹³

In applying these developments in the *Fujitsu-Schenker* case, the court found vicarious liability based on risk creation, thereby establishing a close connection between the employee's actions and the employer's business. The court considered: the opportunity provided by the employer to the employee to misuse their authority; the degree to which the wrongful act may have advanced the employer's objectives, thereby increasing the likelihood of its commission by the employee; the connection and intrinsic relation of the wrongful act to the employer's business; the level of authority granted to the employee; and the susceptibility of potential victims to the wrongful exertion of the employer's power.¹¹⁴

2.6 Policy considerations and constitutional values

Imposing strict liability on the employer has limited solid theoretical or legal backing; this is because vicarious liability is primarily founded on policy considerations rather than strict legal principles.¹¹⁵

¹¹¹ Scott 2013 *TSAR* 249.

¹¹² Scott 2013 *TSAR* 249.

¹¹³ *Fujitsu-Schenker* case para 24.

¹¹⁴ *Fujitsu-Schenker* case para 29.

¹¹⁵ Calitz 2005 *TSAR* 215.

Various theories, which are also utilised as policy considerations, have been proposed to establish the rationale, justification, and foundation of the doctrine. Neither of the theories nor policy considerations alone offers valid reasoning; however, when considered collectively, they provide a clear overview of the policy underpinning the law of vicarious liability.¹¹⁶

In the constitutional era, these theories find normative reinforcement through values such as dignity, equality, and the right to security of the person, which demand that legal doctrines promote fairness and protect vulnerable individuals.

*2.6.1 The identification theory*¹¹⁷

The identification theory holds that an employee acts for the employer, so whenever the employee acts, the employer is considered to be performing the act.¹¹⁸

*2.6.2 "Deepest pockets" or solvency theory*¹¹⁹

The "deepest pocket" theory of vicarious liability holds that liability should be allocated to the party with the most significant financial capacity to compensate the victim, typically the employer.¹²⁰ This approach is based on the policy that victims should be able to obtain compensation even if the actual wrongdoer lacks the resources to pay the claim.¹²¹ It argues that the employer is liable because they are typically in a better financial position than the employee.¹²² It promotes victim compensation, institutional accountability, and social justice.

This theory encounters criticism for deviating from fault-based justice and risking the perception of vicarious liability as solely a financial evaluation, where accountability solely depends on the capacity to pay. This raises concerns regarding fairness and proportionality, especially when employers are held responsible for actions they neither authorised nor could prevent. Critics contend that such an approach may promote

¹¹⁶ Small *Vicarious Liability in South Africa* 139.

¹¹⁷ Calitz 2005 *TSAR* 215.

¹¹⁸ Roets *Doctrine of Vicarious Liability* 14.

¹¹⁹ Calitz 2005 *TSAR* 215.

¹²⁰ Roets *Doctrine of Vicarious Liability* 14.

¹²¹ Small *Vicarious Liability in South Africa* 140.

¹²² Neethling and Potgieter *Delict* 445.

opportunistic litigation against financially solvent entities and result in excessive deterrence, leading employers to impose overly restrictive measures on employee conduct, consequently undermining trust and operational effectiveness.¹²³

2.6.3 Loss distribution, indemnity and fidelity insurance theory¹²⁴

The theories of loss distribution, indemnity, and fidelity insurance collectively support imposing vicarious liability on employers in modern legal systems. Loss distribution theory holds that employers, being better able to bear and spread the costs of employee misconduct through pricing or insurance, should bear the financial burden. This approach can be seen as reducing the employer's losses. However, it has faced criticism for favouring economic efficiency over fault-based justice and for encouraging moral hazard.¹²⁵

Alongside this, the indemnity, interest, or profit theory holds that liability should be based on benefit: employers who approved of or benefited from the employee's actions should be responsible for any resulting harm.¹²⁶ The nature of associating liability with the employer's benefit derived from the employee's wrongful actions falters in deviation cases where the wrongful act has little connection to the employer's enterprise.¹²⁷

The fidelity insurance theory underpins this framework by recognising that employers can reduce risk through insurance. Fidelity policies cover claims arising from negligence, embezzlement, dishonesty, fraud, theft, and similar issues in which an employee's integrity or honesty is compromised. However, it has faced criticism for potentially shifting legal responsibility to financial planning, which could impose disproportionate burdens on smaller organisations.¹²⁸

These theories have faced criticism for disconnecting liability from control and causation, and for failing to align with core constitutional values such as accountability,

¹²³ FasterCapital 2025 <https://fastercapital.com/content/>.

¹²⁴ Calitz 2005 *TSAR* 215.

¹²⁵ Small *Vicarious Liability in South Africa* 140.

¹²⁶ Roets *Doctrine of Vicarious Liability* 14.

¹²⁷ Small *Vicarious Liability in South Africa* 141.

¹²⁸ Small *Vicarious Liability in South Africa* 141.

dignity, and fairness. A more coherent approach to vicarious liability should combine economic reasons with context-aware reasoning and transformative constitutional principles.

2.6.4 The deterrent effect theory¹²⁹

The deterrent effect theory of vicarious liability suggests that making employers responsible for their employee's wrongful acts discourages negligent supervision, inadequate hiring, and institutional neglect. By imposing financial liability, the law motivates employers to implement effective oversight, training, and risk management practices to minimise harm. This approach aligns with larger public policy objectives by encouraging proactive organisational behaviour and improving overall societal safety.¹³⁰

2.6.5 The assumption of risk theory

The assumption-of-risk theory in vicarious liability holds that the work assigned to the employee creates certain risks of harm, for which the employer should be held liable on fair and just grounds to the injured third party.¹³¹ It reflects a policy decision that prioritises protecting victims and fairness over strict fault-based liability.¹³²

A key challenge is its ability to hold employers responsible even if they took all reasonable steps and lacked any control over the wrongful act. This may result in unfair outcomes, particularly when the employee's actions were completely unforeseeable or deeply personal.¹³³

Critics also argue that the theory unduly enlarges the scope of liability, especially in deviation cases, by holding employers accountable for risk acceptance in circumstances where the connection between employment and harm is weak.¹³⁴

¹²⁹ Calitz 2005 *TSAR* 215.

¹³⁰ Small *Vicarious Liability in South Africa* 142.

¹³¹ Neethling and Potgieter *Delict* 445.

¹³² Roets *Doctrine of Vicarious Liability* 15.

¹³³ Small *Vicarious Liability in South Africa* 145.

¹³⁴ Small *Vicarious Liability in South Africa* 145.

In South African constitutional law, the assumption of risk must be balanced with principles such as accountability, fairness, and the right to dignity, requiring a nuanced, context-sensitive approach to liability. While the theory supports victim compensation and institutional responsibility, it should be applied thoughtfully to prevent unfairly blaming employers when there is no strong connection between the employment relationship and the harm.¹³⁵

2.7 Conclusion

The doctrine of vicarious liability in South African law has evolved from fragmented historical roots in Roman, Roman-Dutch, and English law into a coherent modern principle shaped by both judicial development and constitutional imperatives. While its foundation lies in policy rather than fault, the courts have consistently sought to balance fairness to victims with the need to avoid imposing disproportionate burdens on employers. The jurisprudence, particularly in deviation cases from *Feldman* through *Rabie, K*, and *Fujitsu-Schenker*, demonstrates a gradual refinement of the standard test, moving from rigid fault-based reasoning to a nuanced inquiry into whether there is a sufficiently close connection between wrongful conduct and the employer's enterprise.

This development highlights the hybrid nature of South African law: English tort principles provide the doctrinal framework, but constitutional values such as *Ubuntu*, dignity, and fairness now endow the objective test with transformative potential. *Ubuntu*, in particular, redefines vicarious liability not just as risk distribution but as a reflection of communal responsibility, ensuring that entities benefiting from labour also accept accountability for harms resulting from it. In this way, the doctrine aligns private law with the broader constitutional pursuit of social solidarity.

Policy theories, deepest pockets, loss distribution, deterrence, and assumption of risk each shed light on aspects of the rationale but remain incomplete when viewed in isolation. Their actual value lies in their combined contribution to a framework that emphasises victim protection, institutional accountability, and fairness. However,

¹³⁵ Small *Vicarious Liability in South Africa* 145.

critical reflection uncovers the risks of overreach: liability must not become a mere financial calculation detached from causation or control. Courts must therefore continue to interpret these theories within context, ensuring that liability remains proportionate and constitutionally justified.

Ultimately, vicarious liability in South Africa is more than just a strict legal rule. It acts as a flexible tool for justice, influenced by history, shaped by case law, and moulded by constitutional values. Its future path relies on balancing two aims: compensating victims and ensuring accountability, while avoiding unfair burdens on employers. In this way, the doctrine supports the constitutional goal of a society founded on fairness, dignity, and *Ubuntu*.

Having examined the doctrinal foundations and constitutional values that underpin vicarious liability, the discussion now shifts to contract interpretation. This transition is intentional: just as vicarious liability requires courts to balance fairness, accountability, and policy considerations, so too does contract interpretation necessitate a careful reconciliation of textual meaning, party autonomy, and constitutional principles. The next chapter will analyse how South African courts approach contractual language, the guiding principles of interpretation, and the extent to which fairness influences the enforcement of agreements.

CHAPTER 3

3 Interpretation of contracts

3.1 Introduction

The preceding chapter on vicarious liability elucidated how South African jurisprudence navigates the delicate balance between rigorous doctrinal principles and wider considerations of equity, justice, and constitutional values. In this context, courts are frequently tasked with reconciling the doctrine of holding one party accountable for another's conduct with the imperatives of fairness and social policy. A comparable tension is evident within contract law, where judicial interpretation necessitates a balanced approach between the textual provisions of agreements and equitable considerations, particularly as circumstances evolve.

Just as vicarious liability illustrates the law's responsiveness to constitutional values such as dignity and *Ubuntu*, contract interpretation also reflects an evolving approach that moves beyond strict literalism toward a more contextual and purpose-driven understanding. The shift from liability doctrines to interpretive principles highlights a shared theme: the judiciary's role in ensuring that private-law rules remain consistent with constitutional purposes.

A contract is an agreement concluded with the genuine intention of creating legally binding rights and obligations.¹³⁶ Contract law is indispensable in modern society, underpinning virtually all forms of economic activity.¹³⁷

However, even meticulously drafted contracts can give rise to disputes when unforeseen events reveal ambiguities within their provisions.¹³⁸ Anticipated events may also seem unjust under altered circumstances, prompting a consideration of whether fairness should supersede strict adherence to textual interpretation.

¹³⁶ Bradfield *Christie's Contract* 2.

¹³⁷ Bradfield *Christie's Contract* 1.

¹³⁸ Donnelly 2014 *JCM* 21.

Contractual interpretation is the legal process of determining the practical meaning of contractual language.¹³⁹ It requires legal logic and reasoning, guided by interpretive aids, maxims, and judicial precedent.¹⁴⁰ Courts seek to ascertain the parties' mutual intent by reading provisions in the context of the contract as a whole and the circumstances of its conclusion. The primary aim is clarity and certainty, though these values may conflict with fairness.¹⁴¹

Judicial interpretation of contracts is crucial in upholding and promoting the constitutional values of fairness, human dignity, and equality, as outlined in Chapter 2 of the Constitution, specifically the Bill of Rights.¹⁴²

The importance of this legal process also lies in determining whether the contractual terms in contention align with constitutional provisions and are thus legally enforceable. Interpretation, therefore, serves as a gatekeeper, ensuring that contractual terms are not only clear but constitutionally compliant.

This chapter aims to outline the historical development of contract interpretation in South African law, from literalism to contextualism, and to purposivism shaped by constitutional values.

3.2 General principles of contract interpretation

The principles of interpretation assume that a written document is disputed; however, they also apply to oral contracts.¹⁴³ Contract interpretation is solely a judicial task; witnesses do not perform this role. Courts employ a consistent approach when interpreting contracts, statutes, and other legal documents.¹⁴⁴ Interpretation pertains to legal judgment rather than factual evidence.¹⁴⁵

¹³⁹ Bradfield *Christie's Contract* 240.

¹⁴⁰ Moosa 2018 *J Forensic Leg Investig Sci* 3.

¹⁴¹ *Malunga Tax Consultants (Pty) Ltd v Greater Tzaneen Municipality* (LCC) (unreported) case number 1250/2016 of 12 February 2025 (hereafter the *Malunga* case) para 76.

¹⁴² *Constitution of the Republic of South Africa*, 1996.

¹⁴³ Bradfield *Christie's Contract* 240.

¹⁴⁴ Bradfield *Christie's Contract* 240.

¹⁴⁵ Moosa 2018 *J Forensic Leg Investig Sci* 3.

3.2.1 *The text-based approach (Literal or plain meaning approach)*

This approach involves giving words in a contract their literal or ordinary grammatical meanings, assuming that the language used reflects the drafters' intention, without reference to context, thereby rendering the contract self-contained.¹⁴⁶

Under this approach, the courts focused on the literal meaning of the contract's words.¹⁴⁷ Over the years, the courts came to regard the clear, literal meaning of words as identical to the contracting parties' intentions that led to the formation of the contract.¹⁴⁸ The golden rule was that, if the literal meaning of the words is clear, it should be applied and equated with the common intention of the contracting parties.¹⁴⁹

If the literal meaning of the words is ambiguous, vague, misleading or produces absurd results, the court could deviate from the literal sense to avoid absurdity.¹⁵⁰ It is only then that the courts were permitted to consider the context of the contract as a whole, including its background and purpose.¹⁵¹

3.2.2 *The text-in-context, contextual or purposive approach*

Under this approach, the prevailing factor in interpretation is finding the purpose of the contract.¹⁵² To determine the purpose, a purpose-oriented approach is required that considers the contract's contextual framework from the outset, rather than only when absurdity arises.¹⁵³ Therefore, context plays a significant role in determining the contract's purpose. This approach provides a balance between grammatical and overall contextual meaning.¹⁵⁴

The court must consider the broader context or purpose of the contract alongside the grammatical meaning of the words right from the very start of the interpretation

¹⁴⁶ Botha *Statutory Interpretation* 93.

¹⁴⁷ Botha *Statutory Interpretation* 91.

¹⁴⁸ Botha *Statutory Interpretation* 93.

¹⁴⁹ Botha *Statutory Interpretation* 91.

¹⁵⁰ Botha *Statutory Interpretation* 91.

¹⁵¹ Donnelly 2014 *JCM* 22.

¹⁵² Botha *Statutory Interpretation* 97.

¹⁵³ Botha *Statutory Interpretation* 97.

¹⁵⁴ Botha *Statutory Interpretation* 98.

process.¹⁵⁵ The relevant contextual factors, such as the contract's historical background, must always be considered, even if the literal meaning of the provisions is clear and unambiguous.¹⁵⁶

According to this approach, the court has inherent law-making discretion during interpretation. However, as an exception to the rule, it may modify or adapt the text's initial meaning to harmonise it with the contract's purpose.¹⁵⁷ The resulting meaning of the text-in-context must be applied, irrespective of whether the court believes that the parties intended something else.¹⁵⁸

Modification of the text's meaning is only permissible when the purpose of the contract is clear and justifies such a change.¹⁵⁹ In determining the contract's context, there are no hard-and-fast rules because circumstances differ from case to case.¹⁶⁰

The facts specific to the parties and their contextual arrangements are likely to be more relevant when interpreting contracts involving individuals and small businesses with relatively equal bargaining powers.¹⁶¹ The courts must exercise caution not to undo the results of a hard-won bargaining process or to absolve parties of the risks they chose to undertake to achieve other benefits.¹⁶²

Large commercial organisations often enter into agreements such as sales, leases, loans, insurance policies, bills of lading, and charter parties that utilise standard-form contracts (SFCs), also known as contracts of adhesion.¹⁶³ They are usually concluded on a take-it-or-leave-it basis, rather than the result of a negotiation process.¹⁶⁴

SFCs are often drafted by a large organisation with greater bargaining power. The specific facts concerning the party with a weaker bargaining position are less significant. The purpose of the contract, the nature of the relationship established, and

¹⁵⁵ Botha *Statutory Interpretation* 98.

¹⁵⁶ Botha *Statutory Interpretation* 98.

¹⁵⁷ Botha *Statutory Interpretation* 99.

¹⁵⁸ Botha *Statutory Interpretation* 98.

¹⁵⁹ Botha *Statutory Interpretation* 99.

¹⁶⁰ Wallis 2019 *PER/PELJ* 15.

¹⁶¹ Wallis 2019 *PER/PELJ* 16.

¹⁶² Wallis 2019 *PER/PELJ* 16.

¹⁶³ Wallis 2019 *PER/PELJ* 16.

¹⁶⁴ Wallis 2019 *PER/PELJ* 16.

the marketplace in which it operates will all be relevant to its interpretation.¹⁶⁵ Due to the disproportionate bargaining power, fairness and equity are integral to the context.¹⁶⁶

3.2.3 The parol evidence rule

The parol evidence rule protects the integrity of written agreements by asserting that when parties formalise their contract in writing and intend it as the definitive and comprehensive representation of their agreement, no external evidence shall be admissible to contradict, alter, supplement, or diminish its terms.¹⁶⁷

3.2.4 The eiusdem generis rule

The *eiusdem* generis rule states that when general words or phrases follow a list of specific words or phrases, the general words are understood to be limited and apply only to persons or things of the same kind or class as those explicitly mentioned.¹⁶⁸ For example, suppose the term mentions automobiles, trucks, tractors, motorcycles, and other motor-powered vehicles. In that case, a court might apply the rule of *eiusdem* generis to infer that such vehicles do not include aeroplanes, as the list pertains solely to land-based transportation.

3.2.5 Written or typed insertion rule

It is stated that when a contract is partially printed and partially handwritten or inserted, the effect is attributed to the handwritten or inserted modifications, as they are deemed to more accurately reflect the intentions of the parties.¹⁶⁹

3.2.6 Presumed intention rule

States that if a term is ambiguous, it should be given a meaning that would make it effective rather than a word that would make it legally ineffective.¹⁷⁰

¹⁶⁵ Wallis 2019 *PER/PELJ* 16.

¹⁶⁶ Wallis 2019 *PER/PELJ* 17.

¹⁶⁷ Bradfield *Christie's Contract* 226.

¹⁶⁸ *Rosenblum* case para 10.

¹⁶⁹ Maxwell "Interpretation of Contracts" 11.6.

¹⁷⁰ Maxwell "Interpretation of Contracts" 11.6.

3.2.7 *The contra proferentem rule*

The *proferens* is the party to the contract who drafted the contract.¹⁷¹ The rule states that, if the wording is incurably ambiguous, the author should bear the consequences because he had the opportunity to make his meaning clear.¹⁷² However, the alternative interpretation employed to illustrate the ambiguity must be one to which the language is reasonably susceptible; it must not be fanciful or remote.¹⁷³ This rule is applied as a last resort when all methods of ascertaining the common intention of the parties have failed.¹⁷⁴

3.2.8 *The quod minimum rule*

The rule stipulates that, when a legal text is ambiguous or susceptible to multiple interpretations, the interpretation that minimises burdens, obligations, or restrictions should be prioritised. This approach aims to reduce interference with individual rights and to prevent unintended or excessively severe consequences, especially in provisions that are restrictive.¹⁷⁵

3.3 *The evolution of contractual interpretation in South Africa*

Before 1994, our legal system used a text-based approach adopted from English law.¹⁷⁶ A strict devotion to the contractual text characterised the traditional approach.¹⁷⁷ Interpretation involves establishing the plain, literal, or grammatical meaning of the words used in the contract, in line with the intentions of the parties.¹⁷⁸

All previous bargaining and negotiations between the parties who entered into a written contract, including any oral evidence of their intentions, were categorically

¹⁷¹ Bradfield *Christie's Contract* 262.

¹⁷² Bradfield *Christie's Contract* 262.

¹⁷³ *Schenker* case para 13.

¹⁷⁴ Bradfield *Christie's Contract* 262.

¹⁷⁵ Maxwell "Interpretation of contracts" 11.6.

¹⁷⁶ Botha *Statutory Interpretation* 92.

¹⁷⁷ Botha *Statutory Interpretation* 102.

¹⁷⁸ Wallis 2019 *PER/PELJ* 2.

inadmissible; this principle is recognised as the parol evidence rule.¹⁷⁹ Application of the rule in practice proved troublesome, seeming more fluid and less certain.¹⁸⁰

In *Coopers and Lybrand and Others v Bryant*¹⁸¹ (hereafter the *Coopers and Lybrand* case)¹⁸² a new approach was summarised as requiring that the grammatical meaning of the words first be determined, followed by consideration of the context and background circumstances, applying extrinsic evidence of surrounding circumstances when encountering ambiguity.

However, the court in the *Coopers and Lybrand* case cited a judgment stating that the words of the contract should not be isolated from the document when determining their grammatical meaning. Instead, they should be considered in light of the document's overall nature and purpose, as well as their context within it. Immediately afterwards, the court stated that examining the context should occur after establishing the grammatical meaning of the words in question.¹⁸³

After the *Coopers and Lybrand* case, case law fluctuated between these two extremes, resulting in a prolonged tug-of-war between textual and contextual interpreters.¹⁸⁴ However, the past century saw significant developments in contract interpretation, both in South Africa and in other countries with similar legal rules, leading to a new approach.¹⁸⁵

There has been a notable shift towards a purposive text-in-context approach, in which our courts assess not only the literal meaning of contract words but also the surrounding circumstances, commercial facts, and the contract's purpose to identify the parties' intentions accurately.¹⁸⁶ This is an effective transition from the common party intention text-based approach to the purpose-oriented text-in-context approach.

¹⁷⁹ Wallis 2019 *PER/PELJ* 2.

¹⁸⁰ Wallis 2019 *PER/PELJ* 3.

¹⁸¹ 1995 3 SA 761 (A).

¹⁸² *Coopers and Lybrand* case page 10.

¹⁸³ Wallis 2019(22) *PER / PELJ* 6.

¹⁸⁴ Wallis 2019(22) *PER / PELJ* 6.

¹⁸⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter the *Endumeni* case) para 18.

¹⁸⁶ *Malunga* case para 79.

It is noted that this new approach shows an interest in the parties' original intentions and the contract's purpose.

The new approach was first outlined and applied in South Africa in the *Endumeni* case.¹⁸⁷ The court held that:

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which this provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. 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. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

When interpreting laws, courts must go beyond the words and examine previous negotiations and conduct between the parties. This ensures that the resulting analysis reflects what a reasonable person would infer these provisions to mean in comparable circumstances.¹⁸⁸

This innovative approach requires analysing language and context simultaneously from the outset, treating them as a unified process rather than separate steps.¹⁸⁹ Reviewed and compared multiple times to determine the actual meaning of the words.¹⁹⁰

If the court cannot determine the meaning of the provision after applying the above, it will seek guidance from the other rules of interpretation listed above.¹⁹¹ However, the courts are not obliged to use them.¹⁹² These include, but are not limited to, the *ejusdem generis* rule, the written or typed insertions rule, the *contra proferentem* rule

¹⁸⁷ *Endumeni* case para 18.

¹⁸⁸ *Malunga* case para 80.

¹⁸⁹ Moosa 2018 *J Forensic Leg Investig Sci* 3.

¹⁹⁰ Donnelly 2014 *JCM* 21.

¹⁹¹ Maxwell "Interpretation of Contracts" 11.6.

¹⁹² Maxwell "Interpretation of Contracts" 11.6.

and the *quod minimum* rule. There is no closed list of these rules; it is non-exhaustive, and more may be added, with the court applying them in any sequence.¹⁹³

The courts make great efforts to determine the common intention of the parties or interpret the meaning of the contract. When all rules of interpretation have been applied but the common intention or meaning remains unclear, the court will declare the contract void for vagueness.¹⁹⁴

3.4 The role of the Constitution in contract interpretation

South Africa is a sovereign state founded on the value of the supremacy of the Constitution and the rule of law.¹⁹⁵ The Constitution constitutes an objective, normative legal framework, grounded in values such as human dignity, equality, the advancement of human rights and freedoms, non-racialism, and non-sexism.¹⁹⁶ All laws must align with these values and all other constitutional provisions; any law that is contrary to these provisions is invalid and unenforceable.¹⁹⁷

Section 39 (2) of the Constitution provides that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹⁹⁸

Section 39(2) serves as the interpretation clause. It is a mandatory provision that obligates courts to consider the aim and purpose of legislation within the context of the Bill of Rights when interpreting any legislative provision.¹⁹⁹

The Constitution mandates that all contractual interpretation occurs within a framework that upholds dignity, equality, and freedom. Section 39(2) requires courts to interpret the common law in accordance with the Bill of Rights, preventing private agreements from entrenching injustice or conflicting with transformative constitutional aims. This interpretive obligation is especially relevant to the enforceability of

¹⁹³ Maxwell "Interpretation of Contracts" 11.6.

¹⁹⁴ Maxwell "Interpretation of Contracts" 11.6.

¹⁹⁵ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁶ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁷ Section 2 of the *Constitution of the Republic of South Africa*, 1996.

¹⁹⁸ The *Constitution of the Republic of South Africa*, 1996.

¹⁹⁹ Botha *Statutory Interpretation* 101.

indemnity clauses that exclude vicarious liability for employee theft. While the principle of *pacta sunt servanda* upholds contractual freedom, its application must align with constitutional principles. Consequently, the research question arises from this constitutional duty, urging courts to strike a balance between contractual certainty and public policy to ensure contracts serve both commercial and justice objectives.

3.5 The Fujitsu proceedings

3.5.1 The High Court

In the High Court, the legal question was whether, properly interpreted, the written agreements between the parties, which governed their contractual relationship, excluded Schenker's liability for the wrongful conduct of one of its employees.²⁰⁰ This was a matter of contract interpretation.

The court referred to the general rules of interpretation, which provide that any limitation of liability must be strictly construed and that contractual instruments should not be permitted to restrict liability, particularly when liability arises outside the contract, unless expressly stated.²⁰¹

In interpreting the exemption clause, the court held that it excluded liability for damages arising from breach of contract.²⁰² It held that the theft by Mr Lerama did not constitute a breach of contract but rather an act outside the performance of the contract.²⁰³

The court observed that the agreement's explicit language indicates that the parties did not anticipate that the exemption clauses would encompass a delictual claim grounded in theft; otherwise, they could have drafted the agreement to include theft by employee.²⁰⁴

²⁰⁰ *Fujitsu-Schenker* case paras 2 and 31.

²⁰¹ *Fujitsu-Schenker* case paras 32 and 37.

²⁰² *Fujitsu-Schenker* case para 33.

²⁰³ *Fujitsu-Schenker* case paras 35 and 43.

²⁰⁴ *Fujitsu-Schenker* case para 46.

The High Court determined that, when interpreted literally, the exemption clauses did not protect the defendant from liability for theft committed by its employee. The reasoning holds that contractual freedom should not extend to wrongful acts outside the scope of the agreement unless expressly agreed by the parties.

3.5.2 The Supreme Court of Appeal

The SCA overturned the decision of the High Court. It concluded that, when Mr Lerama stole the goods, he was acting in the course of performing his duties on behalf of his employer, Schenker.²⁰⁵ It therefore held that the exemption clause was applicable.²⁰⁶

The legal question was whether, upon a proper interpretation of the agreement's exemption clauses, Schenker's liability is exempted or limited.²⁰⁷

Fujitsu submitted that, in its language, clause 17 cannot be construed as including intentional acts by Schenker's employees.²⁰⁸ The court held that the contextual reading and consideration of the entire agreement, including the phrases of whatsoever nature and howsoever arising, should be given their ordinary meaning and are sufficiently broad to cover the deliberate and intentional acts of Schenker's employees.²⁰⁹

The SCA relied its judgment on the passing of risk clause, clause 17 of the agreement.²¹⁰ It held that clause 17 was unambiguous, thus no room for the application of the *contra proferentem* rule.²¹¹ The court also found no evidence that Fujitsu made special arrangements under clause 17.²¹² It found no public policy considerations that prevented Schenker from enforcing the risk allocation agreed upon by the parties.²¹³

The SCA has affirmed that the exemption clause was sufficiently broad and unambiguous to encompass even intentional acts committed by Schenker's employees

²⁰⁵ *Schenker* case para 14.

²⁰⁶ *Schenker* case para 14.

²⁰⁷ *Schenker* case para 11.

²⁰⁸ *Schenker* para 15.

²⁰⁹ *Schenker* case para 15.

²¹⁰ *Schenker* case para 18.

²¹¹ *Schenker* case para 18.

²¹² *Schenker* case para 16.

²¹³ *Schenker* case para 19.

in the course of their duties. By giving effect to the ordinary meaning of the contractual language and rejecting the application of *contra proferentem*, the court reinforced the principle that parties are bound by the risk allocation they freely negotiated. The judgment reflects a strong commitment to contractual certainty, emphasising that, absent clear public policy concerns, courts will uphold exemption clauses as written.

3.5.3 *The Constitutional Court*

The legal issue concerns whether, when correctly interpreted, the exemption clauses exclude liability for a delictual claim arising from theft committed by employees.²¹⁴

The minority judgment, akin to the decision of the High Court, concluded that theft does not constitute the performance of the contractual obligations requiring Schenker to collect and deliver the goods to or on behalf of Fujitsu.²¹⁵ Theft also does not qualify as a business undertaking. Therefore, there is no strong reason to include theft in the exclusion of liability specified by clause 17.²¹⁶ What must be understood from the contract is that the parties intended its interpretation to align with its terms, not theft, which falls outside the terms.²¹⁷

Mathopo J focused specifically on the heading of clause 17, "Goods requiring special arrangement." He emphasised that headings in contracts are not merely decorative but can guide interpretation. The minority argued that the heading indicated clause 17 was meant to regulate goods of a particular nature, those needing special handling or arrangements, rather than providing an overall exemption from liability for all types of loss, including theft.²¹⁸ By focusing on the heading, the minority emphasised that contractual interpretation must be contextual and purposive: the clause should be understood in light of its subject matter, not extended to cover situations far removed from its intended purpose.²¹⁹ Therefore, the minority concluded that clause 17 could not reasonably be used to shield Schenker from liability for the theft of Fujitsu's laptops, as theft by an employee did not fall within the scope of "special arrangements"

²¹⁴ *Fujitsu* case para 42.

²¹⁵ *Fujitsu* case para 45.

²¹⁶ *Fujitsu* case para 45.

²¹⁷ *Fujitsu* case para 46.

²¹⁸ *Fujitsu* case para 47.

²¹⁹ *Fujitsu* case paras 48-50.

envisaged by the clause. This interpretive approach reinforced their broader stance that exemption clauses must be construed narrowly and do not extend to deliberate criminal conduct. The ordinary meaning of "Goods requiring special arrangement" cannot produce the outcome contemplated by the parties as required by the principles of interpretation.²²⁰

The majority interpreted the heading of clause 17 more broadly than the minority. Zondo CJ reasoned that the clause's wording was sufficiently wide to include a variety of risks, such as theft, and that the heading did not limit its scope only to goods of a special kind.²²¹

In effect, the majority held that the heading could not override the clear and comprehensive language of the exemption clause, which was designed to allocate risk between the parties.²²² This approach reflects the majority's broader commitment to freedom of contract and commercial certainty: parties are entitled to agree on risk allocation, and courts should not unduly restrict the scope of exemption clauses by relying on headings or narrow interpretive devices. Thus, while the minority saw the heading as limiting the clause's reach, the majority regarded it as a non-decisive interpretive aid, affirming that the exemption clause applied even to employee theft.

In conclusion, the differing interpretations of clause 17 in the Fujitsu case highlight the tension between contractual freedom and public policy in South African law. The minority judgment, attentive to the heading "Goods requiring special arrangement," argued that interpretation must be context-driven and purposive, thus excluding employee theft from the scope of the exemption clause.

In contrast, the majority viewed the heading as a non-decisive aid, emphasising the broad textual language of the clause and affirming its application even to theft. This contrast highlights a fundamental interpretive divide: whether exemption clauses should be interpreted narrowly to protect constitutional values of fairness and accountability or broadly to ensure commercial certainty and risk distribution. The case

²²⁰ *Fujitsu* case para 47.

²²¹ *Fujitsu* case para 114.

²²² *Fujitsu* case para 142.

thus emphasises the ongoing judicial challenge to balance freedom of contract with the limits set by public policy, especially when intentional criminal conduct is involved.

3.6 Conclusion

The evolution of contract interpretation in South Africa demonstrates a discernible shift from strict textualism towards a purposive and contextually aware methodology that aligns with constitutional principles. Grounded in the *Endumeni* framework, courts now interpret contractual language by considering contextual factors and the agreement's fundamental purpose, thereby fostering certainty and preventing unreasonable or impractical outcomes. This interpretive approach ensures that private autonomy remains interconnected with public law considerations, as the Constitution embodies normative values including dignity, equality, fairness, and *Ubuntu*.

The implications of this development are particularly significant for indemnity clauses that seek to exclude vicarious liability for employee theft. Under the purposive, text-in-context approach, such clauses cannot be viewed as standalone provisions; their enforceability must be assessed against constitutional commitments to justice and public policy. Interpretation thus becomes the doctrinal hinge upon which the balance between *pacta sunt servanda* and public policy rests, requiring courts to harmonise contractual freedom with the principles of fairness within a constitutional democracy.

Building on this interpretive framework, the next chapter examines how courts apply these principles to exemption clauses in practice, with particular focus on indemnity provisions that seek to exclude vicarious liability for employee theft.

Chapter 4

4 Indemnity clauses

4.1 Introduction

Having established the interpretive framework, it is now necessary to examine how South African courts have applied these principles to indemnity clauses in practice. The jurisprudence reveals a persistent tension: while the doctrine of *pacta sunt servanda* requires fidelity to the contractual text, public policy, comprising constitutional values of fairness, justice, and *Ubuntu*, demands scrutiny of clauses that absolve parties from liability for intentional misconduct. This tension is especially evident in cases involving indemnity clauses that exclude vicarious liability for employee theft, where the contract's clear wording conflicts with the normative principles of a constitutional democracy.

The concept of indemnity clauses originates from Roman-Dutch law and is widely recognised in South African contract law.²²³ Indemnity clauses are not unique; they are simply another clause in a contract, subject to the usual disputes that can arise in a contractual setting.²²⁴ They are used to exclude or limit a contracting party's liability or duty that, under normal circumstances, the law would impose by the nature of the agreement.²²⁵

They are regarded as problematic because they effectively exclude or limit liability for one of the contracting parties and are thereby equated with clauses that deprive another party of legal redress.²²⁶ It is argued that they may undermine the contract's purpose by altering its core.²²⁷ They may lead to the exploitation of parties possessing weaker bargaining power. This is because exemption clauses can be unjust and oppressive and are frequently misused.²²⁸

²²³ Sande *Exemption clauses* 1.

²²⁴ O'Brien 2001 *TSAR* 597.

²²⁵ Kanamugire and Chimuka 2014 *MJSS* 165.

²²⁶ Mupangavanhu 2014 *PER/PELJ* 1172.

²²⁷ Mupangavanhu 2014 *PER/PELJ* 1172.

²²⁸ Mupangavanhu 2014 *PER/PELJ* 1172.

Exemption clauses may take different forms, for example, clauses exempting a party from liability for negligence, gross negligence, fraud, or dishonesty, as well as from vicarious liability for employee theft.

This chapter aims to analyse the legal framework governing exemption clauses in South African law, focusing on their enforceability, limitations, and changing interpretation. It examines how clauses excluding liability for negligence, gross negligence, fraud, and vicarious liability are treated.

The chapter also examines the impact of the Consumer Protection Act 68 of 2008, which provides safeguards for vulnerable consumers against unfair contractual terms. Furthermore, it explores the principles of judicial interpretation relevant to exemption clauses, highlighting the courts' role in balancing contractual freedom with public policy and constitutional values. Through this examination, the chapter aims to clarify the doctrinal tensions and policy issues that shape the modern application of indemnity clauses in South African contractual law.

4.2 Liability

In discussing liability, it is probably a good idea to present an example of an exemption clause from case law.

4.2.1 Rosenblum case

In this case, the Rosenblums have instituted legal action against the bank arising from the theft of the contents of a safe deposit box provided by the bank for Mr Rosenblum's use. The bank's liability was excluded by virtue of an exemption term (clause 2 of the contract):

The bank hereby notifies its customers that while it will take all reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, the flow of storm water, hail, storm, wind, fire or as a result of any cause whatsoever and whether the loss or damage is as a result of the bank's negligence or not.

The Rosenblums contended that the clause did not exempt the bank from liability for all forms of theft, including theft by its employees acting within the scope of their employment. Furthermore, they argued that liability for gross negligence and liability

for negligent acts or omissions committed by the bank's employees were not excluded by the wording of the clause.²²⁹ This contention concerned the interpretation of the exemption clause.

4.2.2 A clause excluding liability for negligence and/or gross negligence

Negligence is generally the failure of an individual or organisation to exercise a duty of care in the same manner as a reasonable person would under similar circumstances.²³⁰

Ordinary negligence occurs when a person breaches their duty of care that a reasonable person would in the circumstances.²³¹ Gross negligence involves an extreme departure from the standard of care, often showing recklessness or a complete disregard for the consequences. Gross negligence is far more serious than ordinary negligence because it involves deliberate actions and a lack of concern for the need to exercise reasonable care, even when their actions could lead to foreseeable harm.²³²

In the *Afrox Healthcare* case, the SCA upheld an exemption clause that exempted a private hospital from liability for harm caused to a patient due to the negligence (medical malpractice) of its nursing staff. The court dismissed the claim that the clause was against public policy and the right of access to healthcare as stipulated in the Constitution.²³³

Another argument in the *Rosenblum* case was whether it is contrary to public policy for a contractor to exempt itself from liability arising from its own or its servant's gross negligence.²³⁴

²²⁹ *Rosenblum* case para 8.

²³⁰ Brits 2021 <http://blog.seesa.co.za/index.php/2021/04/26/the-difference-between-ordinary-and-gross-negligence/>

²³¹ Brits 2021 <http://blog.seesa.co.za/index.php/2021/04/26/the-difference-between-ordinary-and-gross-negligence>

²³² Brits 2021 <http://blog.seesa.co.za/index.php/2021/04/26/the-difference-between-ordinary-and-gross-negligence>

²³³ Section 27 of the *Constitution of the Republic of South Africa*, 1996.

²³⁴ O'Brien 2001 *TSAR* 598.

The court held that:

Finally, there is a submission for respondents that gross negligence is not covered by clause 3. In my view, it cannot be upheld. Nothing in clause 2 suggests that only *culpa levis* is to enjoy immunity but not *culpa lata*. Indeed, in the case of *Fiber Spinners and Weavers* a clause which made no mention of negligence at all was held to cover both negligence and gross negligence. (Here, negligence is expressly mentioned in clause 2). It was also held that there was no reason, founded in public policy, why a clause exempting a person from liability for gross negligence should not be enforceable.²³⁵

It is thus submitted that South African courts have affirmed that exemption clauses may validly exclude liability for both ordinary and gross negligence, as seen in *Afrox Healthcare*²³⁶ and *Rosenblum*,²³⁷ and *The Government of South Africa v Fiber Spinners and Weavers (Pty) Ltd*²³⁸ (hereafter the *Fibre Spinners* case).²³⁹ The principle of freedom of contract prevails, with such clauses enforceable unless they are clearly contrary to public policy or constitutional values.

4.2.3 A clause excluding liability for fraud and/or employee theft

A clause that absolves a contracting party from liability for an employee's fraudulent actions is against public policy, especially if it attempts to exempt the party from its own fraud.²⁴⁰

A clause that exempts a party from liability for its own willful misconduct is considered against public policy and is unenforceable. However, a party can be exempt from liability for its employee's willful misconduct, including theft.²⁴¹

Calitz argues that, given the essential policy concerns of fair compensation for victims and the deterrence of employer misconduct underpinning vicarious liability, it may, under specific circumstances, be detrimental to the public interest and thus contrary to *boni mores* to uphold an exemption clause that absolves vicarious liability.²⁴²

²³⁵ *Rosenblum* case para 26.

²³⁶ *Afrox Healthcare* case para 36.

²³⁷ *Rosenblum* case para 26.

²³⁸ 1978 2 SA 794 (A).

²³⁹ *Fibre Spinners* case page 23.

²⁴⁰ O'Brien 2001 *TSAR* 600.

²⁴¹ O'Brien 2001 *TSAR* 601.

²⁴² Calitz 2021 <https://www.litnet.co.za/>

The jurisprudence on indemnity clauses shows a spectrum of judicial acceptance: while clauses excluding liability for ordinary negligence are generally enforceable, and even those covering gross negligence have been upheld by the SCA, courts have taken a firmer stance against clauses exempting a party from its own fraud.

However, the situation becomes more complex when dealing with vicarious liability for employee theft. In this context, the law permits contractual exclusion. Still, academic commentary warns that such clauses may weaken the remedial and deterrent functions of vicarious liability, thereby conflicting with public policy and constitutional principles, including fairness and *Ubuntu*.

This tension highlights a broader doctrinal challenge: *pacta sunt servanda* requires respect for contractual autonomy, but public policy mandates that contracts not undermine fundamental principles of justice. The combination of case law and scholarly critique emphasises the need for a judicial approach that carefully considers different levels of fault and misconduct, ensuring that indemnity clauses do not weaken the integrity of the legal system or the constitutional goal of a fair society.

4.3 Consumer Protection Act 68 of 2008

The *Consumer Protection Act* 68 of 2008 (CPA) was enacted on 24 April 2009 and came into effect on 31 March 2011. It was introduced to safeguard vulnerable consumers, even against exemption clauses.²⁴³

Under Section 5(2)(b) of the CPA, the Act excludes transactions involving a juristic person, such as a company, close corporation, or trust, whose asset value or annual turnover meets or exceeds the threshold set by the Minister.

This means that if a juristic person holds assets or has annual turnover at or above this amount at the time of the transaction, the protections of the CPA do not apply to it.

²⁴³ Mupangavanhu 2014 *PER/PELJ* 1178.

Section 48 of the CPA affirms the consumer's right to fair, just, and reasonable terms and conditions. It serves as a statutory limitation on the principle of freedom of contract, particularly in consumer transactions where the bargaining power is unequal.

This section prohibits suppliers from engaging in transactions, or from making offers or agreements, that are unfair, unreasonable, or unjust. Such terms are excessively unfavourable to the consumer, rendering them inequitable or excessively biased in favour of parties other than the consumer.

It also prohibits parties from requiring consumers to waive rights or assume obligations on unfair terms. However, exemption clauses usually involve a consumer waiving rights and the supplier excluding liability. Therefore, the CPA provides a remedy where such exemption clauses may be deemed invalid as unjust and unreasonable.

Section 48 marks a paradigm shift in South African contract law, transitioning from traditional autonomy-centric models to a more context-aware, constitutionally integrated approach. It aligns with principles of dignity, equality, and access to justice, fostering the development of a fairer legal framework for consumer transactions.²⁴⁴

Section 48 establishes the yardstick for fairness in consumer contracts. While it outlines the factors used to assess whether an agreement is unfair, the CPA does not specify a definitive list of requirements for unfair contracts. The determination of unfairness largely depends on the court's interpretation of the facts of each case.²⁴⁵

Section 49 complements Section 48 by emphasising procedural fairness. It requires that any potentially prejudicial terms in a consumer agreement be clearly disclosed and conspicuously highlighted to the consumer, in a form likely to attract the attention of an ordinary, alert consumer.²⁴⁶ The party's efforts to inform the consumer of the exemption clause should be reasonable, indicating that a reasonable person would readily notice the provision.²⁴⁷

²⁴⁴ Sande *Exemption Clauses* 24.

²⁴⁵ Sande *Exemption Clauses* 24.

²⁴⁶ Mupangavanhu 2014 *PER/PELJ* 1179.

²⁴⁷ Mupangavanhu 2014 *PER/PELJ* 1179.

Section 49 shifts away from the traditional contract model based on presumed informed consent and *caveat* subscriber, towards a more context-aware approach emphasising transparency and procedural fairness.

The provision is intended to remedy informational imbalances and protect consumers from unknowingly being subjected to unfair terms. It promotes market fairness, enhances consumer confidence, and improves access to justice, while aligning private law with constitutional principles, including dignity and equality.

Sections 50 and 51 of the CPA jointly establish the standards for written consumer agreements, emphasising transparency, fairness, and substantive justice in contracts. Section 50 requires that any written consumer agreement, when mandated by law or customary practice, must be clear, disclose all material terms, and be provided to the consumer free of charge. This upholds the constitutional value of accessibility by preventing consumers from being misled by complex or ambiguous language.

Section 51 adds that unfair, unjust, or unreasonable contractual terms are prohibited, including clauses that waive consumer rights, shield suppliers from liability for gross negligence, or impose excessive penalties. Together, these sections mark a shift from traditional contract law, establishing a statutory duty of fairness that balances contractual freedom with consumer rights.

The Constitutional Court in the *Fujitsu* case did not apply the CPA because the dispute involved two large juristic persons engaged in a commercial transaction, which falls outside the scope of Section 5(2)(b) of the Act. The exclusion of the CPA highlights the doctrinal boundaries of statutory consumer protection in South African contract law.

This restriction underscores the CPA's particular emphasis on protecting natural persons and small legal entities in asymmetric consumer relationships, rather than on overseeing business-to-business agreements.

Consequently, the Constitutional Court relied on principles of the common law and constitutional values to evaluate the enforceability of the exemption clause, reaffirming that public policy remains a flexible and evolving standard.

4.4 Comparative analysis with English law

English law seeks to balance the principle of freedom of contract with public policy.²⁴⁸ To achieve this, statutory provisions such as the Unfair Contract Terms Act 1977 (UCTA) regulate unfair contractual terms.

4.4.1 *Unfair Contractual Terms Act 1977 (UCTA)*

The Act primarily addresses the exemption or limitation of business liability resulting from activities conducted during business operations or from occupying the business premises.²⁴⁹ Section 2–7, titled "avoidance of liability for negligence, breach of contract, etc," is used to regulate exemption clauses.

Section 2 of UCTA reflects a targeted statutory intervention aimed at preventing the evasion of negligence liability in contracts, while maintaining freedom of contract in commercial settings. Its reliance on the reasonableness test places judicial discretion within a practical, case-by-case framework.²⁵⁰ Conversely, Section 48 of the CPA represents a transformative constitutional approach, prohibiting contractual terms that compromise fairness, justice, or public policy. It extends beyond negligence to cover the entire range of consumer agreements, embedding constitutional principles into private law.

Hence, while Section 2 of the UCTA adopts a narrow and functional approach, Section 48 of the CPA adopts a broad and principled stance, reflecting South Africa's post-apartheid dedication to consumer dignity and equality. Collectively, they exemplify two paradigms: incremental statutory regulation of exemption clauses (UK) versus comprehensive constitutional oversight of contractual fairness (South Africa). However, based on Section 51 of the CPA, the South African approach is similar rather than merely a broader constitutional approach.

Section 3 of UCTA acts as a safeguard against the misuse of SFCs,²⁵¹ stopping a party that agrees on its own written terms from excluding liability for breach, changing the

²⁴⁸ Sande *Exemption Clauses* 27.

²⁴⁹ Sande *Exemption Clauses* 28.

²⁵⁰ Section 2(2) of UCTA.

²⁵¹ Section 3(1) of the UCTA.

core of its obligations, or avoiding performance unless such clauses meet the statutory "reasonableness test."²⁵²

Its focus is narrow, targeting the imbalance inherent in standard contractual terms and subjecting exemption clauses to judicial scrutiny under common-law pragmatism. In contrast, the CPA, sections 49–50, adopts a broader constitutional approach, prohibiting any contractual term that is unfair, unreasonable, unjust, or unconscionable, and requiring suppliers to make unusual or disadvantageous terms clear and understandable to the consumer in plain language.

Whereas UCTA section 3 relies on an objective test of reasonableness applied to exemption clauses, CPA section 48 embeds constitutional values such as dignity, equality, and *Ubuntu* into consumer law, empowering courts to strike down oppressive terms across the spectrum of consumer agreements. The comparison thus highlights UCTA's incremental control of liability clauses versus the CPA's transformative commitment to substantive fairness and transparency in contractual dealings.

The provisions of the UCTA, particularly sections 2, 3, 6, 7, and 51 of the CPA, adopt contrasting approaches to regulating unfair contractual terms. UCTA applies a reasonableness test, allowing the exclusion of liability clauses only if they are deemed fair, taking into account factors such as bargaining power and transparency, thereby balancing contractual independence with judicial oversight. In contrast, section 51 of the CPA enforces strict prohibitions, automatically invalidating clauses that attempt to waive liability for gross negligence, fraud, or misleading conduct. This approach reflects South Africa's constitutional commitment to fairness, accountability, and *Ubuntu*, highlighting consumer protection over contractual freedom. Essentially, UCTA moderates contractual excesses through judicial discretion, whereas the CPA enforces explicit statutory constraints, thereby demonstrating the divergence between English common law pragmatism and South Africa's transformative constitutionalism.

²⁵² Section 3(2) of the UCTA.

4.5 Judicial interpretation of the exemption clause

The general rules of contract interpretation, such as those applied to ordinary contractual terms, also apply to exemption clauses.²⁵³ The rules of interpretation are discussed in Chapter 3 above. Judicial interpretation of exemption clauses is clearly stated in *Durban's Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) (hereafter the *Durban's Wonderland* case).²⁵⁴

The SCA held that:

If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be fanciful or remote.²⁵⁵

In the *Schenker* case, the parts of the exemption clauses in contention are as follows:²⁵⁶

Clause 17:

Except under special arrangements previously made in writing, Schenker will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock or plants. Should Fujitsu nevertheless deliver such goods to Schenker or cause Schenker to handle or deal with such goods without prior arrangements previously made in writing, Schenker shall incur no liability whatsoever in respect of Fujitsu's goods and, in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods.

Clause 40.1:

Schenker shall not be liable for any claims of whatsoever nature (whether in contract or delict) and whether for damages or otherwise, howsoever arising.

The legal issue was whether, upon proper interpretation, the exemption clauses exclude liability for a delictual claim of employee theft, which is a matter for judicial interpretation.²⁵⁷

²⁵³ Cuthbertson *Exemption Clauses* 22.

²⁵⁴ Maxwell "Interpretation of Contracts" 11.6.

²⁵⁵ *Durban's Wonderland* case page 10.

²⁵⁶ *Schenker* case para 8.

²⁵⁷ *Schenker* case para 11.

The SCA pointed out specific rules indicating that, in contract disputes, parties are presumed to intend for their legal rights and obligations to be governed by common law unless they clearly specify otherwise. Additionally, suppose a party wants to be fully or partially released from a contractual responsibility or liability at common law. In that case, they must clearly define the extent of the release.²⁵⁸

Fujitsu argued that, in its language, clauses 17 and 40 cannot be construed to include intentional acts by Schenker's employees.²⁵⁹ The SCA ruled that, upon examining the agreement in its entirety and considering the context, the phrases "of whatsoever nature" and "howsoever arising" in clause 40.1 should be interpreted according to their ordinary, literal meanings. These expressions are sufficiently expansive in their plain scope to encompass, within the exemption's protective scope, the intentional acts conducted by Schenker's employees, including theft.²⁶⁰ The court held that the language used to exempt the *proferens* (Schenker in this case) was clear and unambiguous, and should therefore be enforced.²⁶¹

4.6 Role of the courts in preventing the abuse of exemption clauses

Contract law is founded on the principle of consensus; however, in practice, authentic agreement is frequently absent, particularly in the context of SFCs. These agreements are typically presented on a take-it-or-leave-it basis, which consolidates unequal bargaining power and enables the more dominant parties to impose exemption clauses that unjustly disadvantage the weaker parties.²⁶² Consequently, courts bear a significant responsibility to curb the misuse of such clauses, ensuring that the freedom of contractual negotiation does not undermine the standards of fairness, justice, or public policy.²⁶³

South African courts have developed several techniques to mitigate the harsh effects of exemption clauses. One such technique is restrictive interpretation,²⁶⁴ whereby

²⁵⁸ *Schenker* case para 12.

²⁵⁹ *Schenker* case para 15.

²⁶⁰ *Schenker* case para 15.

²⁶¹ *Schenker* case para 15.

²⁶² Kanamugire and Chimuka 2014 *MJSS* 168.

²⁶³ Kanamugire and Chimuka 2014 *MJSS* 168.

²⁶⁴ Mupangavanhu 2014 *PER/PELJ* 1173.

courts construe exemption clauses narrowly, often on the assumption that parties did not intend to exclude liability for negligence unless such intention is expressed in unequivocal terms.²⁶⁵

Similarly, the performance rule forbids a party from invoking an exemption clause if the contract remains unfulfilled, unless the clause explicitly provides otherwise.²⁶⁶ Courts also rely on public policy to cancel clauses that are oppressive or unfair, and they insist that any provisions that undermine the core of the contract be explicitly and properly disclosed to the weaker party before signing.²⁶⁷

The case law demonstrates the judiciary's willingness to intervene where exemption clauses undermine fairness.²⁶⁸ In the *Sasfin* case the Supreme Court of Appeal struck down a cession agreement that effectively stripped a medical practitioner of his future earnings, holding it contrary to public policy.²⁶⁹ This case illustrates the courts' readiness to invalidate contractual terms that are draconian in effect.

Similarly, in the *Beadica* case, the Constitutional Court emphasised that while *pacta sunt servanda* remains central to contract law, enforcement must be balanced against constitutional values such as *Ubuntu*, fairness, and reasonableness.²⁷⁰ In contrast, in the *Schenker* case, the Supreme Court of Appeal upheld an exemption clause limiting liability for loss of goods. Still, it stressed that such clauses must be interpreted restrictively and cannot override fundamental obligations unless expressed in clear language. These cases collectively demonstrate the courts' dual commitment to respecting contractual autonomy while safeguarding fairness.

Nevertheless, judicial intervention has its limits. Where exemption clauses are drafted in clear and unambiguous language, courts generally uphold them, even if they exclude liability for fundamental breaches of contract.²⁷¹ This reflects the tension between contractual autonomy and fairness: while courts are reluctant to interfere with freedom

²⁶⁵ Hutchison "Nature of contracts" 1.9.3.

²⁶⁶ *Fujitsu-Schenker* case paras 32 and 37.

²⁶⁷ Mupangavanhu 2014 *PER/PELJ* 1173.

²⁶⁸ Kanamugire and Chimuka 2014 *MJSS* 168.

²⁶⁹ *Sasfin* case para 45.

²⁷⁰ Huneberg and Berry 2023 *THRHR* 82.

²⁷¹ Maxwell "Interpretation of Contracts" 270.

of contract, they remain vigilant against clauses that are ambiguous, oppressive, or contrary to public policy. Ambiguity, in particular, serves as a safeguard, as courts consistently resolve it against the party seeking to rely on the clause, thereby minimising its impact.²⁷²

4.7 Limitations of the courts in preventing the abuse of exemption clauses

The law on contracts in South Africa has consistently evaluated contract validity by applying principles of legality and contractual interpretation.²⁷³ The principle of *pacta sunt servanda* has always been the main guideline for interpreting contractual terms, and the belief remains that contracts entered into voluntarily are sacred and should not be disturbed.²⁷⁴ Courts can nullify exemption clauses that breach public policy or are excessively unfair, but only if they meet a high standard.

Although the judiciary appears to adopt a cautious stance toward the enforcement of exemption clauses, it will not readily nullify a contract in which both parties have signed.²⁷⁵ Public policy dictates that, in the absence of fraud, parties who affix their signatures to agreements must be bound by them.²⁷⁶

Courts generally uphold the principle of freedom of contract, meaning they are reluctant to interfere with contracts that were validly concluded between the parties.²⁷⁷ This factor limits judicial intervention, even if the clause appears unfair, especially in commercial contracts between parties of equal bargaining power. The parties are free to agree on terms, including exemption clauses, provided they are not illegal or contrary to public policy.²⁷⁸

Our courts can apply the CPA to restrict the enforceability of unfair exemption clauses. However, courts can apply the CPA's protections only to consumer transactions, not to business-to-business transactions

²⁷² Maxwell "Interpretation of Contracts" 271.

²⁷³ Kanamugire and Chimuka 2014 *MJSS* 168.

²⁷⁴ Kanamugire and Chimuka 2014 *MJSS* 168.

²⁷⁵ Mupangavanhu 2014 *PER/PELJ* 1173.

²⁷⁶ Mupangavanhu 2014 *PER/PELJ* 1173.

²⁷⁷ Kanamugire and Chimuka 2014 *MJSS* 168.

²⁷⁸ Kanamugire and Chimuka 2014 *MJSS* 168.

4.8 Conclusion

Exemption clauses occupy a complex yet indispensable position within South African contract law. While they pursue legitimate commercial objectives, such as risk allocation and legal certainty, their potential to undermine fairness, particularly in negotiations marked by imbalance, necessitates vigilant judicial scrutiny.

Courts have consistently upheld such clauses when their language is clear and unambiguous, even in cases involving negligence or gross negligence.²⁷⁹ However, clauses that exclude liability for fraud or a contracting party's deliberate misconduct remain unenforceable on grounds of public policy.

The enactment of the *Consumer Protection Act* 68 of 2008 has further transformed the legal landscape by integrating constitutional principles into private law, notably through sections 48 to 50, which promote substantive and procedural fairness in consumer agreements.

Ultimately, the enforceability of exemption clauses hinges on a contextual interpretation that delicately balances contractual autonomy with evolving standards of public policy, fairness, and constitutional justice.

Discussing exemption clauses naturally leads to examining the broader doctrinal basis for their enforceability. While these clauses are specific contractual tools to restrict or exclude liability, their validity is ultimately evaluated against the fundamental principle of *pacta sunt servanda*. This principle, which states that agreements freely entered into must be respected, serves as the doctrinal foundation courts rely on when deciding whether to uphold exemption clauses. Therefore, shifting from a technical analysis of such clauses to considering the importance of *pacta sunt servanda* helps position these clauses within the larger context of contractual autonomy, legal certainty, and the constitutional values that underpin modern South African contract law.

²⁷⁹ *Afrox Healthcare case*; *Rosenblum case*; *Durban's Wonderland case*; *Fujitsu case*.

Chapter 5

5 *Pacta sunt servanda* and its limitations

5.1 Introduction

Having considered the nature and limits of exemption clauses, it becomes clear that their enforceability cannot be understood in isolation. These clauses derive their legitimacy from the broader doctrinal foundation of *pacta sunt servanda*, the principle that contracts freely and voluntarily concluded must be honoured.²⁸⁰ The transition from exemption clauses to *pacta sunt servanda* is not merely thematic but doctrinal: it situates the debate within the sanctity of contract itself, while opening the door to examine how constitutional values and public policy temper the rigid enforcement of contractual promises.

Rooted in classical theory,²⁸¹ it embodies the ideals of freedom of contract and the sanctity of agreements, ensuring that private arrangements are respected and enforced by courts.²⁸² Classical contract law assumed that parties had genuine autonomy, equal bargaining power, and the ability to negotiate terms in a competitive market.²⁸³ Under this framework, the sanctity of contract was not just a legal rule but a moral obligation to honour voluntarily undertaken promises.

In South African jurisprudence, *pacta sunt servanda* has been consistently affirmed as a constitutional value, closely tied to dignity, freedom, and autonomy.²⁸⁴ Courts have emphasised that the principle provides certainty in contractual relationships and prevents judicial interference that might otherwise substitute the judge's view of fairness for the agreed contractual terms.²⁸⁵ Yet, the doctrine is not absolute. The rise of standard-form contracts and the demands of constitutional justice reveal their

²⁸⁰ *Fleet Africa* case para 18.

²⁸¹ Rosenberg 2013 *McGill L.J.* 176.

²⁸² Gray 1980 *Yale L.J.* 217-218.

²⁸³ Hutchison "The Nature and Basics of Contract" 1.9.3.

²⁸⁴ Huneberg and Berry 2023 *THRHR* 65 – 66.

²⁸⁵ *Bredenkamp* case para 34.

limitations, particularly where enforcement would undermine public policy or fundamental rights.²⁸⁶

This chapter, therefore, examines the classical foundations of *pacta sunt servanda*, its integration into South African law, and the evolving limitations imposed by public policy, constitutional principles, and the pursuit of fairness.

This chapter argues that while *pacta sunt servanda* remains a foundational principle of South African contract law, its authority is necessarily tempered by constitutional values and public policy, ensuring that the sanctity of contract serves both private autonomy and the broader demands of justice.

5.2 Theories

5.2.1 Classical contract theory

The classical law theory pertains to the rules and principles of contract law that were applied from the late 18th century to the early 20th century.²⁸⁷ The theory comprises several key features, and its moral foundation is based on the principles of freedom of contract and the sanctity of contracts.²⁸⁸

According to classical contract law, freedom of contract primarily entails the right to enter into almost any agreement, to rely on its enforcement, and not to have the straightforward meaning of the contract's terms examined and second-guessed for fairness.²⁸⁹

Freedom of contract means that the parties are free to decide whether to enter into a contract, select their contracting partners, and specify its terms.²⁹⁰ The formation of a contract arises from an independent decision, devoid of external interference, thereby reflecting the autonomous nature of the contracting parties.²⁹¹

²⁸⁶ *Sasfin* case para 8.

²⁸⁷ Rosenberg 2013 *McGill L.J.* 176.

²⁸⁸ Gray 1980 *Yale L.J.* 217-218.

²⁸⁹ Gray 1980 *Yale L.J.* 217.

²⁹⁰ Hutchison "The Nature and Basics of Contract" 1.9.3.

²⁹¹ Hutchison "The Nature and Basics of Contract" 1.9.3.

The classic law states that a bilateral contract exists when the wills or intentions of the parties are in accord.²⁹² The purpose of the agreement is to ensure that the situations to which people have committed their wills, with prospects in mind, actually come to pass or that a party who would be worse off if they do not materialise is compensated financially as if the project had succeeded.²⁹³

The classical method of contract is predicated on the assumption that contracting parties typically possess genuine freedom of choice, maintain relatively equal bargaining power, operate within a market characterised by perfect or near-perfect competition, and actively negotiate the terms of their agreements.²⁹⁴

In the current socio-economic climate, where SFCs are the norm rather than the exception, such assumptions are idealistic but unrealistic.²⁹⁵ The SFCs are characterised by their take-it-or-leave-it nature, leaving parties with weaker bargaining power little choice about whether to enter contracts, and with negotiation occurring in only a tiny fraction of cases.²⁹⁶ Nevertheless, contract law is founded on many fundamental concepts, including freedom of contract, good faith, privity of contract, and sanctity of contract.²⁹⁷

5.3 Limitations on *pacta sunt servanda*

While *pacta sunt servanda* is a fundamental and widely recognised legal principle, frequently regarded as a moral cornerstone of contractual and societal coherence, it is not absolute.²⁹⁸ It is, as some provocatively suggest, not a "holy cow."²⁹⁹ The requirements for a valid contract, legality, public policy considerations, constitutional values, and the evolving demands of justice inherently limit its application.³⁰⁰

²⁹² Gray 1980 *Yale L.J.* 218.

²⁹³ Gray 1980 *Yale L.J.* 218.

²⁹⁴ Hutchison "The Nature and Basics of Contract" 1.9.3.

²⁹⁵ Hutchison "The Nature and Basics of Contract" 1.9.3.

²⁹⁶ Hutchison "The Nature and Basics of Contract" 1.9.3.

²⁹⁷ Cuthbertson *Development of Exemption Clauses* 17.

²⁹⁸ *Bredenkamp* case para 37.

²⁹⁹ *Oregon Trust v Beadica* (SCA) (unreported) case number 74/2018 of 28 March 2019 (hereafter the *Oregon* case) para 25.

³⁰⁰ Huneberg and Berry 2023 *THRHR* 66.

The principle of contractual freedom permits individuals to enter into agreements with anyone they choose and on terms they consider suitable.³⁰¹ Courts generally uphold these agreements under the doctrine of *pacta sunt servanda*, thereby reinforcing the autonomy and predictability that are vital to private arrangements. However, this freedom is not unlimited. South African courts retain a residual discretion to refuse to enforce contractual terms that violate public policy or constitutional norms.³⁰²

Contractual provisions that are unconscionable, oppressive, or contrary to public policy are unenforceable and deemed null and void.³⁰³ Public policy, though historically rooted in common law, is now interpreted through the lens of the Constitution—the supreme law of the Republic. The Bill of Rights enshrines fundamental values such as dignity, equality, and freedom, which must be respected in all legal relationships, including contracts.³⁰⁴ Any term that undermines these rights or conflicts with constitutional values cannot be enforced, regardless of the parties' consent.

Notably, public policy includes not only legality and morality but also the broader interests of the community.³⁰⁵ A contract might specify performance that is neither illegal nor immoral, yet its enforcement could still harm societal welfare. In such cases, courts may declare the agreement, or specific terms of it, unenforceable.³⁰⁶ This illustrates a shift away from strict formalism toward a more context-aware, value-based approach to adjudication, ensuring that contract law serves both private and public interests.

5.4 Conclusion

The principle of *pacta sunt servanda* remains a fundamental component of South African contract law, rooted in traditional concepts of autonomy, freedom of contract, and the sanctity of agreements. Historically, classical contract theory presupposed equal bargaining power and genuine consent, thereby justifying limited judicial

³⁰¹ *Mohamed's Leisure* case para 23.

³⁰² Kruger 2011 *SALJ* 715.

³⁰³ Huneberg and Berry 2023 *THRHR* 65.

³⁰⁴ Section 2 of the *Constitution of the Republic of South Africa*, 1996.

³⁰⁵ *Sasfin* case para 8.

³⁰⁶ *Sasfin* case para 8.

interference. Nonetheless, the expansion of SFCs and the realities of socio-economic inequality have exposed the limitations of this idealised framework.

Modern jurisprudence acknowledges that, although contractual freedom is essential for private arrangements and economic predictability, it is not absolute. The Constitution, as the supreme law, mandates that all legal relationships, including contracts, must uphold fundamental values such as dignity, equality, and liberty. Consequently, courts possess the authority to deny enforcement of contractual provisions that violate public policy or constitutional principles, even if such provisions were voluntarily agreed upon.

This chapter has demonstrated the delicate balance between maintaining the sanctity of contracts and ensuring justice within contractual relationships. The shift from strict formalism to a more context-aware, value-led approach reflects a broader effort to align private law with public constitutional principles. Ultimately, *pacta sunt servanda* is not an inflexible rule but a principle that must be considered in light of fairness, legality, and the public interest. The next chapter will focus on the judicial approach in balancing public policy and the doctrine of *pacta sunt servanda*.

Chapter 6

6 Balancing *pacta sunt servanda* and public policy

6.1 Introduction

It is essential to recognise that the Constitution offers a new perspective for evaluating public policy by incorporating established values such as fairness, reasonableness, good faith, and justice. However, these same values also require the courts to uphold and enforce the terms of contracts that parties have freely and voluntarily accepted. This indicates that public policy demands that courts carefully consider the interests of all parties involved in a contract. These provisions highlight the tension between enforcing unfair contractual terms and protecting weaker parties who are more vulnerable to prejudice.

In the pre-constitutional era, the South African courts were more inclined to prioritise certainty over fairness; however, in the constitutional era, the pendulum is swinging in the opposite direction.³⁰⁷

The contemporary constitutional dispensation took effect after the enactment of the Constitution.³⁰⁸ As already alluded to, the Constitution is the supreme law of the land, meaning that all laws are subject to its values and principles.³⁰⁹

Cameroon JA stated in *Brisley v Drotsky* 2002 4 SA 1 (SCA) that;

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this court that proclaim that the limits of contractual certainty lie at the borders of public policy will therefore receive enhanced force and clarity in light of the Constitution and values embodied in the Bill of Rights.³¹⁰

This chapter examines the tension between enforcing contracts and protecting weaker parties.

³⁰⁷ Hutchison 2019 *ACTA* 100.

³⁰⁸ The *Constitution of the Republic of South Africa*, 1996.

³⁰⁹ Huneberg and Berry 2023 *THRHR* 74.

³¹⁰ Huneberg and Berry 2023 *THRHR* 74.

6.2 Case law

6.2.1 The Bredenkamp case

The appellant, Mr Bredenkamp, a distinguished businessman, contested the bank's unilateral termination of its banking relationship with himself and his affiliated entities. This termination was executed pursuant to a contractual clause permitting cancellation upon reasonable notice, without the need to furnish specific reasons.³¹¹ Standard Bank invoked this clause following international media reports linking Bredenkamp to contentious dealings in Zimbabwe, thereby raising concerns about its reputation.³¹² Bredenkamp contended that the termination was arbitrary, unjust, and in conflict with public policy informed by constitutional principles such as dignity and *Ubuntu*.³¹³

Bredenkamp challenged the contractual clause on the ground that it was incorporated into an SFC imposed by a dominant corporate entity on a vulnerable consumer, thereby functioning inequitably and infringing constitutional principles.³¹⁴ The court referred to the well-established common law principle that an indefinite contract may be terminated by either party on reasonable notice.³¹⁵

The court subsequently had to determine whether, in the particular circumstances under which the bank closed the accounts, a constitutional value of fairness was offended.³¹⁶

It was a common cause, on application of the first question of the fairness test, that the contractual clause was fair and reasonable and in line with constitutional values.³¹⁷ The remaining issue was the fairness in its enforcement under the given circumstances.³¹⁸

³¹¹ *Bredenkamp* case para 6.

³¹² *Bredenkamp* case paras 12 and 17.

³¹³ *Bredenkamp* case para 9.

³¹⁴ *Bredenkamp* case para 22.

³¹⁵ *Bredenkamp* case para 23.

³¹⁶ *Bredenkamp* case para 25.

³¹⁷ *Bredenkamp* case para 27.

³¹⁸ *Bredenkamp* case para 30.

The court recognised the historical importance of the principle of *pacta sunt servanda* as a sacred rule, emphasising that contracts entered into contrary to laws, imperial constitutions, or the *boni mores* are void.³¹⁹ The court held that deciding whether an agreement conflicts with public policy involves balancing competing values; *pacta sunt servanda* is one of them.³²⁰ Fairness is not a freestanding requirement for the exercise of a contractual right.

Fairness ought to be upheld for both parties involved.³²¹ Although the appellants' entitlement, as commercial entities, to access banking facilities may be a relevant factor, it isn't easy to see how anyone can compel a bank to open a bank account with a particular institution against the bank's will or genuine intention, especially when protecting its reputation.³²²

The court found that the bank had a valid contractual authority to terminate the accounts. The termination neither breached any recognised constitutional value nor conflicted with any other public policy considerations.³²³

This judgment reaffirms the enduring authority of contractual autonomy within South African law, emphasising the significance of *pacta sunt servanda*. It also clarifies that, although fairness is a constitutional value, it does not provide an independent basis for overriding explicit contractual terms.

The court's approach emphasises that public policy must be evaluated within its context, weighing competing interests without imposing unreasonable burdens on private entities, such as banks, which could jeopardise their commercial discretion or reputation. Ultimately, the case demonstrates that constitutional values offer guidance but do not override the fundamental principles of contract law unless a clear conflict with public policy is proven.

³¹⁹ *Bredenkamp* case para 37.

³²⁰ *Bredenkamp* case para 38.

³²¹ *Bredenkamp* case para 65.

³²² *Bredenkamp* case para 57.

³²³ *Bredenkamp* case para 64.

6.2.2 *The Aspara case*

In the *Aspara* case, the High Court was required to balance the principle of *pacta sunt servanda* against appeals to public policy.³²⁴ The dispute arose from a commercial lease agreement which granted Aspara the option to renew at the end of the six-year term, provided notice was given three months before expiry.³²⁵ Aspara failed to comply with this requirement, and the landlord sought to evict Aspara upon termination of the lease.

In resisting ejectment, Aspara argued that the landlord's conduct had rendered renewal impossible and that constitutional values should compel the court to enforce a renewal despite the clear contractual terms.³²⁶ The court rejected this contention, emphasising that what was effectively sought was a waiver of an unambiguous contractual right, thereby reversing the agreed benefit-prejudice ratio and undermining the certainty of contract law.³²⁷ While acknowledging that parties may invoke public policy, good faith, and *Ubuntu* in contractual disputes, the court stressed that such values must be formulated with precision and cannot serve as vague, discretionary overrides of explicit obligations.³²⁸ A clause granting the landlord the express option to renew or refuse renewal was held not to be objectively unfair, and the court warned against judicial interventions that would transform fairness or *Ubuntu* into free-standing bases for altering commercial bargains.³²⁹ Ultimately, the court upheld the landlord's right to eviction, reaffirming that *pacta sunt servanda* remains the default rule, and that constitutional values guide but do not displace contractual autonomy unless enforcement demonstrably conflicts with public policy.³³⁰

This decision underscores a fundamental theme of this study: South African courts predominantly uphold the principle of contractual autonomy through *pacta sunt servanda*. They recognise that public policy, infused with constitutional values, functions as a contextual check rather than an absolute authority. By rejecting the

³²⁴ *Aspara* case para 20.

³²⁵ *Aspara* case para 10.

³²⁶ *Aspara* case para 22.

³²⁷ *Aspara* case para 28.

³²⁸ *Aspara* case para 38.

³²⁹ *Aspara* case para 39.

³³⁰ *Aspara* case para 49.

tenant's reliance on fairness, Ubuntu, and good faith as autonomous grounds for renewal, the court emphasised the significance of legal certainty in commercial transactions.

6.2.3 *The Afrox Healthcare case*

In the *Afrox Healthcare* case, the Supreme Court of Appeal was tasked with determining whether an exemption clause indemnifying a private hospital against liability for negligence could be enforced in light of public policy and constitutional values. The dispute arose after a nurse negligently applied a bandage too tightly, causing post-operative complications, with the patient arguing that the clause was contrary to fairness, good faith, and public policy.³³¹

The Supreme Court of Appeal rejected arguments based on unequal bargaining power, finding no evidence of disparity at the time of contracting, and clarified that abstract notions such as fairness, reasonableness, and good faith, though foundational to legal rules, are not, in themselves, independent legal rules capable of overriding explicit contractual terms.³³²

Notably, the SCA distinguished between negligence and gross negligence, holding that while indemnifying a hospital against gross negligence would indeed be contrary to public policy, the pleadings were confined to ordinary negligence, rendering the public policy challenge irrelevant. The judgment thus illustrates the judiciary's cautious approach: constitutional values inform the assessment of public policy, but they do not displace the sanctity of contract unless enforcement would be manifestly unjust or contrary to the public interest.

The SCA reaffirmed that freedom of contract and *pacta sunt servanda* are themselves constitutional values. Although the patient argued that an exemption clause indemnifying the hospital against negligence was contrary to fairness and good faith, the court held that abstract values cannot override clear contractual terms unless

³³¹ *Afrox Healthcare* para 7.

³³² *Afrox Healthcare* paras 8 – 12.

enforcement would be manifestly contrary to public policy. This judgment illustrates the judiciary's cautious approach to constitutional values in contract law.

6.2.4 *The Mohamed's Leisure case*

This was an SCA case between the appellant, Mohamed's Leisure Holdings (Pty) Ltd, and the respondent, Southern Sun Hotel Interests (Pty) Ltd. The two parties had previously entered into a written lease agreement for immovable property owned by Mohamed's Leisure Holdings, as the lessor. Clause 20 of the lease agreement stipulated that, in the event the lessee failed to pay the rent on the due date, the lessor would be entitled to terminate the lease and take possession of the property.³³³

The respondent breached this clause twice by failing to pay the rent on time, as stipulated on the seventh day of each month. Initially, the appellant wrote to the respondent, requesting payment within 5 days of receipt of the letter. In that letter, the appellant warned that if the same breach were to occur again, no notice would be issued, the agreement would be cancelled, and the respondent would be required to vacate the premises with immediate effect.

In the second instance, through no fault of the respondent, the respondent's bank omitted to transfer the rental amount into the appellant's bank account when it was due. The bank made an error and paid the rental money into the wrong account. The bank subsequently explained that the rental amount was credited to the wrong account rather than the appellant's account.

As a result, the appellant's attorneys invoked the provisions of section 20.

The legal question was whether enforcing clause 20 of the lease agreement is clearly unreasonable or unfair to the point of conflicting with public policy. The decision required evaluating whether applying the breach clause was manifestly unreasonable or unfair enough to breach public policy. This involved balancing two key considerations: the principle of *pacta sunt servanda* and public policy considerations.³³⁴

³³³ *Mohamed's Leisure case* para 6.

³³⁴ *Oregon Trust case* at para 30.

In the court of first instance, the lessee argued that, given the circumstances, relying on the right to cancel when the default was not their fault was clearly unreasonable and against public policy. The court *quo* accepted this defence, reasoning that the principle that agreements should be honoured was no longer valid law.³³⁵ The High Court effectively recommended that the principle of *pacta sunt servanda* be developed by infusing it with the principles of fairness and *Ubuntu*.³³⁶

The Supreme Court of Appeal ruled that a clause being unfair or potentially harsh does not automatically make it contrary to public policy.³³⁷ The court observed that, in certain cases, the principles of equality and dignity can be crucial, especially when the question of a party's relative power arises.³³⁸

After analysing the contract and the relevant circumstances, the court determined that the respondent was aware of the cancellation clause because of the earlier breach that brought it to their attention.³³⁹

The court found that there was no complaint against clause 20 being objectively unconscionable, no allegation that the agreement was not entered into freely, no claim of unequal bargaining power between the parties, and no evidence that the respondent's constitutional right to dignity and equality was infringed.³⁴⁰

The court found that the terms of the contract did not, on the surface, conflict with public policy. While a clause might be considered harsh, this does not automatically imply a violation of the Constitution or constitutional principles.

The parties had equal bargaining positions. They could have negotiated a clause requiring the respondent to provide notice and to remedy the breach before the contract was terminated, especially after the first breach. The timely payment of rent was not impossible, as the respondent could have diarised the monthly fee and used

³³⁵ *Oregon Trust* case at para 28.

³³⁶ Huneberg and Berry 2023 *THRHR* 79.

³³⁷ *Mohamed's Leisure* case para 30.

³³⁸ *Mohamed's Leisure* case para 30.

³³⁹ Huneberg and Berry 2023 *THRHR* 79.

³⁴⁰ *Mohamed's Leisure* case para 29.

other payment methods, such as electronic funds transfer, rather than relying solely on the bank to effect this important transaction.³⁴¹

The SCA found that clause 20 was not against public policy and thus enforceable. It held that relaxing the principle of *pacta sunt servanda*, in this case, would be untenable because it would be tantamount to the court concluding a contract on behalf of the parties.³⁴²

The SCA in the *Mohamed's Leisure* case reaffirmed that *pacta sunt servanda* remains the cornerstone of contract law. Although the lessee argued that enforcing the cancellation clause was manifestly unreasonable given that a bank error caused the default, the court held that harshness alone does not render a clause contrary to public policy. This judgment illustrates the judiciary's reluctance to allow abstract values such as fairness or *Ubuntu* to override clear contractual terms, unless enforcement would objectively undermine constitutional rights.

6.2.5 The Fujitsu case

Similarly, in the *Fujitsu* case, the Constitutional Court was confronted with the tension between the principle of *pacta sunt servanda* and the considerations of public policy.

The *Fujitsu* case represents a pivotal moment in South African contract law, particularly in the interpretation of passing-of-risk clauses and their intersection with public policy. At its core, the dispute concerned whether a logistics provider could rely on a contractual clause transferring risk to the customer to avoid liability for goods stolen by its employee. The Constitutional Court's fractured reasoning underscores the enduring tension between freedom of contract and constitutional values of fairness and accountability.

While commercial certainty requires respect for risk allocation clauses, most caution against clauses that effectively shield a party from liability for intentional wrongdoing, asserting that such provisions contravene public policy. This restrictive stance exemplifies a broader judicial trend in South Africa: exclusionary clauses are

³⁴¹ *Mohamed's Leisure* case para 28.

³⁴² *Mohamed's Leisure* case para 32.

interpreted narrowly, especially when they compromise fundamental principles of justice or protect parties from gross negligence and fraud. The majority judgment reaffirmed the importance of contractual autonomy, holding that exclusion clauses, such as the one exempting Schenker from liability for theft by its employees, are not inherently contrary to public policy.

In doing so, the Court emphasised that commercial certainty requires that parties, particularly sophisticated actors, are held to the bargains they freely conclude. However, the dissenting opinion highlighted the transformative constitutional imperative that public policy must be infused with values of fairness, accountability, and Ubuntu.

From this perspective, a clause that exempts a contracting party from responsibility for its own employee's misconduct undermines the constitutional vision of justice and relational accountability. The case thus demonstrates the Constitutional Court's delicate balancing act: while *pacta sunt servanda* remains a fundamental principle of South African contract law, its application is not absolute but must be continually assessed against the evolving demands of public policy shaped by constitutional values. In this way, *Fujitsu* both limits the scope of public policy intervention in commercial contracts and also leaves open the possibility of future recalibration where contractual terms are oppressive or unjust.

6.3 Conclusion

South African jurisprudence continues to favour *pacta sunt servanda* over public policy, even when confronted with contracts that raise serious fairness concerns. In the *Aspara* case, the Supreme Court of Appeal reaffirmed that courts should be slow to invalidate agreements on public policy grounds, emphasising certainty in commercial dealings. Similarly, in *Mohamed's Leisure* the Court upheld contractual terms despite arguments that they entrenched inequality, stressing that freedom of contract remains a cornerstone of private law. This trajectory was reinforced in *Fujitsu* case, where the Constitutional Court upheld an exclusion clause absolving a freight forwarder from liability for theft by its own employee, privileging commercial certainty over fairness.

Earlier cases like *Afrox Healthcare* and *Bredenkamp* have also entrenched the principle that contracts freely entered into must be enforced, even where they appear harsh or one-sided. Taken together, these authorities demonstrate that the judiciary has consistently recommended *pacta sunt servanda* to be the dominant principle, with public policy intervention remaining exceptional.

Yet, in light of South Africa's socio-political context, marked by high unemployment, pervasive illiteracy, and structural inequality, this trajectory risks entrenching contractual injustice by privileging formal autonomy over substantive fairness. There is thus a pressing need to relax this rigid adherence, allowing public policy, infused with constitutional values such as *Ubuntu* and social justice, to play a more active role in tempering contractual outcomes and ensuring that private law resonates with the lived realities of the majority of South Africans.

Chapter 7

7 Conclusion

This dissertation makes a contribution to South African contract law by interrogating the enforceability of indemnity clauses that exclude vicarious liability for employee theft. Anchored in the *Fujitsu* case, it illuminates the doctrinal tension between *pacta sunt servanda* and the constitutional values that inform public policy. The study demonstrates that while contractual autonomy remains a cornerstone of commercial certainty, its unqualified application risks undermining fairness, justice, and *Ubuntu* in a constitutional democracy.

By tracing the historical development of vicarious liability, analysing the evolution of exemption clauses, and comparing the divergent approaches of the Supreme Court of Appeal and the Constitutional Court, the research highlights the jurisprudential uncertainty currently characterising South African law. Comparative insights from English law and statutory measures, such as the Consumer Protection Act, further enhance the analysis, situating South Africa within a broader global discourse on contractual fairness.

The study's originality lies in its balanced normative approach: it neither regards *pacta sunt servanda* as outdated nor allows public policy to serve as an unchecked veto. Instead, it promotes a principled reconciliation that respects contractual freedom while safeguarding constitutional justice from exemption clauses. This stance provides practical direction for courts, contract drafters, and policymakers, emphasising the importance of clarity, predictability, and fairness in commercial dealings.

Ultimately, the dissertation enhances the scholarly discussion of constitutional contract law by demonstrating that the legitimacy of exemption clauses should be evaluated not only on the basis of certainty but also in light of the principles of a transformative constitutional order. In this way, it contributes significantly to doctrinal progress and policy reform, affecting both academic debates and practical contract drafting within South Africa's changing legal framework.

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