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CORPORATE & COMMERCIAL **ALERT**

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The contours of Ubuntu: A principal's right to terminate a contract of mandate

It is firmly established in our law that both the terms and enforcement of a contract must not offend public policy, a matrix of rules articulating society's values and sense of propriety. These values are neatly encapsulated in the concept of *Ubuntu*, which our courts have held on a number of occasions, suffuse all areas of our law (including the law of contract). Should the terms of the contract *per se* or their enforcement in a particular context violate public policy, our courts will decline to uphold them.

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The contours of Ubuntu: A principal's right to terminate a contract of mandate

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It is firmly established in our law that both the terms and enforcement of a contract must not offend public policy, a matrix of rules articulating society's values and sense of propriety. These values are neatly encapsulated in the concept of *Ubuntu* which, as our courts have held on a number of occasions, suffuse all areas of our law (including the law of contract). Should the terms of the contract *per se* or their enforcement in a particular context violate public policy, our courts will decline to uphold them.

Public policy is protean in nature – a necessary feature, given that the *mores* of society shift over time. However, the danger with public policy is that if applied too liberally or hastily in the interpretation of contracts, it can lead to inconsistent judgments and, by extension, commercial uncertainty. This much is clear when looking at some of the recent high court judgments wherein, for example, *Ubuntu* was incorrectly invoked to deny a landlord its right to evict an errant tenant in accordance with its contractual rights. In the case of *Liberty Group Limited v Mall Space Management CC 2019 JDR 1940* (SCA) (*Mall Space Management*), the Supreme Court of Appeal (SCA) made some instructive pronouncements, which hopefully herald a return to the correct application of *Ubuntu* to contracts.

In *Mall Space Management*, the appellant and respondent were party to an unwritten contract of mandate as principal and agent respectively. The respondent was tasked with marketing and administering floorspace earmarked for exhibitions in the appellant's various shopping centres. When the respondent failed to account for certain monies that it had collected on behalf of the appellant, the appellant terminated the mandate. The respondent was unsurprisingly aggrieved by this decision. The crux of its case when it sued the appellant was that although the appellant was within its rights to terminate the contract, it was not entitled to so summarily but rather upon reasonable notice of six months. Such summary termination, so the respondent's case continued, was in bad faith, unfair, undignified and inimical to *Ubuntu*. This argument met with success in the trial court, whose findings in this regard the appellants sought to challenge in the SCA.

The point of departure when adjudicating the appeal was for the SCA to restate the common law position that a principal may terminate its agent's mandate at any time and without prior notice. The respondent did not differ with this position but argued that *in casu*, the contract contained a tacit term to the effect that a notice period of six months was applicable, as this was how long it would take for the respondent to wind up its affairs in respect of the contract.

The SCA found for the appellants, and the central considerations leading to this finding were as follows: first, the respondent could establish neither the tacit term relied upon nor a trade usage (a practice or custom that is widely followed within a certain industry) supporting its contention that it should have been afforded a notice period of six months; second, the appellant's reasons

The contours of Ubuntu: A principal's right to terminate a contract of mandate...*continued*

Underpinning the SCA's reasoning was the fact that Ubuntu is not a substantive rule operating independently, upon which one can place direct reliance when challenging the terms or enforcement of a contract.

for terminating the contract were sound, and it could not validly be expected to wait for the respondent to mismanage the situation further and be precluded from taking preventative steps by exercising its cancellation right; and third, the consequences of forcing a principal to continue enlisting the services of an agent who had breached the terms of the mandate would be untenable.

Underpinning the SCA's reasoning was the fact that *Ubuntu* is not a substantive rule operating independently, upon which one can place direct reliance when challenging the terms or enforcement of a contract. Instead, it is merely one of the lenses informing our critical engagement with and understanding of the law of contract, the core tenets of which cannot be overlooked on the basis of abstract references to *Ubuntu* and fairness.

The most important practical lesson to be gleaned from the *Mall Space Management* judgment is that agents who wish to obviate the often harsh consequences of termination should enter into written agreements affording them workable notice periods or financial compensation in the event of summary termination. Proving the terms of a verbal contract can be fraught with difficulty where those terms are disputed, and the SCA has re-affirmed the stance that our courts will not lightly discard the common law rules simply because their application is subjectively unfair.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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