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Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity

When it comes to enforcing contracts, South African courts have grappled for some time with the competing values of fairness, reasonableness and good faith on the one hand and on the other, the notion of legal certainty and the notion of *pacta sunt servanda* (being the recognised principle that contracts freely entered into between parties must be honoured and, if necessary, enforced by the courts).

"*Winds of change*" to the face of the legal profession

"An examination of the legal profession as it has been in the past and as it still exists, reveals a number of problems and anomalies, namely: The legal profession does not represent the diversity of South African society. The number of black lawyers in private practice and in the public service sector is comparatively low, as is the number of women. Black people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar. They were, accordingly, also largely absent from the controlling bodies of the Bar Councils and Law Societies until recently, when steps were taken to make these bodies more representative."

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Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity

The applicants in the *Beadica* Case were four close corporations, whose businesses focused predominantly on the rental and sale of construction-related equipment, that had entered into franchise agreements with the second respondent (Sale's Hire) as part of a black economic empowerment initiative financed by the National Empowerment Fund.

When it comes to enforcing contracts, South African courts have grappled for some time with the competing values of fairness, reasonableness and good faith on the one hand and on the other, the notion of legal certainty and the notion of *pacta sunt servanda* (being the recognised principle that contracts freely entered into between parties must be honoured and, if necessary, enforced by the courts). Debate has raged on how the right balance between these competing values should be struck, how far the courts should go in interfering in contractual relationships and whether a party should be able to set aside a contract by relying on constitutional values or principles if it operates prejudicially towards such party.

On 17 June 2020, the Constitutional Court of South Africa gave its latest pronouncement on this debate and, in particular, the public policy grounds upon which a court may refuse to enforce contractual terms, particularly those terms which are alleged to operate unfairly, unreasonably or which are unduly harsh in the matter of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (*Beadica* Case).

It is necessary to consider the litigation history of the *Beadica* Case in order to appreciate the findings made by the Constitutional Court on the question of when, and to what extent, the competing concepts of fairness and reasonableness and/or good faith may be invoked at the expense of legal certainty in order for the judiciary to exercise control over – and possibly interfere with – contractual arrangements.

Background

The applicants in the *Beadica* Case were four close corporations, whose businesses focused predominantly on the rental and sale of construction-related equipment, that had entered into franchise agreements with the second respondent (Sale's Hire) as part of a black economic empowerment initiative financed by the National Empowerment Fund (the NEF, cited as the third respondent).

During 2011, Sale's Hire entered into a co-operation agreement with the NEF, whereby the NEF would provide loans to black-owned entities to enable them to own and operate Sale's Hire franchised businesses. Sale's Hire was appointed as the coordinator of these funding transactions and it also undertook to train franchisees on operating their businesses and provide ongoing business support and mentorship.

Franchise agreements were also entered into with the applicants (whose members were former long-term senior employees of Sale's Hire) during 2011 which were intended to operate for a period of ten years.

The applicants also entered into lease agreements during 2011 which contemplated that the franchises would operate from premises leased from the first

Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity...*continued*

Before the High Court, the applicants argued that South African contract law had become "*infused*" with the public policy notions of fairness and Ubuntu.

respondent (Oregon Trust). These leases were intended to run for an initial period of five years, terminating on 31 July 2016, but incorporated options to renew the leases for a further period of five years. These options required the applicants to give six months' written notice of their intention to renew the leases before the termination date, by 31 January 2016. Amongst other things, the franchise agreements gave Sale's Hire the election to terminate the franchise agreements if the lease agreements were terminated.

The applicants did not exercise their renewal options by the 31 January 2016, but purported to exercise the options only thereafter. During July 2016, Oregon Trust demanded that the applicants vacate the leased premises, as their options to renew had lapsed and the lease agreements had terminated.

Litigation history

Fearful that their businesses would collapse, the applicants instituted an urgent application in the High Court against Sale's Hire and Oregon Trust seeking an order declaring that their renewal options had been validly exercised, permitting them to remain in occupation of the leased premises and prohibiting Oregon Trust from evicting them. Oregon Trust, in turn, brought a counter-application for the applicants' eviction.

Before the High Court, the applicants argued that South African contract law had become "*infused*" with the public policy notions of fairness and Ubuntu (which "*emphasises the communal nature of society and social justice and fairness and envelopes the key values of group solidarity, compassion, respect and human dignity...*"). The applicants also argued that, despite the strict terms of the franchise agreements, considerations of good faith and the broader purpose of both the franchise and lease agreements should be considered, particularly in circumstances where Sale's Hire had undertaken to the NEF that it would support the historically disadvantaged franchisees' operations and that the franchise agreements would endure for at least ten years.

The High Court noted that terminating the lease agreements would result in the applicants losing their businesses and cause an important black economic empowerment initiative to fail, which be a disproportionate sanction for the applicants' failure to exercise their lease renewal options timeously. The High Court also noted that the argument for legal certainty, on its own, should not be a restraint on the clear intention of the parties – which was to advance historically disadvantaged persons – and the High Court held that the strict terms of the lease agreement should not be enforced, accordingly granting granted the applicants the relief sought.

Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity...*continued*

The SCA also cautioned that *"the parties [must] know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable"*.

Aggrieved, the respondents appealed to the Supreme Court of Appeal (SCA). In handing down judgment, the SCA adopted a more conservative approach and emphasized the importance of the principle *pacta sunt servanda* and the need for certainty, whilst noting that although fairness and reasonableness inform public policy, they are not self-standing principles. The SCA also held that while the courts may decline to enforce contractual terms which are deemed contrary to public policy, this power should be exercised *"sparingly and only in the clearest of cases"*.

The SCA rejected the concept of the *"disproportionality"* of sanction relied upon by the High Court, as it is not a recognised principle in South African law. Lastly, the SCA also cautioned that *"the parties [must] know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable"*.

Regarding the renewal of the leases, the SCA held that while the applicants may not be *"sophisticated business people"* as they had argued, they were not *"ignorant individuals"*. There were no considerations of public policy that rendered the renewal clause unenforceable, particularly as the only limitation that was imposed on the parties was that the option to renew had to be exercised by the applicants in a particular manner and by a particular date. The SCA noted that the applicants had jeopardized their own businesses through non-compliance with the renewal clause, as they did not provide sufficient reasons why they had failed to renew their leases timeously.

The SCA accordingly upheld the appeal and replaced the High Court's order with an order dismissing the application with costs and ordered the eviction of the applicants.

Majority judgment of the Constitutional Court

Judge Theron, who delivered the majority judgment (the First Judgment), held that parties cannot escape contractual terms on the basis that their enforcement would be disproportionate or unfair, particularly as the values enshrined in the Constitution of the Republic of South Africa, 1996, do not provide a free-standing basis upon which a court may interfere in contractual relationships. Rather, constitutional values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.

The First Judgment held that the applicants failed to demonstrate that the enforcement of the renewal clause in question is contrary to public policy, particularly as they did not provide adequate reasons for their failure to comply, leading to the conclusion that the applicants neglected to comply with the renewal clause in circumstances where they could have done so. Furthermore, the applicants had not shown that the failure

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The First Judgment noted that it was clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is recognised as a constitutional value and informs public policy.

of their businesses, in these circumstances, would unjustifiably undermine substantive equality as they had attempted to argue before the Constitutional Court.

Judge Theron noted that constitutional values should be used creatively by courts to develop new constitutionally-infused common law doctrines, and that such developments must take place in an incremental fashion and yield clear and ascertainable doctrines to provide predictable outcomes for contracting parties. In the *Beadica* Case, however, the applicants had not sought to develop a clear and ascertainable doctrine to ameliorate a demonstrated problem of unfairness and, as a result, their case had to fail.

Judge Theron also noted that the judgment in *Barkhuizen v Napier* (2007 (5) SA 323 (CC)) (*Barkhuizen* Case) remains the leading authority on the role of equity in contract, as part of public policy considerations. As per the *Barkhuizen* Case, the Constitution requires the courts to "*employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives.*" The First Judgment noted that it was clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is recognised as a constitutional value and informs public policy.

Lastly, Judge Theron emphasised that a court may not refuse to enforce contractual terms because the enforcement would, in the court's subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.

Dissenting judgments in the Constitutional Court

The first dissenting judgment was handed down by Judge Froneman (the Second Judgement), who noted that he would have upheld the appeal with costs.

He held that the regulation of unfairness in contract law involves judges making an underlying moral or value choice within the objective value system of the Constitution, but noted that further guidance should be provided on how these objective values can be translated into practical application. He suggested that this should be done by describing reasonably certain, practical and objective legal principles and rules to guide contracting parties and that this approach would be best achieved by recognising

Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity...*continued*

The *Beadica* Case confirms that whilst the values of fairness, reasonableness and good faith may play a role in tempering unreasonable prejudice in contractual relationships, these values are not standalone rules that can be applied freely to undermine commercial and legal certainty.

that South Africa's law of contract has always taken account of the reasonable expectations of the parties to the contract as well as those of the wider community. This can be done in a manner that ensures objective, reasonable practicality and certainty.

A second dissenting judgment was handed down by Acting Judge Victor (the Third Judgment), who agreed with the finding made in the Second Judgment that the adjudication of fairness in contract cannot be plucked from a set of neutral legal principles.

The Third Judgment held that Ubuntu is an important constitutional value which stands alongside other values such as good faith, fairness, justice, equity, and reasonableness. Acting Judge Victor held that characterising Ubuntu as an adjudicative value in reaching substantive fairness between contracting parties will achieve a constitutionally transformative result, and that the recognition of Ubuntu in interpreting contracts will not undermine the concept of certainty and contractual autonomy.

Conclusion

The *Beadica* Case confirms that whilst the values of fairness, reasonableness and good faith may play a role in tempering unreasonable prejudice in contractual relationships, these values are not standalone rules that can be applied freely to undermine commercial and legal certainty. Public policy demands that contracts, freely and consciously entered into, must be honoured as this is crucial to ensuring certainty and promoting economic development. However, this still does not mean that striking a balance between the competing values of fairness, reasonableness and good faith versus ensuring legal certainty will be an easy task.

Anja Hofmeyr and Gareth Howard

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"*Winds of change*" to the face of the legal profession

These problems were pronounced in a Discussion Paper by the Department of Justice and Constitutional Development to stimulate debate and consultation on the issues raised.

"An examination of the legal profession as it has been in the past and as it still exists, reveals a number of problems and anomalies, namely: The legal profession does not represent the diversity of South African society. The number of black lawyers in private practice and in the public service sector is comparatively low, as is the number of women. Black people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar. They were, accordingly, also largely absent from the controlling bodies of the Bar Councils and Law Societies until recently, when steps were taken to make these bodies more representative."

These problems were pronounced in a Discussion Paper by the Department of Justice and Constitutional Development to stimulate debate and consultation on the issues raised because they intended to introduce legislation concerning the legal profession into Parliament in the year 2000.

But can one truly say that the face of the legal profession has changed since the introduction of the new legislation?

In the case, *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020), the Cape Bar challenged the constitutionality of the regulations and rules published under the new Legal Practice Act 28 of 2014 (Act) which ushers a new dispensation of transforming, unifying, governing and regulating the legal profession in South Africa.

The Cape Bar brought the challenge of unfair discrimination in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), simultaneously a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively under the doctrine of legality. If the former did not apply, it sought to have the provisions declared unlawful and invalid, to the extent that they imposed inflexible quotas for the composition of the Western Cape Provincial Council (Provincial Council) on the basis of gender and race.

The Cape Bar challenged regulations which require 50% of the Provincial Council to be male and 50% to be female. The provisions create six seats for attorneys and four seats for advocates in each provincial council. The seats for advocates must be composed of one white male, one white female, one black male and one black female.

The Cape Bar submitted that the provisions of the regulations were rigid and although they were ostensibly aimed at affirming black and female representation in order to rectify past and present discrimination, it capped such representation which is harmful to that objective. The Cape Bar argued that the cap effectively protected positions for white and male advocates. It contended that in this case a white man had received a majority of the votes, but that had he received the least votes of the other candidates who were not white males, but the most in his category, he would have displaced the female and black candidate who obtained more votes. It further contended that the electoral scheme is unfairly discriminatory and fails the test devised by the Constitutional Court in *Van Heerden*.

"*Winds of change*" to the face of the legal profession...*continued*

The Minister submitted that black women in the scheme are not victims of discrimination, the regulations do not single them out in favour of white men, but rather, they apply across the board to all races and genders.

The Cape Bar contended that the Minister of Justice's decision to promulgate the regulations, the National Forum's decision to promulgate the impugned rules and the Legal Practice Council's (LPC) application of the rules all constituted administrative action under PAJA. The Cape Bar argued that the electoral scheme is irrational, unreasonable and arbitrary because it did not ensure representation of black people and women, but instead acts as a job reservation for white people and men. Lastly, it was argued that the regulations were *ultra vires* because the Minister of Justice had no power to determine an electoral procedure for the provincial councils, and that such power fell within the purview of the Provincial Council itself in terms of section 23(4) and 95(1)(j) of the Act.

The Minister submitted that black women in the scheme are not victims of discrimination, the regulations do not single them out in favour of white men, but rather, they apply across the board to all races and genders. There is no preservation of seats for white men. White men only have one set despite being an overwhelming majority of the legal profession. Mindful of the fact that black people are in the minority and women in particular, in the legal profession, the regulations seek to benefit them. In the absence of mandatory obligations for their representation, they would have been left out. The Minister contended that the measure meets the *Van Heerden* test.

The Cape Bar asserted that it had established a *prima facie* case of discrimination on the grounds of gender and race as the regulations deny access to opportunities on the basis of race or gender because they depart from the standard democratic position of a person with the most votes being the one to serve on the Provincial Council. Furthermore, the rules and regulations and their application constitute discrimination because they withhold a benefit or opportunity on the grounds of race and gender.

The court held that occupying a seat as the Provincial Council did not constitute a "*benefit*", it could however be viewed as an "*opportunity*" to serve the profession, as serving on the Provincial Council does not give rise to a contract of employment, or access to work, briefs or instructions nor do members of the Provincial Council earn a salary.

The court applied the *Van Heerden* test which was devised specifically and finds application when a measure is challenged for violation of an equality provision. The test to determine whether a measure falls within section 9(2) of the Constitution is threefold: (a) whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; (b) whether the measure is designed to protect or advance such persons; and (c) whether the measure promotes the achievement of equality.

"*Winds of change*" to the face of the legal profession...*continued*

The court applied the first requirement and found that three seats of the Provincial Council are reserved for members of groups disadvantaged by unfair discrimination, in the form of a black woman, a black man and a white woman.

According to Moseneke J, the legal efficacy of the scheme should be adjudged by whether an overwhelming majority of the members of the favoured class are persons designated as disadvantaged by unfair exclusion. The existence of a tiny majority of those who were not unfairly discriminated against in the past, but who benefitted from the differential scheme, did not affect the validity of the scheme. Secondly, the remedial measures adopted must be reasonably capable of attaining the desired outcome. Thirdly, to determine whether the measure will promote the achievement of equality requires an appreciation of the effect of the measure in a broader society.

The court applied the first requirement and found that three seats of the Provincial Council are reserved for members of groups disadvantaged by unfair discrimination, in the form of a black woman, a black man and a white woman. While the scheme favoured persons designated as previously disadvantaged by unfair exclusion, white men also benefit by gaining a seat but that should not invalidate the scheme concerned. However, they do not benefit unduly because of they are a larger group in the profession.

While applying the second requirement, the court found that the scheme was designed to ensure that black people and women have a seat in the Provincial Council. The regulations and rules clearly advanced the benefits of those who have been disadvantaged by unfair discrimination.

The court held that the scheme is not intended to prefer white men at all, but that it is rather designed to make equal contributors and partners in the governance of the legal profession. The court held that this was a legitimate objective, in terms of section 14(2) of the Equality Act read with section 9(3) of the Constitution. It was further held that the electoral scheme in no way unjustifiably or disadvantageously targets black people and women and neither does it seek to impair them.

The court held that notwithstanding that the Minister and the LPC exercised public power reviewable in terms of section 2 of the Constitution, PAJA was not applicable.

The Cape Bar contended that the Minister acted *ultra vires* his powers as his powers were limited to *"establishing the Provincial Council"* but not *"election of the procedure"*.

In considering this issue, the Court held that the Minister was empowered to make regulations in terms of section 94 of the Act. It was further held that section 95 empowers the LPC to make rules while section 97 empowered the National Forum to make recommendations to the Minister as regards among others, *"the composition, powers and functions of the Provincial Councils"*. The Minister was obliged to act on the recommendations. The Court found that the Minister acted within the confines of the Constitution and the Act, and therefore that he executed his powers and functions *intra vires*.

"*Winds of change*" to the face of the legal profession...*continued*

The court made an important concluding remark reminding parties that the election of black women to the governing structures of the profession is not in itself sufficient to fulfil the transformation objective of the legal profession and that transformation is an imperative that must extend beyond that, to addressing matters that include briefing patterns, attraction, retention and offering support to black and women legal practitioners, among others. It remains to be seen whether this important decision will serve to inform and guide the transformational objectives not only within the legal profession but also in other sectors of our economy.

For arbitrariness to be established there must be an absence of reasons or reasons which do not justify the action taken. The court held that the Minister and LPC provided reasons to justify the promulgation of the regulations and the rules. In making this finding the court concluded that there was no unequal treatment of persons similarly placed and there was no naked preference of white men.

With regards to rationality the Court referenced Ngcobo CJ in *Albutt*:

> *"What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."*

The court held that the regulations and rules were intended to ensure that there was equitable representation of all races and genders, and that this objective was achieved. A rational link has been demonstrated between the purpose and the means chosen to achieve that purpose.

It was held that it is not unreasonable that a decision maker, seeking to give expression to the aims of the Act which include the taking into account of race and gender as factors in the composition of the Provincial Council, would adopt the impugned regulations and rules to do so.

For the reasons mentioned above the court dismissed the Cape Bar's application and according to the *Biowatch* principle each party was ordered to pay its own costs.

The court made an important concluding remark reminding parties that the election of black women to the governing structures of the profession is not in itself sufficient to fulfil the transformation objective of the legal profession and that transformation is an imperative that must extend beyond that, to addressing matters that include briefing patterns, attraction, retention and offering support to black and women legal practitioners, among others. It remains to be seen whether this important decision will serve to inform and guide the transformational objectives not only within the legal profession but also in other sectors of our economy.

Thabile Fuhrmann, Johanna Lubuma and Kelebogile Selema

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