A recent Constitutional Court judgment has clarified the questions regarding the role of fairness and the public policy grounds upon which a court may refuse to enforce contractual terms. The judgment outlines the important principles for the court to consider when exercising judicial control, but at the same time emphasises the point that the court’s discretion to invalidate a contract, on the basis of public policy, must be used cautiously.

On 17 June 2020, the South African Constitutional Court handed down judgment in Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust (CCT109/19) [2020] ZACC 13 (“the Beadica judgment”), in which the court pronounced on the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms.

The case essentially turns on the failure by the applicants to give written notice of their respective intentions to renew their leases within the notice period, as required in terms of the renewal clause of their respective lease agreements with the first respondent, the so-called “Oregon Trust”. The Oregon Trust subsequently demanded that the applicants vacate the leased premises.
In the Western Cape High Court, the applicants contended that the strict enforcement of the renewal clause of the lease agreements would be contrary to public policy. The High Court ruled in favour of the applicants and held that the principle in *Botha v Rich N.O* 2014 (4) SA 124 (CC) was that the sanction of cancellation for breach must be proportionate to the consequence of the breach. The High Court held that terminating the lease agreement would constitute a disproportionate consequence for the applicants' failure to comply with the terms for renewal.

On appeal, the Supreme Court of Appeal ("SCA") overturned the High Court decision by relying on the principle of *pacta sunt servanda* (meaning that agreements must be kept / honoured) and the need for certainty in the law of contract. The SCA recognised that the courts have a discretion to invalidate contractual terms which would be contrary to public policy, but cautioned that this power should be exercised "sparingly, and only in the clearest of cases".

On appeal from the SCA, the apex court was required to determine the proper constitutional approach with regards to the judicial enforcement of contractual terms, with a particular emphasis on the public policy grounds upon which a court may exercise its discretion to enforce or not to enforce particular terms.

Key takeaways from the judgment

The majority judgment was handed down by Theron J and held, firstly, that *Barkhuizen v Napier* 2007 (5) SA 323 (CC) is still the leading authority on the role of equity in contract, in that "the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".

Furthermore, the majority referred to the judgment of *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) (1 November 2018) ("the Pridwin case") in which the SCA set out, in their view, what are the most important principles for the court to consider when exercising judicial control over a contract, focusing mainly on public policy considerations, which include:

- Public policy demands that contracts freely and consciously entered into must be honoured;
- A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
- Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
- The party who attacks the contract or its enforcement bears the onus to establish the facts;
- A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds; and
- A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

The apex court recognised the principles from the Pridwin case and added the following:

- Generally, public policy requires that parties honour their freely and voluntarily undertaken obligations so that the principle of *pacta sunt servanda* may continue to feature as a crucial component in the judicial control of contracts.
- Contractual relations are a major component of economic development. It is therefore imperative that parties are confident that the contracts that they enter into will be upheld. This certainty,
within contractual relations, fosters a fertile environment for the advancement of constitutional rights.
- A court must use their discretion to invalidate a contract sparingly, and only in the most clear case. However, courts should not rely upon this discretion to shy away from their constitutional duty to intertwine public policy and constitutional values.

Ultimately the majority held that the application be dismissed as the applicants failed to discharge the onus of proving that the enforcement of the renewal clause would be contrary to public policy.

The Beadica judgment emphasises the importance of fairness, reasonableness and equity that must be encapsulated in all contracts under South Africa law. However, the judgment makes it clear that:

"a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. It is only when 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".

This judgment clearly sets out the public policy grounds upon which a court may refuse to enforce contractual terms and at the same time emphasises the point that the courts discretion to invalidate a contract, on the basis of public policy, must be used cautiously in order to protect the sacred principle of *pacta sunt servanda* in contract law.

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