

AN ESCAPE FROM CONTRACTUAL OBLIGATIONS BECAUSE THEY ARE UNFAIR?

Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13 (17 June 2020)

In recent times, there has been increasing debate and court judgment dealing with the question whether an agreement between two reasonable business persons is at risk of being invalidated by invoking unreasonableness, unfairness and public policy considerations, viewed against the backdrop of legal certainty and pacta sunt servanda (the principle that contracts freely entered into between parties must be honoured and, if necessary, enforced by the courts). This judgment deals with a franchisee's application not to be evicted from premises after it failed to timeously renew a lease agreement. The Constitutional Court confirmed that contracts will generally be upheld and enforced but that the law will, in so doing, not lose sight of the fact that good faith, ubuntu and public policy all play an important role in contractual dealings.

The Judgment can be viewed [here](#).

FACTS

Beadica 231 CC (Beadica) and others are four close corporations that entered into franchise agreements with Sale's Hire to operate Sale's Hire franchised businesses for a period of ten years. They acquired their businesses in terms of a black economic empowerment initiative financed by the National Empowerment Fund and coordinated by Sale's Hire. Beadica and the other franchisees operated their businesses from premises leased from the Oregon Trust, as required in terms of their franchise agreements with Sale's Hire.

The leases were intended to run for an initial period of five years, but conferred on Beadica and the others an option to renew the leases for a further period of five years. The renewal clause in the lease agreements provides that the option to renew be exercised by giving notice six months before the termination of the lease. Beadica and the other franchisees did not exercise their renewal options within the requisite time and purported to exercise them only after the time period for doing so had expired. Oregon Trust alleged that the options to renew had lapsed and the lease agreements had terminated and asked the franchisees to vacate the premises.

Beadica and the other franchisees instituted urgent proceedings in the High Court against Sale's Hire and Oregon Trust seeking an order declaring that their renewal options had been validly exercised and prohibiting Oregon Trust from evicting them. Oregon Trust brought a counter-application for eviction of Beadica and the others.

The High Court held that the strict terms of the lease agreement should not be enforced. The termination of the leases would result in Beadica and the other franchisees losing their businesses as well as the failure of a black economic empowerment initiative. This, the High Court held, would constitute a disproportionate sanction for the failure of Beadica and the franchisees to comply with the renewal clause.

The Oregon Trust and Sale's Hire appealed to the Supreme Court of Appeal (SCA). The SCA rejected the notion of proportionality, confirming that courts may only decline to enforce contractual terms when doing so would offend public policy and then only in the clearest of cases (i.e. with 'perceptive restraint'). It then upheld the appeal on the grounds that there were no considerations of public policy that would render the renewal clauses unenforceable. The eviction of Beadica and the other franchisees from the leased premises was therefore ordered.

In an appeal to the Constitutional Court, the franchisees argued that enforcement would be inimical to the values of the

Constitution, in particular the right to equality contained in section 9(2) of the Constitution in that it would collapse their businesses and lead to the failure of the black economic empowerment initiative financed by the Fund. The Oregon Trust and others (including Sales Hire) argued that the Constitutional Court in *Barkhuizen* imposed an onus on parties seeking to avoid the enforcement of a contractual term on the basis of public policy, to adequately explain their failure to comply with the term and that, since the franchisees had failed to do so, the enforcement of the renewal clause could not be found to be contrary to public policy. The franchisees' explanation for their failure to comply with the term in the agreement, namely that they were unsophisticated and did not grasp the implications of their failure to comply, was accepted by the High Court but rejected by the SCA.

HELD

(Majority of 7 and 2 separate, minority judgments)

- The judgment in *Barkhuizen* remained the leading authority in our law on the role of equity in contract, as part of public policy considerations. It recognised that good faith was 'not a self-standing rule, but an underlying value that [was] given expression through existing rules of law'. *Botha v Rich* did not revise *Barkhuizen*, nor did it hold that disproportionality or unfairness was separate, self-standing grounds, upon which a court may generally refuse to enforce contractual provisions. There was agreement between this court and the SCA that abstract values did not provide a free-standing basis upon which a court may interfere in contractual relationships, but instead performed creative, informative and controlling functions.
- The impact of the Constitution on the enforcement of contractual terms through the determination of public policy was profound. As was stated in *Barkhuizen*, it required that courts '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'. Public policy imported values of fairness, reasonableness and justice; and ubuntu, which encompasses these values, was now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informed public policy. And, many established doctrines of contract law are themselves the embodiment of these values, such as those concerning fraud, duress, misrepresentation, estoppel, implied terms and rectification.
- While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning was required to ensure certainty of the law and respect for the doctrine of separation of powers. The scope for the development of new common-law rules in our law of contract was broad: constitutional values had an essential role to play in the development of constitutionally-infused common-law doctrines. In developing the common law, courts must develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This was what the rule of law, a foundational constitutional value, required.
- A court may however not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application was 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. Therefore, only where a contractual term or its enforcement is so unfair, unreasonable or unjust that it was contrary to public policy, may a court exercise its discretion to refuse to enforce it.
- In applying this approach to facts of this case, the question was whether the franchisees discharged the onus of demonstrating that the enforcement of the renewal clauses would be contrary to public policy in the particular circumstances of this case.

- Contracting parties cannot escape the enforcement of contractual terms on the basis that enforcement would be disproportionate or unfair in the circumstances. Constitutional values do not provide a free-standing basis upon which a court may interfere in contractual relationships. Rather these values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy. It is only where the enforcement of a contractual term would be so unfair, unreasonable or unjust so as to be contrary to public policy that a court may refuse to enforce it.
- In this matter, Beadica and the franchisees therefore had to fail in their application as they had not discharged the onus of demonstrating that the enforcement of the strict terms of the renewal clause would be contrary to public policy in the particular circumstances of this case. It was fatal to their case that they did not adequately explain why they did not comply with the terms that they sought to avoid. The only inference that could be drawn was that they simply neglected to comply with the clause in circumstances where they could have complied with it. In any event, Beadica and the other franchisees had not shown that the failure of their businesses, in these circumstances, would unjustifiably undermine substantive equality.

CONCLUSION

The appeal failed.