"MOUNTAINS ARE NOT FAIR OR UNFAIR – THEY ARE DANGEROUS". SO TOO IS AGREEING TO OBLIGATIONS UNDER A LOAN AGREEMENT

***68 Wolmarans Street Johannesburg (Pty) Ltd and Others v Tufh Limited* (1263/2022) [2024] ZASCA 48 (15 April 2024)**

The above quote from Reinhold Messner, the first person to summit Mount Everest without oxygen and who climbed all the 'eight-thousanders' (the name for the 14 mountains recognised by the International Mountaineering and Climbing Federation as being more than 8 000 metres above sea level), is apt to describe the dispute in the above judgment. The borrower under a loan agreement argued, amongst other things, that it was unfair and against public policy to allow the lender to accelerate payment of the full debt after the borrower had defaulted – not because of missing an instalment, but because it failed to settle the monthly municipal accounts in respect of the property development for which the loan was earmarked. It was an express obligation in the loan agreement to pay the municipal charges monthly, in full.

Putting pen to paper in agreeing to obligations under a contract can be dangerous because the law holds both parties to the terms of their own agreement. Courts will only in exceptional circumstances find that an agreed term in a contract is unfair and against public policy, and hence may be disregarded.

The judgment can be viewed here

FACTS

Tufh Limited ('Tufh') is a public company engaged in the business of providing its clients with loan facilities to enable them to purchase and subsequently convert or refurbish buildings in the inner cities of South Africa into affordable residential units that would be available for rental.

During 2013, 68 Wolmarans Street Johannesburg (Pty) Ltd ('Wolmarans') and Tufh entered into a loan agreement for R5,7 million, the funds being earmarked for Wolmarans' purchase of immovable property in Hillbrow (on which a large apartment building is erected) and then to refurbish the apartments.

A material term of the agreement was that Wolmarans would, in addition to paying the monthly loan repayment instalment due to Tufh, also be obliged to pay the account of the City of Johannesburg (CoJ) in respect of all municipal charges, including property taxes, water, electricity, sanitation charges (in respect of refuse removal and sewerage) and other services rendered to the property; and to provide Tufh with proof of such monthly payments. In addition, should Wolmarans fail to do so or breach any other provision of the agreement, Tufh would have the right to accelerate the outstanding payments and demand payment of the fell outstanding balance under the loan.

As security, two surethyships were procured (one which was later held to be invalid) and Wolmarans registered a mortgage bond over the property for an amount of R8,6 million at the request of Tufh.
Wolmarans duly paid its monthly instalments towards the loan agreement, but breached the specific terms of the loan agreement by failing to pay the City of Johannesburg (CoJ) for municipal service charges (rates, water, sanitation, refuse and electricity) provided to the property. No payments were made to the CoJ after October 2015, and by November 2019, the amount owing to the CoJ was in the region of R3,2 million.

Demand from Tufh to remedy the breach and settle the debt, was not heeded. Tufh argued that this constituted breach of the agreement, placed its security in the property at risk, and that it was therefore entitled to accelerate and declare all amounts in terms of the loan agreement to be due, owing and payable.

Wolmarans contended that it was embroiled in a *bona fide* dispute with the CoJ, even landing before the courts in 2016. The dispute between Wolmarans and the CoJ had to do with a billing query relating to water and electricity supplied to the property. There was no dispute about the rates, refuse, sanitation and other charges being levied by the CoJ to the property. In this regard, Tufh argued that notwithstanding Wolmarans' billing query, it was obliged to pay all other current charges levied subsequent to the 2016 court order on the due date.

Tufh then applied to the Johannesburg High Court for relief, including an order for payment of the sum of R4,8 million (the total debt as at February 2020). The application was successful in that court, but in an appeal to a full bench, Tufh succeeded. The full bench also refused Wolmarans leave to appeal.

This matter deals with Wolmarans' approach to the Supreme Court of Appeal ('SCA') for special leave to appeal. In the SCA, Wolmarans conceded that it had breached the loan agreement, but argued that there were reasonable prospects of success in an appeal and that leave should be granted, because:

(i) it was engaged in a *bona fide* dispute with the CoJ with regard to the municipal charges levied against the property;
(ii) Tufh's security was not at risk as it still held suretyships;
(iii) any risk to Tufh's security was caused by Tufh itself when it elected to accelerate and declare all amounts owing in terms of the loan agreement immediately due and payable; and
(iv) the implementation of the agreement was unconscionable and contrary to public policy.

HELD

Did Wolmarans have a bona fide dispute with the CoJ in respect of municipal services rendered to the property?

- It is common cause that, despite Wolmarans' dispute with the CoJ relating only to water and electricity, it failed to make any payments for other municipal charges (i.e., rates and taxes, wastewater services) for the past 7 years— this despite collecting the amounts in respect of these charges from tenants.
- Apart from the specific provisions of the loan agreement that impose an obligation on Wolmarans to pay for all municipal services rendered to the property, the obligation to pay also flows from the provisions of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') and the CoJ's Credit Control and Debt Collection By-laws ('the Collection By-laws'). Section 96(a) of the Systems Act obliges to collect all money that is due and payable to it. It obliges municipalities to reduce municipal debt by all legitimate means and must take reasonable steps to collect amounts that are due. The Systems Act requires that a dispute must relate to a 'specific amount' claimed by the municipality and the ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer's objection thereto. The CoJ's Collection by-laws. contain provisions aimed at curbing unscrupulous property owners from declaring a dispute with the municipality and then withholding payment for years.
- In this context, Wolmarans' argument that it had a *bona fide* dispute with CoJ over the outstanding municipal charges is not sustainable. While Wolmarans admits that its dispute with the CoJ is limited to electricity and water charges it nonetheless unreasonably, unlawfully and inexplicably withholds payments for all other municipal services and charges, since 2015. The billing crisis which plagued the CoJ at the time has clearly afforded Wolmarans with an ideal opportunity to exploit the situation by withholding all payments.
- In the result it cannot be found that Wolmarans' dispute with the CoJ is *bona fide*.

Was Tufh's security in the property at risk given that it held suretyships?

- There was only one existing suretyship, no longer two as initially agreed upon. In the light hereof, Wolmarans' contention that Tufh has sufficient *security* in the form of the two suretyships is without merit.

Was Tufh's security put to any risk by its own conduct when it accelerated payment of the full debt and did this make the implementation of the loan agreement unconscionable and contrary to public policy?

- The legal principles that are applied by our courts in order to determine whether a contract is inimical to a constitutional value or is contrary to public policy (and should be invalidated), was stated in various cases. The SCA in *A B and Another v Pridwin Preparatory School and Others* provided the following guidance::

  '(i) Public policy demands that contracts freely and consciously entered into must be honoured;
  (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
  (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
  (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
  (v) 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;
  (vi) 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.'
- In *Barkhuizen v Napier*, the Constitutional Court rejected notions of good faith, fairness and reasonableness as independent grounds for refusing to enforce contractual terms. It did, however, hold that public policy as informed by the Constitution imports 'notions of fairness, justice and reasonableness'; it takes account of the need to do 'simple justice between individuals'; and is informed by the concept of Ubuntu. It also recognised that public policy requires parties to honour their contractual obligations undertaken freely and voluntarily as encapsulated in the Latin maxim *pactum sunt servanda*, because this is a 'profoundly moral principle, on which the coherence of any society relies' and it 'gives effect to the central constitutional values of freedom and dignity'.
- Applying the above principles to the facts of this case, the question is whether Wolmarans has discharged the onus of demonstrating that the implementation of the loan agreement would be contrary to public policy in the particular circumstances of this case.
- On the facts, Wolmarans was unable to do so: Here was an agreement that was freely and voluntarily entered into. There was no suggestion whatsoever that the clauses requiring settlement of the municipal debt monthly or that the lender may accelerate payment on default by the borrower, were out of the ordinary or that they imposed any undue hardship on Wolmarans.
- As the facts show, the last payment made by Wolmarans to the CoJ was in October 2015. No payment was made after this date, despite the fact that the dispute with the CoJ related to water and electricity charges only. What made Wolmarans' conduct particularly egregious and unconscionable was that it had for more than eight years enjoyed the benefit of all municipal services at the property, collected all rental from its tenants and still failed to pay for such services.
- It cannot therefore, be said that Wolmarans discharged the onus to show that the enforcement of the relevant clauses would be unconscionable and contrary to public policy.

CONCLUSION

In the circumstances, there are no reasonable prospects in any appeal challenging the findings of the full court. The application for special leave must fail.