UNFAIR ENFORCEMENT OF A CONTRACT AND THE CONSTITUTIONAL NORM OF UBUNTU:

Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2017 (4) SA 243 (GJ)

1 Introduction

The courts have accepted that a contractual term not *per se* illegal will not be enforced if, in the circumstances, enforcement would be contrary to public policy as where, for example, it would unjustifiably infringe a constitutional value or other community value or norm (see eg, *De Beer v Keyser* 2002 (1) SA 827 (SCA) par 22; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) par 91; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) par 47). Good examples of clauses that are often not enforced for these reasons are restraint of trade clauses and time-bar clauses. However, the principle of unlawful enforcement extends to any kind of contractual term. In *Bredenkamp's* case (*supra* par 47), Harms DP referred, by way of example, to a clause in a lease which states that the tenant may not sublet without the consent of the landlord. This sort of term is *prima facie* innocent, but should the landlord attempt to use it to prevent the property from being sublet in circumstances amounting to discrimination under the equality clause, the court will not enforce the term. In *Nyandeni Local Municipality v Hlazo* (2010 (4) SA 261 (ECM) par 124–126), the court applied the principle of unlawful enforcement to an "entrenchment" ("non-variation" clause) in an employment contract. The court refused to uphold the clause because to do so would infringe the employer's right to due process of law under section 34 of the Constitution. See also *GF v SH* (2011 (3) SA 25 (GNP) par 18–22) where it was held that enforcement of a "non-variation" clause in divorce settlement would be contrary to public policy if it operated against the best interests of the minor children or negated the fundamental duties and powers of the parents.

The Supreme Court of Appeal has adopted the dogmatic stance that the mere fact that enforcement of a contractual provision would produce a result, which is unfair or unreasonable, is not enough to make the enforcement contrary to public policy. The basic proposition adopted by the appeal court is that fairness and reasonableness are not freestanding requirements for the exercise of a contractual right and, therefore, a court cannot refuse to give effect to the implementation of a contractual provision simply because it would be unfair or unreasonable to do so (see *Brisley v Drotsky supra* par 22, 35, 93; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) par 32; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) par 27;

Bredenkamp v Standard Bank of South Africa Ltd supra par 53; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) par 23–25; *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) par 32–34). In *South African Forestry Co Ltd v York Timbers Ltd* (*supra* par 27), Brand JA explained the basis of the principle:

> "(A)lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly."

Whether the Constitutional Court will follow this approach, remains to be seen. Nkabinde J's judgment in *Botha v Rich* (2014 (4) SA 124 (CC)) seems to imply that a court may refuse enforcement of a contractual provision purely on the ground of unfairness, but it is unclear whether the courts will interpret the judgment in this way or regard it as authoritative. A glaring omission from Nkabinde's judgment is her failure to even mention, let alone consider, the appeal court decisions dealing with unfair enforcement (*Bredenkamp v Standard Bank of South Africa Ltd supra*; *Maphango v Aengus Lifestyle Properties (Pty) Ltd supra*; *Potgieter v Potgieter NO supra*) and the substantial body of legal writing on unfair contracts and the unfair enforcement of contracts (see below). This failure substantially undermines the authoritative status of the judgment. As Waglay J pointed out in his minority judgment in *Bosch v Commissioner, South African Revenue Service* (2013 (5) SA 130 (WCC) par 103), "[b]efore one is bound to a precedent-setting judgment and is obliged to follow it, the judgment must be clear and unequivocal, it must be plain, unmistakable and explicit in its rejection of previous judgments, which it seeks to reverse" and it must provide reasons why those judgments are no longer good law. The appeal court, in the cases mentioned above, has adopted a clear position on unfair enforcement of a contract: that unfairness does not or cannot render the enforcement offensive to public policy. The least that could have been expected from Constitutional Court was a review of the appeal court cases, a rejection of the view adopted in those cases, and a clear explanation of why the view is no longer good law.

Another major shortcoming in Nkabinde J's judgment is that it does not indicate what principles are to be applied to identify the cases in which unfair enforcement is offensive to public policy. This *lacuna* in her reasoning effectively leaves the door open for judges to decide issues of unfair enforcement according to their own ideas of what is unreasonable or unfair. This is precisely the problem that Brand JA was concerned about in *South African Forestry Co Ltd v York Timbers Ltd* (*supra* par 27) when he observed:

> "[a]cceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder".

In *Potgieter v Potgieter NO* (*supra* par 34), Brand JA reiterated the concern more forcefully.

> "[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge."

2 Legal writing on this issue and the appeal court's response

The question of how the law should respond to unfairness in contractual relations has generated a substantial body of legal writing. For a general discussion of the topic, see Neels "Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid" (1998 1 *TSAR* 702; 1999 2 *TSAR* 257; 1999 3 *TSAR* 477). One of the major points of the debate regarding unfair enforcement of a contract has been whether good faith is an independent substantive legal principle – one embodying values such as justice, reasonableness and fairness – on the basis of which the courts may decline to enforce valid contractual provisions (see eg, Miller "*Judicia Bonae Fidei*: A New Development in Contract?" 1980 97 *SALJ* 531; Van der Merwe, Lubbe and Van Huyssteen "The *Exceptio Doli Generalis*: *Requiescat in pace* – *Vivat Aequitas"* 1989 106 *SALJ* 235; Lubbe "Bona Fides, Billikheid en Openbare Belang in die Suid-Afrikaanse Kontraktereg" 1990 1 *Stell LR* 7; Van Huyssteen and Van der Merwe "Good Faith in Contract: Proper Behaviour Amidst Changing Circumstances" 1990 1 *Stell LR* 244; Zimmermann "Good Faith and Equity" in Zimmerman and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 236; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" 1999 *TSAR* 684; Hutchison "Good Faith in the South African Law of Contract" in Brownsword, Hird and Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 236; Hefer "Billikheid in die Kontraktereg" 2004 29 *TSAR* 1; Brand and Brodie "Good Faith in Contract Law" in Zimmermann, Visser and Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 94).

The Supreme Court of Appeal has rejected the idea that good faith is an independent legal principle. Its view is that good faith, reasonableness and fairness are no more than abstract values which perform creative, informative or controlling functions through established rules of contract law, and that the appropriate mechanism for judicial control of contract enforcement is public policy (see eg, *Brisley v Drotsky supra* par 21–255, 93–95; *Afrox Healthcare Bpk v Strydom supra* par 31–32; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) par 18; *South African Forestry Co Ltd v York Timbers Ltd supra* par 27; *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) par 11; *Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* par 23. See also Brand SC "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" 2009 126 *SALJ* 71;

Lewis "The Uneven Journey to Uncertainty in Contract" 2013 76 *THRHR* 80; Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" 2016 27 *Stell LR* 238).

The appeal court has been strongly criticised for its view. (For discussion of the good faith approach, as well as what is needed for the constitutional development of contract law by the courts, see eg, Tladi "One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Healthcare v Strydom"* 2002 17 *SAPL* 473; Lewis "Fairness in South African Contract Law" 2003 120 *SALJ* 330; Hawthorne "The End of Bona Fides" 2003 15 *SA Merc LJ* 271; Pretorius "Individualism, Collectivism and the Limits of Good Faith" 2003 66 *THRHR* 638; Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 67 *THRHR* 294; Lubbe "Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law" 2004 121 *SALJ* 395 404; Bhana and Pieterse "Towards Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" 2005 122 *SALJ* 865; Naudé and Lubbe "Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*" 2005 122 *SALJ* 441; Glover "Lazarus in the Constitutional Court: An Exhumation of the *Exceptio Doli Generalis*?" 2007 124 *SALJ* 449 (hereinafter "Glover"); Sutherland "Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen *v Napier* 2007 (5) SA 323 (CC)" (Part 1) 2008 19 *Stell LR* 390; (Part 2) 2009 20 *Stell LR* 50; Liebenberg "The Application of Socio-economic Rights to Private Law" 2008 3 *TSAR* 464; Barnard–Naude "'Oh, what a tangled web we weave...' Hegemony, Freedom of Contract, Good Faith and Transformation – Towards a Politics of Friendship in the Politics of Contract" 2008 1 *Constitutional Court Review* 187; Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 26 *SAJHR* 403 468; Davis "Developing the Common-law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" 2011 22 *Stell LR* 845; Kruger "The Role of Public Policy in the Law of Contract Revisited" 2011 128 *SALJ* 712; Rautenbach "Constitution and Contract: The Application of the Bill of Rights to Contractual Clauses and their Enforcement: *Bredenkamp v Standard Bank of South Africa* (SCA)" 2011 74 *THRHR* 510; Louw "Yet another Call for a Greater Role for Good Faith in the South African Law of Contract: Can we Banish the Law of the Jungle, while Avoiding the Elephant in the Room?" 2013 16(5) *PELJ* 45; Hawthorne "Public Policy: The Origin of a General Clause in the South African Law of Contract" 2013 19 *Fundamina* 300; Dafel "Curbing the Constitutional Development of Contract Law: A Critical Response to *Maphangov Aengus Lifestyle Properties (Pty) Ltd*" 2014 131 *SALJ* 271 281; Bhana "Contract Law and the Constitution: An Evaluation of *Bredenkamp v Standard Bank of South Africa (Pty) Ltd (SCA)*" 2014 29 *SAPL* 508; Bhana "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract" 2015 26 *Stell LR* 3; Sharrock "Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*" (2015) 27 *SA Merc LJ* 174; Bhana and Meerkotter "The Impact of the Constitution on the Common Law of Contract *Botha v Rich NO (CC)"* 2015 132 SALJ 494; Rautenbach "The Constitutional Status of Contractual Freedom" 2016 *TSAR* 467; Hawthorne "Rethinking the Philosophical

Substructure of Modern South African Contract Law: Self-Actualisation and Human Dignity" 2016 79 THRHR 286).

The Constitutional Court has yet to deliver its final word on the role of good faith in contract law. In *Barkhuizen v Napier* (2007 (5) SA 323 (CC) par 82), the court expressly refrained from deciding whether the limited role accorded to good faith by the appeal court is appropriate. It simply held that as the law currently stands, good faith is not a self-standing rule.

3 Unfairness as a ground for refusing enforcement of a contract

A convincing argument can be made out that the law should recognise that contractual enforcement might be so unfair as to be contrary to public policy. The appeal court was persuaded to adopt its view for two reasons: concepts like reasonableness, fairness and good faith are merely abstract values, not independent substantive rules, and allowing judges to refuse to implement contractual provisions on the basis of unfairness will give rise to intolerable legal and commercial uncertainty (*Brisley v Drotsky supra* par 22 and 93; *Afrox Healthcare Bpk v Strydom supra* par 32; *South African Forestry Co Ltd v York Timbers Ltd supra* par 27; *Bredenkamp v Standard Bank of South Africa Ltd supra* par 53; *Maphango v Aengus Lifestyle Properties (Pty) Ltd supra* par 23 and 25).

Neither reason is convincing.

Merely because reasonableness and unfairness are abstract values does not mean that they cannot be determinative of public policy on a particular issue. The approach followed in relation to substantive unfairness of contractual terms demonstrates this point. It is trite that contractual terms need not be fair to be valid, yet *Sasfin (Pty) Ltd v Beukes* (1989 (1) SA 1 (A)) and subsequent appeal court cases make it clear that a term, or an entire contract, may be so unfair as to be contrary to public policy. If a point can be reached where substantive unfairness is offensive to public policy, then surely a point can be reached where enforcement of a valid provision becomes sufficiently unfair to be offensive to public policy.

As to the possible uncertainty resulting from this approach, enforcement, which is alleged to be unfair, is obviously governed by the ordinary principles of common law illegality. These principles have been shown to be very effective in ensuring that the alleged substantive unfairness of contractual provisions do not become a 'last resort' defence for recalcitrant debtors. Adherence to the principles generally has the effect of ensuring, *inter alia*, that judges do not make ill-considered decisions based on subjective notions of fairness and equity. If applied sensibly, the principles will perform the same limiting function in relation to the alleged unfair enforcement of a contract.

4 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*

There are decisions of the lower courts, which suggest that enforcement may be sufficiently unfair in certain circumstances to be contrary to public

policy *(s*ee *Combined Developers v Arun Holdings* 2015 (3) SA 215 (WCC) par 36; *W v H* 2017 (1) SA 196 (WCC) par 39). In a recent decision, *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (2017 (4) SA 243 (GJ)), the court refused to enforce a cancellation clause on the ground that implementing the clause would be contrary to the concept of *Ubuntu*, in particular, the notion of fairness implicit in the concept. The key to this approach is that it recognises fairness as an important part of the constitutional concept of *Ubuntu*. It follows that unfair enforcement of a contract may be refused on the basis that it conflicts with a constitutional value.

Van Oosten J outlined the issue to be decided as follows (par 1–2):

> "The Roman-law maxim *pacta servanda sunt* … is a universally recognised basic principle of civil law, canon law, and international law … In regard to the law of contract the maxim is described in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) … para 70 as 'the age-old contractual doctrine that agreements solemnly made should be honoured and enforced' and further, although not a holy cow (*Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 37, 40), as 'a universally recognised legal principle' encompassing 'a moral principle, on which the coherence of any society relies' (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) … para 87). The rationale for the maxim is that parties must know that should either of them fail to honour their promise the other might invoke the assistance of the law to hold them to the agreement. Except for relaxation on grounds of public policy, the maxim was inflexibly applied, at least pre–Constitution. The advent of our constitutional dispensation also spread its wings to the law of contract: the desirability and necessity of infusing the law of contract with constitutional values were recently firmly established by the Constitutional Court. Further developments necessitating the relaxation of *pacta sunt servanda* in specific areas of the law of contract occurred and predictably may well continue in future. These developments caused an eminent retired justice of the Constitutional Court to ponder whether the time has not perhaps arrived to bid the maxim farewell or, as he posed the hypothetical question, RIP *Pacta Sunt Servanda*. (*Constitutionally Speaking*, 13 April 2007). The issue this case is concerned with, concisely, is whether, in the circumstances of this case, and in further developing the common law in accordance with s 39(2) of the Constitution, the constitutional values of the concepts of Ubuntu and fairness dictate that the maxim *pacta sunt servanda* ought to be relaxed.
>
> …The issue requires determination in the context of the contractual setting, broadly stated, of the landlord's right to and exercise of a contractual entitlement to cancel a lease agreement and as a corollary thereto, to be restored into possession of the property, where the lessee has defaulted in paying the rent on the due date. The constitutionality of the contractual provision relating to cancellation and its consequences remains unchallenged: the constitutional challenge, in this case, is directed at the consequences arising from the cancellation and the landlord seeking an order for the ejectment of the lessee, which is the application now before me.'

4 1 The factual background

The applicant's landlord was Mohamed's Leisure Holdings (Pty) Ltd (hereinafter "Leisure Holdings") and the respondent tenant was Southern Sun Hotel Interests (Pty) Ltd (hereinafter "Southern Sun"). Leisure Holdings sought to eject Southern Sun from its business premises at Garden Court, Nelson Mandela Boulevard, Cape Town. Southern Sun formed part of the greater Tsogo Sun Hotel Group brand of hotels.

The original lease agreement was concluded in January 1982, between Cape Town Holiday Inn (Pty) Ltd, as lessor, and Rennies Hotel and Liquor Holdings (Pty) Ltd, as lessee. That agreement remained in existence between Leisure Holdings and Southern Sun, both successors in title, from the beginning of 2013. On 19 November 2013, Southern Sun arranged a stop order on its bank account at Nedbank Ltd (Nedbank) for the monthly rental payment into Leisure Holdings' account at Absa Bank Ltd (Absa). Clause 4.5 of the lease between the Leisure Holdings and the Southern Sun provided that "the lessee shall make monthly … rent payments to the lessor by not later than the seventh day of each month". Clause 20 provided that if the lessee failed to pay any month's rent by its due date, the landlord would be entitled to cancel the contract and repossess the property.

In June 2014, Nedbank failed to pay the rental on the due date. On 12 June 2014, on learning of the default, Southern Sun delivered to Nedbank a written instruction to transfer the amount due to Leisure Holdings' bank account. On 20 June 2014, Leisure Holdings sent a letter to Southern Sun demanding payment of the rent within five days, failing which the lease would be cancelled. The letter added that in the event of any future failure to pay rental on the due date, no notice to remedy would be given and cancellation of the lease would follow instantly. On the same day, the June rental was transferred into Leisure Holdings' bank account in compliance with the demand. Nedbank, accepted responsibility for the late payment, stating the following in a letter addressed to Leisure Holdings:

> "We wish to confirm that non-payment of the rental amount stated herein (R566 988,38) was caused as a result of a change in Nedbank processes which impacted the payment run for 1 June 2014 and by no omission of the client. We apologise for this inconvenience caused."

In order to avoid another late rental payment, Southern Sun perused its bank statements to ensure that the payments were debited from its bank account by the seventh day of each month. The rent payments for the next three months were processed before the due date. The October rent was debited from Southern Sun's bank account on 6 October 2014, and this was reflected on the bank statement (perused by Southern Sun), but for some reason, the payment was not transferred to Leisure Holdings. By a letter addressed to Southern Sun on 20 October 2014, Leisure Holding's attorneys informed Southern Sun of its breach of the agreement and further stated that Leisure Holdings had "elected to exercise its right in accordance with the provisions of clause 20 of the lease agreement to cancel the lease agreement with immediate effect". The next day, Southern Sun transferred the amount of the October rental into Leisure Holding's bank account. The transfer included interest in an amount of R3 844,65 to compensate for the late payment. Southern Sun also asked Nedbank for an explanation why it had failed to implement Southern Sun's stop order. Nedbank replied that an investigation had revealed that the "non-payment occurred as a result of a technical administrative error".

On 28 October 2014, Southern Sun's attorneys responded to the letter of cancellation. They informed Leisure Holdings, *inter alia*, that Southern Sun had raised the issue of non-payment with Nedbank and it was awaiting a full response, and Southern Sun had not been remiss in payment of rental. In a

further letter dated 6 November 2014, Nedbank reported to Southern Sun on "the timeline events" leading up to the October non-payment. The report revealed a plethora of blunders and inadvertence in administering Southern Sun's stop order instruction. This was a direct result of Nedbank's implementation of a "corporate payment system" in replacement of the existing stop order system. On 31 October 2014, a meeting was held between "high ranking" representatives of the parties and Nedbank. The late payment was explained by Nedbank to have occurred due to a "processing error" in depositing the amount into a wrong Absa bank account. The outcome of the meeting was evidently unfavourable to Southern Sun because, on 17 March 2015, Leisure Holdings launched an application to have it ejected from the property.

The respondent opposed the application on several grounds, one of which was that the maxim *pacta sunt servanda* should be relaxed on the ground that implementation of the cancellation clause in the circumstances would offend against public policy. Van Oosten J agreed with this contention and held that Leisure Holdings was not entitled to cancellation of the lease.

4 2 *Judgment*

The main points in Van Oosten J's reasoning were as follows:

- Clause 20 entitled Leisure Holdings to cancel the contract on the ground of late payment of the October rental and that this triggered the right to be restored possession of the leased premises (par 19).
- Pre-constitutional instances of the relaxation of *pacta sunt servanda* on the ground of public policy date back to 1925 and find expression in the judgments in *Robinson v Randfontein Estates GM Co Ltd* (1925 AD 173 204–206) and *Schierhout v Minister of Justice* (1925 AD 417 423–424). More recent examples are *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984 (4) SA 874 (A) 891) and *Sasfin (Pty) Ltd v Beukes* (*supra)*. In the latter case, it was held that agreements that are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, would not, on the grounds of public policy, be enforced. It was emphasised that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases (par 21).
- In the pre-constitutional case of *Venter v Venter* (1949 (1) SA 768 (A)), the Appellate Division dealt with an issue analogous to the present matter. A landlord's cancellation of the lease agreement was held to have been valid where the late payment of rental was the result of an error by the tenant's bank. The tenant's deposit was received in good time by the bank but, owing to an error by the bank, the money was only transferred into the landlord's bank account after the due date. Watermeyer CJ, writing for the majority of the court, approved the following propositions: that payment of rental timeously was an obligation of the tenant "under penalty of forfeiture"; that the bank was the tenant's agent to implement the payment instruction; and that there was no legal obligation on the landlord to issue an ultimatum prior to cancelling the lease. In a separate concurring judgment, Van den Heever JA remarked (784–785):

> "Moreover payment implies a *dare* that the money paid becomes the property of the creditor. Where the lessee has assumed an obligation sounding in *dare*, therefore, action on his part is implied, namely conduct which would lead to the satisfaction and extinction of the debt. It is clear that in this case the debtor never managed to effect such an *oblatio realis*. If the creditor must bear the consequences of *mora* where his health or the weather fails him, it seems to me not unreasonable that the debtor should bear the consequences where the bank fails him" (par 22).

- In the post-constitutional judgment of *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* (2004 (5) SA 248 (SCA) par 12), Heher JA, said that a "creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand". In *Combined Developers v Arun Holdings* (2015 (3) SA 215 (WCC) par 36), Davis J understood this *dictum* to mean "that a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy". In regard to what public policy can be invoked in justification of a refusal to enforce a provision, the judge required the finding of some "objective standard within the normative framework of the Constitution" (par 23).
- In *Nyandeni Local Municipality v Hlazo* (*supra* par 78), Alkema J said the following about the concept of fairness and the Constitution.

> "The concept of fairness runs like a golden thread through the Bill of Rights. However, even a superficial glance will reveal that it is used as an adverb or adjective (unfairly discriminate (s 9) or fair public hearing (s 34)), and it is not an independent or substantive constitutional right. Therefore, and subject to what follows, a contract does not necessarily offend public policy merely because it may operate unfairly. Like the concept of good faith (*bona fide*), fairness may be regarded as an ethical value that underlies and informs the substantive law of contract …, but it is not an independent constitutional or contractual principle in terms of which contracting parties may escape their obligations including obligations arising from the *Shifren* principle [*Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 12–22]. It follows that a court does not have a general discretion to decide what is fair and equitable and then to determine public policy with reference to his or her views on fairness. See also [*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)] at 8C–9A; *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782I–J" (par 25).

- In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (2012 (1) SA 256 (CC) par 71), the majority judges said that in the development of the common law it is "highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *Ubuntu*, which inspire much of our constitutional compact". The concept of *Ubuntu*, the majority held,

> "emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity' (see also *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) … paras 15–16; FDJ Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the

> Constitution" (2009) 126 *SALJ* 71; and MM Pillay "The Impact of *Pacta Sunt Servanda* in the Law of Contract" 2016 LLM Mini Dissertation, University of Pretoria)." (par 26).

- In the present case, the lease, including the cancellation clause, did not in any way offend against public policy. It was the implementation of the cancellation clause on the facts of the matter that had to be subjected to constitutional scrutiny (par 27).
- The court was required to make a value judgment based on constitutional concepts and values as referred to in the authorities quoted above. In particular, adopting an objective approach, the concept of *Ubuntu* was paramount. The final test was whether the circumstances of the case constituted sufficient cause for relaxation of the *pacta servanda sunt* principle (par 28).
- The following information regarding the nature of the hotel business conducted by Southern Sun was apposite.

> "The five-storey building in which the hotel is housed comprises 292 rooms, a restaurant, a bar, 5 meeting rooms, a 'team' room, an outdoor pool, a gymnasium and parking. The premises have been utilised for the conducting of the business as a hotel since 1982. The nature of the business, primarily, is hotel accommodation across all market segments, including corporate, government, leisure, standard tour operators, conferencing and food and beverage services. Guests from abroad are primarily from Europe, especially France and Germany. … [Southern Sun's] hotel is operated and managed as part of a total of 18 Garden Court–branded hotels, which is a well-known, established brand in the hospitality industry. Employment is provided to 91 permanent members of staff, additional casual staff as well as indirectly to secondary staff and service providers. The annual turnover of the respondent's hotel division in South Africa runs into millions of rands." (par 29–30).

- The prejudice either party would suffer if the eviction order was, or was not, granted was of crucial importance (par 31). Southern Sun had pointed out that its ejectment would cause "untold damages, both patrimonial and reputational". Further, it would effectively sound the death knell for the hotel, which Southern Sun would be unable to replace in Cape Town. The relocation of a hotel business not only involves substantial costs and long-term planning, but it may well have a dire impact on the owner's reputation in the marketplace. In short, an order to vacate the premises would cause Southern Sun "irreparable harm" (par 32). Leicester Holdings had not shown that it would suffer any prejudice if the eviction order were not granted (par 33).
- Although a fault in the non-payment of rent is not a requirement for the remedy of cancellation, it was of relevance to the question whether cancellation should be granted. Nedbank was "wholly responsible for the predicament" that Southern Sun now found itself in. The bank had acted as Southern Sun's agent (cf *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A) 140–141). However, the hotel had not placed unjustified trust in and reliance on the bank. After the June non-payment of rental, Southern Sun had taken steps to avoid a repetition of the non-payment. For the next three months, the bank had processed the payments timeously. In relation to October payment, Southern Sun had been led to believe that the payment had been made in time, once the

debit entry dated 6 October 2014 appeared on its bank statement (par 34).

- The court concluded as follows: (par 35)

> "In a nutshell the court is required to balance the late payment of the October rental, on the one hand, juxtaposed with the bank solely having to bear the blame for the late payment, and the prospect of [Southern Sun] … suffering disproportionate prejudice in the event of eviction. The determinant criterion is the demonstrable unfairness in the implementation of clause 20, in granting an order for eviction as sought by [Leicester Holdings]. … Applying the value of Ubuntu, "carrying with it the ideas of humaneness, social justice and fairness" [*Everfresh* para 71], to the facts of this matter, finally leads me to conclude that an order for the eviction of [Southern Sun] … would offend the values of the Constitution I have alluded to, and that the application accordingly must fail.'

5 Conclusion – the way forward

The crucial question that arises from *Mahomed's* case is: accepting that enforcement of a contract may, in certain circumstances, be so unfair as to be contrary to the value of *Ubuntu* (and, therefore, contrary to public policy), what specific principles are to be applied to ensure that the outcome in any particular case does not "depend on the personal idiosyncrasies of the individual judge" and to prevent unfair enforcement from becoming a "last resort" defence of the "recalcitrant and otherwise defenceless" debtor (cf *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) 381; *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C); *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W) 210). It is clear that if no principles are recognised, this will in all likelihood have the effect of introducing a large measure of uncertainty into contract enforcement, with judges deciding cases according to their individual sense of fairness and reasonableness.

A practical solution, immediately available, is for the courts to follow the principles that they have already adopted in relation to substantive unfairness of terms (in cases such as *Sasfin (Pty) Ltd v Beukes supra*, *Botha (now Griessel) v Finanscredit (Pty) Ltd supra*, and *Standard Bank of SA Ltd v Wilkinson supra*) suitably tailored or modified to deal with unfair enforcement. In *Brisley v Drotsky* (*supra* par 32), the majority of the court envisaged that the courts would have to take this approach if the "*Sasfin* principle" were broadened to prevent the enforcement of contractual provisions not *per se* contrary to public policy (see also Lubbe 2004 121 *SALJ* 395 412, 418–19; Glover 2007 124 *SALJ* 449 457).

Adopting this approach, it is possible to formulate certain general principles.

A court may refuse to enforce a valid contractual provision based on unfairness only if the enforcement would be manifestly inimical to the interests of the community. A judge must take care not to conclude that enforcement would be contrary to public policy merely because it would offend his or her individual sense of fairness (cf *Sasfin (Pty) Ltd v Beukes supra* 8). The court must exercise its power to refuse enforcement sparingly, and only in cases in which the element of public harm is manifest (cf *Botha*

(now Griessel) v Finanscredit (Pty) Ltd supra 783; *Standard Bank of SA Ltd v Wilkinson supra* 827; *Mufamadi v Dorbyl Finance (Pty) Ltd* 1996 (1) SA 799 (A) 804; *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) par 23). The circumstances must be such that enforcement would be "exceptionally unfair" (cf *Brisley v Drotsky supra* 18). To give judges discretionary power beyond this could create considerable legal and commercial uncertainty (cf *South African Forestry Co Ltd v York Timbers Ltd supra* par 27; *Potgieter v Potgieter NO supra* par 32).

In deciding whether enforcement would cause manifest public harm, the court must consider the interests of the community as a whole, and not merely the interests of the individual parties to the contract or a few members of the community (cf *Standard Bank of SA Ltd v Wilkinson supra* 827–32). Furthermore, the court should avoid attaching too much weight to the interests of the party who would be adversely affected by the enforcement. Assessing fairness as between the contracting parties requires the court to consider the matter from each party's point of view (*Bredenkamp v Standard Bank of South Africa Ltd supra* par 65).

It is clear from *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (*supra*) that matters that are relevant to determining whether enforcement would be unfair to include whether the party in breach knew of the breach or could have prevented it from happening, and the prejudice either party will suffer if enforcement is, or is not, granted.

Enforcement of a valid contractual term may not be offensive to public policy if it can be justified in the broad commercial context in which it is sought. This generally boils down to determining whether the creditor, having regard to the circumstances that already exist or which may arise in the future, has a sound commercial reason for wanting to enforce the provision in question (*Standard Bank of SA Ltd v Wilkinson* supra 832–837).

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