

SOUTH AFRICA / JUDGMENT

Firststrand Bank LTD v Wolmarans N.O and Others (M442/2017) [2018] ZANWHC 40 (30 August 2018)

[2018] ZANWHC 40

COURT

North West High Court, Mafikeng

BEFORE

GUTTA

CASE / FILE NUMBER

M442/2017

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M442/2017

In the matter between:-

FIRSTRAND BANK LTD

APPLICANT

And

THEODORUS CORNELIUS MINNE WOLMARANS N.O FIRST RESPONDENT

PETRUS JOHANNES ROSSOUW N.O

SECOND RESPONDENT

EUGENE KLEINSMIT

THIRD RESPONDENT

REUBEN LEOGANG MABALE

FOURTH RESPONDENT

CIVIL

JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The applicant applied for judgment against the first, second, third and fourth respondents jointly and severally, the one paying the other to be absolved in the amount of R6 150 219.62 together with interest from 1 January 2017 to date of payment and costs.
- [2] The first, second and third respondents did not oppose the application. The fourth respondent filed an opposing affidavit. On 10 November 2017, Djaje J granted default judgment against the first, second and third respondents jointly and severally the one paying the other to be absolved with any order against the fourth respondent in the amount of R6 150 219.62 and interests and costs.

B. COMMON CAUSE

- [3] The following facts are common cause:

3.1 The applicant and WBE Engineering Projects (Pty) Ltd (the principal debtor) represented by the first and second respondents entered into a written credit facility agreement on 15 December 2015.

3.2 In terms of the credit facility agreement:

- a) The applicant made available to the principal debtor a credit facility in the amount of R10 000 000.00, which facility would be repayable on demand.
- b) The annual interest rate applicable to the credit facility would be the applicant's prime interest rate plus 3.00%, compounded monthly.
- c) A certificate signed by any manager of the applicant setting out the amount of the principal debtor's indebtedness, shall constitute prima facie proof of the principal debtor's indebtedness.

3.3 As at 17 August 2017, the principal debtor was indebted to the applicant in respect of the credit facility in the amount of R6 150 219.62.

3.4 On 22 October 2012, the first respondent bound himself as surety and co-principal debtor in solidum with the principal debtor in favour of the applicant.

3.5 On 15 December 2015, the second, third and fourth respondents bound themselves as sureties and co-principal debtors in solidum with the principal debtor in favour of the applicant.

3.6 The principal debtor has been liquidated.

C. FOURTH RESPONDENT OPPOSITION

[4] The fourth respondent in his answering affidavit raised the following defences:

4.1 The correctness of the amount reflected in the certificate of balance is disputed for the following

reasons:

- a) Book debts of the principal debtor were ceded to the applicant. The founding affidavit is silent as to what steps have been taken in respect of the book debts and how much of it has been recouped.
- b) Assets were realised by the applicant in terms of the notarial bond into the control of the business rescue practitioner. There is no information regarding these assets.
- c) A final winding up order was granted against the principal debtor on 22 September 2016. There is no evidence whether the applicant proved a claim against the principal debtor and if it received a dividend.
- d) The first and second respondents have been sequestrated. No information is contained in the founding affidavit as to whether the applicant has proved any claim against any of these insolvent estates, and if so, what dividends it has received.

4.2 The fourth respondent raised a constitutional argument that his constitutional rights in terms of the Constitution of the Republic of South Africa 1996 (the Constitution) were encroached upon when he signed suretyship agreement. This defence is dealt with more fully hereinbelow.

[5] With regard to the defences raised in paragraph 4.1 supra, counsel for the respondent, Mr Rossouw did not persist with these defences at the hearing and only advanced arguments on the constitutional issue raised. I will however briefly deal with the defences raised in paragraph 4.1 supra.

The book debts ceded by the principal debtor to the applicant

[6] The applicant alleged that it was unable to act upon the cession of debts because the principal debtor's cession of debts to the applicant was preceded by a cession of debts to a different entity. The applicant attached both the cession of debts which confirmed that the principal debtor prior to the cession concluded with the applicant had already ceded its debt to Macsteel Service Centres SA (Pty) Ltd (Regulation No. 2005/016292).

[7] What is of significance is that:

7.1 The fourth respondent bound himself as surety and co-principal debtor;

7.2 The deed of suretyship signed by the fourth respondent provides that the suretyship shall be in addition to and without prejudice to any other securities from or on behalf of the principal debtor.

7.3 The applicant has the choice regarding the method of enforcement of its rights against the principal debtor and nothing contained or implied in the suretyship creates any obligation on the applicant to enforce or pursue any of its rights against the principal debtor before being entitled to enforce its rights against the fourth respondent under the suretyship.

[8] From the foregoing it is apparent that the applicant in terms of the suretyship agreement could proceed against the fourth respondent to the exclusion of the sureties and or security held by the applicant. Accordingly, there is no merit in this ground of opposition.

Assets realised in terms of the notarial bond

[9] The applicant in its replying affidavit explained that the outstanding amount as reflected in the certificate of balance had already taken into account the dividends obtained from the sale of the movable assets over which the applicant held a general notarial bond.

[10] Hence the dividends were taken into account in the certificate of balance. Furthermore the certificate of balance provides prima facie proof of the fourth respondent's indebtedness. Hence the fourth respondent is indebted to applicant for the amount reflected in the certificate of balance.

Dividends from the insolvent estate of the first and second respondents

[11] The applicant in its replying affidavit also explained that the dividends obtained from the sale of the movable assets were taken into account and the certificate of balance reflects the correct amount.

[12] Further, as stated supra, the applicant in terms of the suretyship agreement had a choice regarding the enforcement of its rights. Hence this ground of

opposition stands to be rejected.

Security provided by the Chawal Trust

[13] The applicant in the replying affidavit alleged that it had been unable to realise the immovable properties forming the subject matter of the aforesaid security. Furthermore, the same principles which have been referred to herein above in relation to the terms of the suretyship and the applicant's choice as to the enforcement of its rights apply here. Hence there is no merit to this ground of opposition.

D. ENCROACHMENT OF CONSTITUTIONAL RIGHTS

[14] The fourth respondent alleged inter alia that:

14.1 His constitutional right to freedom, equality and human dignity as entrenched in the Constitution was encroached upon in that he signed the said suretyship unwillingly on terms and condition that only benefit the applicant.

14.2 His freedom to contract has been violated, which right forms an integral part of his right in terms of section 25 of the Constitution. It is also an incident of his right that is contained in section 18, 22, 23, 25 and 31 of the Constitution.

14.3 He is entitled to the full and equal enjoyment of his aforementioned constitutional rights as envisaged in section 9 of the Constitution, which he has been refused by the applicant. When the suretyship was signed by the fourth respondent, the applicant and the fourth respondent were in an unequal bargaining position.

14.4 The suretyship agreement contains all the applicant's standard terms and conditions. These terms were not negotiated upon. Any person that was prepared to stand surety for the principal debtors' obligations towards the applicant simply had no choice but to sign the said agreement containing all the applicant's terms and conditions.

14.5 There was no opportunity given to the fourth respondent to take the said document to an attorney of his choice for purposes of negotiating the terms of the suretyship on his behalf. The applicant did not and does not tolerate any amendments to its standard terms and conditions and the fourth respondent had no choice but to sign the document with its standard terms and conditions, failing which the facility would not have been granted to the company.

14.6 The suretyship was prepared one-sidedly in favour of the applicant. If the fourth respondent had the opportunity to negotiate the terms of the suretyship from an equal bargaining position, he would not have consented to the following clauses:

- a) admissions (clause 6);
- b) release of security (clause 7);
- c) money recovered (clause 10);
- d) certificate of balance (clause 21);
- e) waiver of benefit as surety (clause 31).
- f) he would not have signed as surety and co-principal debtor, but merely as a surety;

[15] The fourth respondent submits that the matter should be referred to trial to prove:

- a) That all banks operate on the same basis and that all banks' terms and conditions are one-sided in favour of the bank and that all persons signing as surety in favour of the banks receive unequal treatment;
- b) That it is banking practice that the standard terms of conditions contained in deeds of suretyship, mortgage bonds, credit agreements etc. are not negotiable;
- c) That it is the bank's business to lend out money and that it is an economic reality that a substantial portion of the population is dependent on loans from the banks;

- d) That all consumers who are desirous of having their purchases of motor vehicles and houses and other household items financed are as a rule dependent upon a bank and the consumer is the party in need;
- e) That the consumer usually has no choice but to sign any document presented by the bank on the latter's terms and conditions and that same is done from an unequal bargaining position.
- f) It is necessary for the applicant to present evidence as to why the aforesaid constitutional rights should be infringed as envisaged in section 38 of the Constitution and if grounds exist for such infringement, the applicant will have to prove why there should not be less drastic measures in attaining the same objective.

[16] Counsel for respondent, Mr Rossouw submitted further that:

16.1 This case is not about whether a person should adhere to a contract. It is about the development of the common law in the spirit of the Constitution.

16.2 The agreement was freely and voluntarily signed. No one was under duress. The question is whether the parties were in an unequal bargaining position when they concluded the agreement. If the fourth respondent did not sign the agreement, the principal debtor would not have secured the loan. The fourth respondent reluctantly consented to signing the agreement. The suretyship agreement is in the applicant's favour.

16.3 In casu, the evidence is scant regarding the unequal bargaining position, hence the Court should refer the matter to trial to allow evidence on the issue of whether there is unequal bargaining position.

16.4 If there is an unequal bargaining contract, you cannot say there is freedom and sanctity of contract. Everything must be tested against the Constitution.

[17] The applicant's counsel, Mr Louw submitted inter alia that:

17.1 Insofar as the fourth respondent's allegation that he signed the deed of suretyship unwillingly, he is precluded from escaping liability due to the doctrine of quasi-mutual assent.

17.2 The doctrine of quasi-mutual assent, which has been affirmed and applied in a number of leading decisions, was explained by Blackburne J in *Smith v Hughes*[1] as follows:

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

17.3 In addition, the fourth respondent's assertion that his constitutional rights were encroached is also in direct conflict with the legal principle of *pacta sunt servanda* and freedom of contract.

17.4 Our law does not recognise an unbounded prejudice principle.

17.5 The fourth respondent does not deny that he is indebted to the applicant for the amount claimed. The fourth respondent has failed to set out a valid defence to the applicant's claim.

17.6 The principal debtor requested credit and a prerequisite for securing credit was to provide security. The fourth respondent is a director of the principal debtor and therefore had a direct interest in the credit application and stood to benefit and in fact did benefit from the loan. In terms of clause 31 of the suretyship, the fourth respondent agreed that he has a material interest.

17.7 The fourth respondent was advised in the suretyship of the risks and of his right to seek legal advice before he signed the agreement. The fourth respondent was not forced to sign the agreement and had a choice to refuse.

[18] Mr Rossouw relied on the case of *Brisley v Drotskie*[2]. This case dealt with an entrenchment clause in a written agreement. The Court at paragraph [26], page 17 said:

“Wat beklemontoning uit die aanhaling verdien, is dat die verskansingsklousule beide partye beskerm – en dit was hulle vrye keuse. Die potensiele ongelykheid van die partye in hulle bedingingsmag of finalisiële vermoë en die beskerming van

swakker kontraktante kom dus glad nie hier ter sprake nie”.

[19] Mr Rossouw submitted that the SCA considered the inequality of the parties bargaining power when they found that the entrenchment clause benefits both parties and that the inequality of the parties in their bargaining power does not come into play.

[20] Mr Rossouw also relied on the case of *Afrox Healthcare Bpkf vs Strydom*[3] to highlight the inequality of bargaining power. This judgment dealt with the exception clause that is contained in the hospitals written document which is signed on admission. The Court held that:

“Wat die eerste grond betref, spreek dit eintlik van self dat ‘n ongelykheid in die bedingingsmag van die partye tot ‘n kontrak op sigself nie die afleiding regverdig dat ‘n kontraksbeding wat tot voordeel van die ‘sterker party’ is, noodwendig teen die openbare belang sal wees nie. Terselfdertyd moet aanvaar word dat ‘n ongelyke bedingingsmag wel ‘n factor is wat, tesame met ander faktore, by oorweging van die openbare belang ‘n rol kan speel. Desondanks is die antwoord op die respondent se beroep of hierdie factor in die onderhawige saak, dat daar hoegenaamd geen getuienis is wat daarop dui dat die respondent tydens kontraksluiting inderdaad in ‘n swakker bedingingsposisie as die appellant verkeer het nie”.

From the foregoing it is clear that the fourth respondent was forewarned that the obligations in the agreement are burdensome and that he should obtain legal advice before he signed the agreement.

[21] In *Afrox supra* it was contended by the respondent that the exemption clause was contrary to the public interest, that it was in conflict with the principles of good faith or bona fide and the clerk had a legal duty to draw his attention to the relevant clause. One of the grounds upon which the respondent based his reliance on the public interest, was the unequal

bargaining position of the parties at the conclusion of the contract. The respondent argued further that section 39(2) of the Constitution obliged every Court when developing the common law, to promote the spirit, purport and object of the Bill of Rights. The effect of section 39(2) was therefore that, in considering the question of whether a particular contractual term conflicted with the public interest, account had to be taken of the fundamental rights contained in the Constitution. It was argued that the relevant clause conflicted with the spirit, purport and object of section 27(1)(a) of the Constitution which guarantees every person's right to medical care and as such was in conflict with the public interest.

[22] Although the SCA considered the inequality of the parties in their bargaining power, their findings did not in my view assist the fourth respondent as the Court at paragraph [11] – [34] and 12G – 19B/C found that the argument that the entrenchment clause ought not to be enforced because it would in the circumstances be unreasonable, unfair and in conflict with the principles of bona fides, cannot be successfully invoked. The SCA in *Afrox supra*, at paragraph [9] and [10] at 34D – D/E G and H – I said “The question was whether upholding the relevant exclusionary

clause or other contractual term would conflict the interest of the public as a result of extreme unfairness or other policy issues”

and at paragraph [12] at 35 C – D held that “there was no evidence that the respondent had indeed occupied a weaker bargaining position than the appellant during the conclusion of the contract” and at paragraph 23 and 24 38 C/D – F, the court held that “the elementary and basic general principle was that it was in the public interest that contracts entered into freely and seriously by parties having the necessary capacity should be enforced. The respondent's contention that a contractual terms in terms of which a hospital could exclude liability for the negligent conduct of its nursing staff was not in the public interest could accordingly not be supported”.

[23] The Court in *Afrox supra* at paragraphs [27], [28] and [29] at 39B – H/I drew a distinction between three scenarios regarding pre-constitutional decision of the SCA where the common law could be developed in the constitutional context.

- a) The first is where the High Court was convinced that the relevant rule of common law was in conflict with a constitutional provision. In this instance the High Court was obliged to depart from the common law as the Constitution was supreme.
- b) The second is where the pre-constitutional decision of the SCA was based on considerations such as *boni mores* or public interest. If the High Court was of the opinion that such decision, taking constitutional values into account no longer reflected the *boni mores* or public interest, the High Court was obliged to depart from the decision.
- c) Thirdly, where a rule of the common law determined by the SCA was not in direct conflict with any specific provision of the Constitution such as *boni mores*, but the High Court was nevertheless convinced that the relevant common law rule, upon the application of section

39(2) of the Constitution, had to be changed to promote the spirit, purport and object of the Constitution. In this situation the principles of stare decisis still applied and the High Court was not empowered by the provisions of section 39(2) of the Constitution to depart from the decision of the SCA whether such decisions were pre or post constitutional.

- [24] Further in *Afrox* at paragraphs [32] to [35], the Court held that “although abstract considerations such as good faith or bona fide were the basis and reason for existence of legal rules and also led to the creation and amendment of those rules, they were not in themselves legal rules. When it came to enforcement of contractual terms, the Court had no discretion and did not operate on the basis of abstract ideas but on the basis of established legal rules that persons who signed a written agreement without reading it did so at their own risk and were consequently bound by the provisions contained therein as if they were aware of them and had expressly agreed thereto”.
- [25] Mr Rossouw submitted that the fact that the parties were in an unequal bargaining position is a factor that must be taken into account together with public policy. Everything is tested against the Constitution and not what the Court considers to be against public policy. He submitted that, in *Afrox supra*, there was freedom of contract because if a private hospital has an exemption clause, the patient did not have to sign as he could go to a state hospital. while in *casu*, there was no freedom of contract as all banks operate on similar terms and conditions as the applicant.
- [26] Mr Louw submitted that the SCA rejected the argument that the parties were not on equal footing. He submitted further that the cases cited by the respondent show that although unequal bargaining power is a consideration, that argument was not upheld by the Courts.
- [27] Mr Rossouw also relied on the case of *Napier v Barkhuizen*[4]. This case dealt with a time bar in an insurance agreement. Cameron JA (as he then was) held that:
- “[14] It is relatively easy to see how the Constitution’s foundational values of non-racialism and non-sexism could lead to the invalidation of a contractual term. Less immediately obvious is how the values of human dignity, the achievement of equality and the advancement of human rights and freedoms may affect particular contractual outcomes. But *Brisley and Afrox* and *Stott* opened the door to precisely such determinations. As *Afrox* indicated, a factor of particular importance is the parties’ relative bargaining positions, for it is here that the constitutional values of equality and dignity may prove decisive.*
- [15] In the present case, the evidence is so scant that we can only speculate on the plaintiff’s bargaining position in relation to the insurer. This is because there was no evidence regarding the market in short-term insurance products; whether a variety of such products is available; the number of suppliers, and their relative market share; whether all or most short-term insurers impose a time-bar; whether a diversity of time-limits is available to those seeking short-term insurance cover, and over what range they fall; whether for a person in the plaintiff’s position (who travels in a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle) short-term vehicle insurance is an optional

convenience, or an essential attribute of life.

- [16] All this would bear on the critical question, which is whether the plaintiff in effect was forced to sign the contract with the insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires this court to develop the common law of contract so as to invalidate the term. But without any inkling regarding the issues set out above, the broader constitutional challenge cannot even get off the ground. I therefore turn to the right of access to courts protected by s 34, on the basis of which the high court invalidated the time-bar”.
- [28] From the foregoing it is apparent that the SCA did not uphold the contention that the time-bar clause was unfair and infringed the respondent’s right of access to the Court as enshrined in section 34 of the Constitution. The Court found that there was scant evidence to support the inequality of bargaining power.
- [29] The respondent in Napier supra applied for leave to appeal to the Constitutional Court (CC) in *Barkhuizen v Napier*[5]. Neither counsel for the applicant nor the fourth respondent relied on the Constitutional Court’s judgment.

The CC at paragraphs [29] – [30], [33] – [34] and [36] held that:

“Public policy has to be determined with reference to the Constitution, so that a contractual term which violates the Constitution is by definition contrary to public policy and therefore unenforceable. The proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by South Africa's constitutional values, in particular those found in the Bill of Rights. Section 34, therefore, not only reflected the foundational values that underlie the constitutional order, but also constituted public policy. The proper approach to the present matter was to determine whether the time-limitation clause violated section 34 of the Constitution and was thus contrary to public policy.

- [30] As a matter of public policy, the CC in *Barkhuizen supra* at paragraph [48] held that:

“subject to considerations of reasonableness and fairness, time-limitation clauses in contracts are permissible; and the right to seek judicial redress (as guaranteed by section 34) may be limited in circumstances where:

1. it is sanctioned by a law of general application; and
2. the limitation is reasonable and justifiable”.

The CC at paragraph [70] approved the words of Cameron JA in the SCA that:

“the courts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus ‘public policy’ now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism”

“While it is therefore necessary to recognise the doctrine of pacta sunt servanda, the courts may decline the enforcement of a time-limitation clause if its implementation would result in unfairness or would be

unreasonable for being contrary to public policy”.

[31] The test for reasonableness, the CC at paragraph [52], [54], [56] –

[59] and [65] found, was whether or not the clause afforded the claimant an adequate and fair opportunity to seek judicial redress. If a contractual term provides only for an impossibly short time for the dispute to be referred to a court of law, it is contrary to public policy and unenforceable. As to the requirement of fairness, the Court laid out a two-part test:

1. whether the clause itself is unreasonable; and, if not,
2. whether it should be enforced in light of the circumstances that prevent compliance.

The first part entails a weighing-up of the principle of pacta sunt servanda and the right of all persons to seek judicial redress. The second part entails proof by the claimant that he has good reason for his non-compliance with the time-limitation clause. In that regard, the relative equality or inequality of the bargaining positions of the parties is a relevant consideration.

The CC at paragraph [63],

[66] and [67] found that:

1. the ninety-day time limitation was not manifestly unreasonable;
2. nor was it manifestly unfair: There was no evidence that the contract had not been freely concluded between parties in equal bargaining positions or that the clause was not drawn to the applicant's attention. The applicant had not furnished the reasons for his non-compliance with the time-limitation clause. Without those facts, the court was unable to say whether the enforcement of the clause against the applicant would be unfair and therefore contrary to public policy. In the circumstances, enforcement of the clause would not be contrary to public policy. The Court thus concluded that enforcement of the clause would not be unjust to the applicant. and dismissed the appeal.

[32] A more recent decision referred to by Mr Louw is the case of Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd[6]. The issue in this case was whether the common law maxim pacta sunt servanda should be relaxed in line with the constitutional values of Ubuntu, fairness and good faith. The Court at paragraph [21], [22], [23], [24], [28], [29], [30] and [32] said the following:

“[21] What must be decided in this case is whether the implementation of clause 20 is manifestly unreasonable or unfair to the extent that it is contrary to public policy. To answer that question the enquiry must be directed at the objective terms of the agreement, in the light of the relative situation of the parties. This, without doubt, calls for a balancing and weighing-up of two considerations, namely the principle of pacta sunt servanda and the considerations of public policy, including of course constitutional imperatives.

[22] Before these arguments are considered, it is necessary to place the issue in its proper perspective with regard to the legal principles governing contractual obligations. This court in *Sasfin (Pty) Ltd v Beukes* 1989

(1) SA 1 (AD) said:

‘The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness.’

[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract. This court in *Wells v South African Alumenite Company* 1927 AD 69 at 73 held as follows:

‘If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.’

[24] Parties enter into contractual agreements in order for a certain result to materialise. The fact that parties enter into an agreement gives effect to their constitutional right of freedom to contract, however, the carrying out of the obligations in terms of that contractual agreement relates to the principle of *pacta sunt servanda*. In *Brisley v Drotsky* [2002] ZASCA 35, 2002

(4) SA 1 (SCA) Cameron JA held that judges must exercise ‘perceptive restraint’ lest contract law becomes unacceptably uncertain.

Cameron JA noted that the judicial enforcement of terms, as agreed to, is underpinned by ‘weighty considerations of commercial

reliance and social certainty’. In the majority judgment in *Barkhuizen*, Ngcobo J endorsed Cameron JA’s broader conception of the law of contract as reflected in *Brisley* and affirmed that the Constitution requires parties to honour contractual obligations that were freely and voluntarily undertaken. The court further went on to say:

‘While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of ... a clause if it would result in unfairness or would be unreasonable’.

- [28] The following facts are critically relevant in the present case in applying the judgment of the Constitutional Court in *Barkhuizen*: (a) the terms of the contract are not, on their face, inconsistent with public policy; (b) the relative position of the parties was one of bargaining equality; the parties could have negotiated a clause in terms of which the respondent was given notice to remedy a breach before the contract was cancelled; and (c) the performance on time was not impossible because the respondent could have diarised well ahead of time to monitor this important monthly payment and it could have effected other means of payment such as an electronic funds transfer. Against this background, it cannot be against public policy to apply the principle of *pacta sunt servanda* in this case.
- [29] In this case there is no complaint that the impugned clause is objectively unconscionable. No allegation is made that the lease agreement was not concluded freely. There is also no evidence or contention advanced by either of the parties that there was an unequal bargaining power between them. On the contrary, there is ample evidence that the parties contracted with each other on the same equal footing. In other words it cannot and neither was the respondent's case that there was an injustice which may have been caused by the inequality of bargaining power. Evidently the respondent was at all material times aware or must have been aware of the implications of the cancellation clause.....
- [30] The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question.
- [32] The result may well be unpalatable to the respondent. It must therefore bear the consequences of its agent's
- (bank) failure in paying the October rental on due date. Its defence was clearly to restrict the lawful breach of the contract and to limit what can be regulated by way of a contractual agreement between parties, in circumstances where the terms of the contract were clear and unambiguous. In this case the parties freely and with the requisite *animus contrahendi* agreed to negotiate in good faith and to conclude further substantive agreements which were renewed over a period of time. It would be untenable to relax the maxim *pacta sunt servanda* in this case because that would be tantamount to the court then making the agreement for the parties.
- [33] In the matter of *Breedenkamp and others v Standard Bank of South Africa Ltd and another*[7], a clause in a contract concluded between the applicant and the respondent entitled the respondent to unilaterally cancel the contract for no cause at all and without hearing the applicant. The respondent cancelled the contract on the ground that the applicant

posed a risk to the respondent's reputation. Lamont J, held that the cancellation was substantively and procedurally fair and further that it passed constitutional muster.

[34] In Breedenkamp supra, the issue to be decided was whether, in the particular circumstances of the case, the manner in which the bank had implemented the clause entitling it to cancel the contract offended constitutional values. The applicant contended that:

- (a) by virtue of the unequal bargaining positions of the applicant and the bank at the time of conclusion of the contract, the clause in question was an 'imposed term' and hence enforceable;
- (b) the bank's implementation of the clause violated the standard of fairness set by the Constitution as, if the account was terminated at the will of the bank, for that reason alone, no other bank would take the applicant as a customer;
- (c) the bank's implementation of the clause was procedurally unfair, as the bank's reliance on the reasons it gave for making the decision to terminate the contract was unfounded

[35] Lamont J in Breedenkamp supra at paragraphs [11] at 282 C, [26], [27] at 287C – F held that:

"[11] Accordingly, the contract looked at from the perspective of the contractual terms alone could be and was lawfully cancelled at the volition of the bank. [26] These facts do not show that the applicant was at a bargaining disadvantage or in a position of inequality.

[27] That being so, the applicant had to be treated as if it were a person of equal bargaining capacity at the time the contract was concluded. The contract accordingly had to be treated as if it were concluded by contracting equals, each able to stipulate terms that each required to be inserted. It followed that the terms within the contract had to be treated on the basis that they were terms agreed to and intended to be agreed to by the contracting parties". Terms which are perceived as being against interests or limiting the rights of the applicant must be treated as if those terms were, after careful consideration agreed to by parties who were equals. Each exercised its rights of freedom and dignity to conclude a relationship governed by terms each found appropriate to govern the relationship".

Evaluation

[36] The question to consider in the light of Barkhuizen supra, is whether the suretyship and the clauses contained therein were manifestly unreasonable and unfair and thus contrary to public

policy. Public policy is determined with reference to the Constitution and is subject to considerations of reasonableness and fairness.

[37] The fourth respondent contends that he would not have agreed to certain clauses in the suretyship referred to in paragraph 14.6 supra, had he been given the opportunity to negotiate the terms from an equal bargaining position. When applying the two part test for fairness which the Constitutional Court in Barkhuizen introduced, the first part is whether

the clauses are unreasonable. This entails a weighing up of the principle of pacta sunt servanda with the fourth respondent's rights. The second part entails proof that the fourth respondent had good reason for his non-compliance. The bargaining position of the parties are considered under this leg.

[38] In casu, the fourth respondent failed to adduce any evidence that:

1. The applicant was forced to sign the suretyship or that he signed the suretyship unwillingly.
2. The applicant was denied an opportunity to take the suretyship to his legal representative and to consult thereon.
3. The applicant elected to negotiate the terms of the suretyship but was denied such a request.
4. The loan would be refused if the fourth respondent did not sign as surety.
5. The suretyship and the clauses contained therein were unreasonable and unfair.
6. The fourth respondent was in an unequal bargaining position when he signed the suretyship.
7. The fourth respondent's rights were violated when he signed the agreement.

[39] The aforesaid issues are relevant considerations to the question of unreasonableness and fairness and to the question of whether the parties were or were not in an unequal bargaining position. As stated supra, there is no evidence that the implementation of the clauses contained in the suretyship which fourth respondent alleges he would not have signed are unfair or would be unreasonable for being contrary to public policy.

[40] The fourth respondent as a director of the principal debtor benefitted directly from the credit facility advanced by the applicant to the principal debtor in the amount of R10 000 000.00. Mr Rossouw in his submissions regarding the unequal bargaining position made sweeping references to poor individuals and people with home loans who have no financial resources to consult with legal representatives. Although these are important considerations, it does not find application in casu. In the present case, the evidence is so scant, regarding the fourth respondent's unequal bargaining position. This point was conceded by counsel for the fourth respondent in his request to refer the matter to trial. In these circumstances one cannot generalise on all persons or entities that apply for loans and who stand surety for the payment of the loans.

[41] What can be gleaned from the suretyship signed by the fourth respondent is that at the beginning of the suretyship, the following information is written in bold:

“This document contains IMPORTANT LEGAL INFORMATION – read this carefully. The obligations on you may be very burdensome. DO NOT sign this document if you have any doubts about the exact meaning and effect of these obligations or of any other wording herein or if you do not understand the risk and scope of this document. We strongly recommend that you obtain independent legal advice before you sign this document. You may not rely on the protection of the National Credit Act 2005

(NCA) and this rights contained in clauses 40 and 44 will not apply to you, unless this suretyship is subject to the NCA”.

At the end of the suretyship agreement, before the fourth respondent signed the suretyship, the following appears in bold:

*“FOR AND ON BEHALF OF THE SURETY (WHERE THE SURETY IS A NATURAL PERSON)
IMPORTANT: The obligations imposed upon the surety pursuant to this suretyship may be burdensome. Should the surety harbour any doubts regarding the exact meaning and effect of these obligations, we advise that independent legal advice should be taken prior to signature hereof”.*

- [42] The aforesaid information provided in the suretyship are important considerations to the question of fairness. What is apparent from the foregoing is that the fourth respondent was forewarned that the allegations in the suretyship are burdensome and that should he have any doubts regarding the meaning and effect of his obligations, he should seek legal advice.
- [43] In casu, as stated supra, there is no evidence to support the respondent’s contention that the fourth respondent was forced to sign the suretyship as the weaker contracting party or that his constitutional rights to dignity and equality were infringed in terms of section 38 of the Constitution of the Republic of South Africa. As was found in Mohammed Leisure Holdings supra, the terms of the suretyship on the face are not inconsistent with public policy, and there is no evidence that the parties were not in an equal bargaining position. Furthermore the fourth respondent has not denied his liability in terms of the suretyship. Hence it cannot be against public policy to apply the principles of pacta sunt servanda. The suretyship was concluded freely and voluntarily and must be honoured. The absence of sanctity and freedom of contract will lead to judicial uncertainty and absence of integrity between contracting parties. Contracts entered into freely and seriously by parties having the necessary capacity should be enforced. Privity and sanctity of contract goes hand in hand with the freedom to contract.
- [44] It is general practice for financial institution such as the applicant to obtain security when granting a loan. This is not against public policy nor is it contrary to section 39(2) of the Constitution. The fact that the terms of the suretyship may operate harshly for the fourth respondent does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy.
- [45] Accordingly, I am of the view that the clauses contained in the suretyship are not manifestly unreasonable, nor was there any evidence that it was manifestly unfair or that the suretyship was not concluded freely between parties in equal bargaining position. Accordingly the suretyship is not contrary to public policy. The terms of the suretyship are clear and unambiguous and the parties freely with the requisiti animus contrahendi concluded the suretyship. Accordingly there is no reason to relax the maxim pacta sunt servanda and to refer the matter to trial.

E. ORDER

[46] In the result,

1. Judgment is granted against the fourth respondent, in the amount of R6 150 219.62, jointly and severally with the first, second and third respondents the one paying the other to be absolved, together with interest on the said amount at the applicant's prime rate from the 1 January 2017 to date of payment.
2. Fourth respondent is to pay the costs on the scale as between attorney and client.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 02 AUGUST 2018

DATE OF JUDGMENT

: 30 AUGUST 2018

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ADVOCATE FOR DEFENDANT : ADV A.B ROSSOUW (SC)

ATTORNEYS FOR APPLICANT : MAREE & MAREE ATTORNEYS

(Instructed by: RWL Attorneys)

ATTORNEYS FOR 4TH RESPONDENT : NIENABER & WISSING ATTORNEYS

(Instructed by: George Loock Attorneys)

[1]

(1871) LR 6 QB 597

[2] 2002(4) SA 1 (SCA)

[3] 2002(6) SA 21 (SCA) 35

[4] 2006(4) SA 1 (SCA)

[5] 2007(5) SA 323 CC

[6] (183/17) [2017] SASCA 176

[7] 2009(6) 277 (GST)

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