**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No 599/09

In the matter between:

| | |
|---|---|
| **JOHN ARNOLD BREDENKAMP** | **First Appellant** |
| **BRECO INTERNATIONAL LTD** | **Second Appellant** |
| **HAMILTON PLACE TRUST** | **Third Appellant** |
| **INTERNATIONAL CIGARETTE MANUFACTURERS (PTY) LTD** | **Fourth Appellant** |
| **and** | |
| **STANDARD BANK OF SA LTD** | **First Respondent** |

**Neutral citation:** *Bredenkamp v Standard Bank* (599/09) [2010] ZASCA 75 (27 May 2010)

**Coram:** Harms DP, Cloete, Ponnan and Cachalia JJA and Saldulker AJA

**Heard:** 06 May 2010

**Delivered:** 27 May 2010

**Summary:** Banker and client – closing of account by bank – when justified – exercise of a contractual right, which does not involve any public policy considerations or constitutional values, does not have to be 'fair'.

---

**ORDER**

---

**On appeal from:** South Gauteng High Court (Johannesburg) (Lamont J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

---

**JUDGMENT**

---

HARMS DP (CLOETE, PONNAN and CACHALIA JJA and SALDULKER AJA concurring)

INTRODUCTION

[1] This appeal relates to the right of a banker to close a client's account.[1] The issue was presented as a constitutional issue because it was said to be based on principles laid down by the Constitutional Court (the CC) in *Barkhuizen v Napier.*[2] The first proposition is that the benchmark for the constitutional validity of a term of a contract is fairness; and the second is that even if a contract is fair and valid, its enforcement must also be fair in order to survive constitutional scrutiny.[3] The appellant's case, as it unfolded during the course of the proceedings, was based on the second but it will be necessary to consider both because in my judgment they are not to be found in the CC judgment and are in any event unsound.

[2] The appellants, who were the applicants in the High Court, are Mr John Bredenkamp, two companies that 'belong' to him, and a trust that owns one of Bredenkamp's many residences.[4] Before us the case of the trust was abandoned,

---

[1] The complex relationship between a bank and its customers was discussed by Moseneke AJ in *Standard Bank of SA Ltd v Absa Bank Ltd* [1995] 1 All SA 535, 1995 (2) SA 740 (T) at 746G-747E.
[2] 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).
[3] *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304, [2009] 3 All SA 339 (GSJ) (the Jajbhay J judgment). The incorrect spelling of Bredenkamp in the law reports comes from this judgment.
[4] The second appellant is Breco International Ltd; the third is Hamilton Place Trust; and the fourth is International Cigarette Manufacturers (Pty) Ltd.

which means that we are concerned only with Bredenkamp and his two companies, and further references to 'the appellants' will be to them. According to the founding affidavit, the appellants are international commodities traders that required banking facilities in order to conduct business in this country. They also required Pound Sterling and US Dollar denominated accounts to make and receive payment for commodities bought and sold internationally. In addition, Bredenkamp required personal banking facilities.

[3] The appellants, consequently, opened a number of accounts with the respondent, Standard Bank of SA Ltd, during 2002. Bredenkamp held a MasterCard credit card, a number of current accounts and two foreign currency accounts. The one company held a current account and the other a money market account.

[4] On 8 December 2008, the Bank notified the appellants that it had suspended the credit card facilities and that it intended to withdraw them on 6 January 2009. One of Bredenkamp's current accounts had an overdraft facility attached, and that was likewise suspended and was to be withdrawn on the same date. As far as the other current accounts and the foreign currency accounts were concerned, the Bank requested the appellants to make alternative arrangements because these were to be closed on 19 January 2009. At the request of the appellants the Bank gave them extensions from time to time. The detail is of no consequence.

[5] The appellants approached the High Court as a matter of urgency for an interim interdict restraining the Bank from cancelling the contracts, which underlie the banking facilities, and from closing the accounts. The matter came in the first instance before Jajbhay J (whose untimely death occurred two days before the hearing of this appeal). The learned judge granted the interim interdict and his judgment is reported.[5] On the return day the matter came before Lamont J who found that the appellants had not made out a case for an interdict and so he discharged the rule and dismissed the application. His judgment is also reported.[6] This appeal against his judgment is with the leave of this Court.

THE APPLICATION

---

[5] The Jajbhay J judgment.
[6] *Breedenkamp v Standard Bank of SA Ltd* 2009 (6) SA 277 (GSJ).

[6] The Bank sought to justify its right to terminate its relationship with the appellants on two grounds. The first was that it had the right in terms of an express term of its contracts to close the accounts with reasonable notice. It also relied on an implied term with the same effect, namely that an indefinite contractual relationship may be terminated with reasonable notice.[7] (An implied term is one implied by law into all contracts of a particular nature (a *naturale)*. This means that it is a rule of law that can be varied or made inapplicable by agreement. A tacit term is one that has to be implied with reference to the presumed intention of the parties to a particular contract.)

[7] The Bank did not initially inform the appellants of its reasons for termination. One would assume that in the ordinary course of events the motive of a party in exercising a right – contractual in this case – is irrelevant.[8] (A possible exception could be the abuse of rights.)

[8] The final relief sought in the notice of motion was multi-pronged and wide-ranging. It was based primarily on the supposition that the contracts between the parties did not contain the express term. Probably realizing that the term could be said to be implied, the appellants sought an order declaring that the common-law rule is that an indeterminate contract may be terminated only in the event of a breach by the other party. In the event, the affidavit of Bredenkamp, dealt with later, sought to make out a different case without an amendment of the notice of motion.

[9] In the alternative, the appellants sought to attack the validity of the implied term and by implication the express term. Apart from a generalized attack on the basis of both being *contra bonos mores*, the constitutional attack was particularized with reference to a breach of the following rights contained in the Bill of Rights, viz:

'section 9 (equality); section 10 (human dignity); section 14 (privacy); section 15 (freedom of religion, belief and opinion); section 16 (freedom of expression); section 18 (freedom of association); section 22 (freedom of trade, occupation and profession); section 25

---

[7] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A); ([1985] 2 All SA 533 (A)); *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); [2003] 4 All SA 95 (SCA).

[8] Compare *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), [2008] 1 All SA 197 (SCA) para 37-38; *Jansen van Vuuren & ano NNO v Kruger* 1993 (4) SA 842 (A), [1993] 2 All SA 619 (A).

(property); section 32 (access to information); section 33 (just administrative action); [and] section 34 (access to courts).'

[10] There was also a prayer for review of the Bank's decision in terms of administrative justice principles on the basis that the appellants were entitled to a hearing before the decision to close the accounts was taken. The appellants have abandoned this leg of their case. However, they harked back to a right to be heard (not a right to a hearing) in another context.

[11] The crucial relief sought was for an order that the Bank had to 'maintain the accounts' – presumably until the appellants were to commit a breach of contract. The apparent basis for the relief was that the term was invalid or that it flowed from the new common-law rule that was to be developed.

THE REASONS FOR TERMINATION

[12] The Bank disclosed its reasons for termination in its first set of affidavits. The decision came about because of the listing of Bredenkamp and a number of entities owned or controlled by him as 'specially designated nationals' (SDNs) by the US Department of Treasury's Office of Foreign Asset Control (OFAC) on 25 November 2008. OFAC administers and enforces economic and trade sanctions based on US foreign policy and national security goals. The Bank became aware of the listing on 26 November.

[13] MasterCard, a US company, is not permitted by US law to conduct any business directly or indirectly with any listed person or entity and the Bank, by virtue of its relationship with MasterCard, could not permit an SDN to use a MasterCard. The Bank was, accordingly, obliged to cancel the MasterCard account and Bredenkamp accepted before us that he was not entitled to any relief in relation to this account.

[14] The reason why Bredenkamp was listed by OFAC is because he was said to be a 'crony' of President Mugabe of Zimbabwe and that he had provided financial and logistical support to the 'regime' that has enabled Mugabe 'to pursue policies that seriously undermine democratic processes and institutions in Zimbabwe'. Bredenkamp disputed these allegations. The Bank in turn did not suggest that the

grounds for his listing were factually correct or justified and this Court, too, is not called upon to determine whether they are.

[15] An on-line report at the time alerted the Bank to the fact that Bredenkamp was allegedly involved in various business activities, including tobacco trading, grey-market arms trading and trafficking, equity investments, oil distribution and diamond extraction.

[16] Bredenkamp was clearly not an ordinary client. On one bank form he indicated that his monthly income was R500 000 during 2002. He was reputed to have been one of the 100 richest persons in the UK. He owned residences in several parts of the world. It is accordingly not surprising that the Bank, immediately after the listing (which in itself was evidence of his prominence and wealth), made internal inquiries and discussed his case at the level of senior executives and managers.

[17] The Bank's first concern was that if it were to maintain its relationship with the appellants, 'domestic and foreign onlookers might reasonably believe or suspect that accounts held at Standard Bank would or could be used to facilitate unlawful and/or unethical acts' and its association 'might well undermine a bank's hard-won and fragile national and international reputation'.

[18] The Bank was also apprehensive of the possibility that any continued relationship with the appellants would create material business risks. Although the Bank itself is not bound to comply with the listing, many financial institutions with which it conducts business internationally are. These financial institutions impose stringent obligations in respect of the correspondent accounts they offer to banks such as the respondent. Any misstep by the Bank concerning a client who is an SDN could lead to the seizure of funds transferred in bulk on behalf of a number of clients, to a closure of accounts or to an adverse report to OFAC. It follows that it was not only the Bank's reputation that it felt was at risk but that there were also material business risks.

[19] Subsequently, but while the termination was suspended and before the filing of the answering affidavit, the Bank made further inquiries about Bredenkamp and established that, apart from his listing, he had an unenviable and dubious reputation

locally and internationally.[9] The allegations included the following: He was a sanctions buster not only of US but also of UN arms embargoes; he smuggled cigarettes and thereby circumvented customs and tax laws; he benefitted from the war in the Congo; he was the subject of serious fraud investigations in the UK and of police raids and tax evasion investigations in South Africa; his Dutch citizenship had been withdrawn; and that he was a 'paymaster of irregular commissions to SA government officials'. Once again, it must be assumed, as the Bank did, that these allegations may not be true: unfortunately, reputation is not necessarily based on fact but often on perception.

[20] To add to Bredenkamp's woes the UK soon followed the US and Bredenkamp was placed on a consolidated list of financial targets in relation to the Zimbabwe 'regime'. The European Union followed suit on 20 February 2009. Bredenkamp has launched review proceedings in relation to the EU listing but there is nothing on the papers to indicate that he has taken any formal steps to set aside the other listings.

THE CASE BEFORE LAMONT J

[21] The appellants' case as argued before Lamont J was much narrower than that envisaged in the papers. It is important to understand the downsizing because it impacts on the argument eventually presented to this Court.

[22] I deal first with the attack on the express term of the contract on which the Bank relied to close the accounts. Bredenkamp, in his first affidavit which was supplementary to the founding affidavit, attacked the express term on the basis that it was contained in a standard-form contract imposed by a powerful corporate entity upon a vulnerable consumer, accordingly operated in an unbalanced way, and was unconstitutional. He added that he had been under the 'definite impression that my relationship with the bank would be perpetual and that it would not be terminated without good reason or, at minimum, without first discussing with me the reasons why the bank chose to do so'.

[23] The problem with the attack on the express term was that it took the case nowhere because it provided no more than does the implied term or common-law rule, which entitles a party to terminate an indefinite contractual relationship on

[9] Lamont J judgment para 25.

reasonable notice. This compelled the appellants to attack the common-law rule. The attack was constitutionally based with reference to the list of values in the Bill of Rights referred to earlier. Bredenkamp submitted that the common law should be developed so as to require that the decision to close an account be preceded by a hearing and be based on rational or reasonable grounds.

[24] The appellants themselves scuttled these arguments. They accepted that the agreement with the Bank entitled either party to terminate the relationship on reasonable notice for any reason[10] and that this clause or the implied term did not offend any constitutional value. It was accordingly valid. They also accepted that due notice had been given and that a reasonable time had been allowed.

[25] The issue Lamont J was asked to decide was whether or not, in the particular circumstances under which the Bank had closed the accounts, any constitutional values were 'offended' (para 14). On the basis that any had, the appellants whittled down the relief sought. They now required an order prohibiting the Bank from closing the accounts in the absence of good cause (because the contracts had already been closed a mandamus to the effect that the closing was unlawful would have been more appropriate) and interdicting the Bank from closing the accounts unless and until good cause arose (para 19). Lamont J recognized that the constitutional values had to be identified (para 17) but eventually considered the matter with reference, it would appear, to the constitutional value of 'fairness' (para 31). Since he quoted at length from *Barkhuizen,* one may assume that he proceeded from the assumption that this value was recognised in that case.

THE CASE BEFORE THE SCA

[26] The argument for the appellants before this Court did not differ much from that before Lamont J. It took as its lodestar para 56 from the majority judgment of Ngcobo J in *Barkhuizen* which reads:

'There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.'

[10] I do not necessarily subscribe to the appellants' submission that the entitlement extends to 'bad' reasons, at least by the Bank. This could amount to an abuse of the Bank's rights.

This dictum, according to the argument, means that all contractual provisions have to be 'reasonable'. If they are not, they are unconstitutional. And even if they are reasonable, their enforcement must also be reasonable. The contextual phrase 'which prevented compliance with the time limitation clause' was conveniently glossed over.

[27] Consistent with the approach before Lamont J the appellants accepted that the common-law rule and the express term of the contract were fair and reasonable and therefore not in conflict with any constitutional values. Their complaint was accordingly limited to the exercise of the admittedly 'fair' and valid contractual right. The argument proceeded on the basis that *Barkhuizen* stands as authority for the proposition that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of our law generally. This would mean that any conduct (including legislation), which is unfair, would be in conflict with the Constitution and, accordingly void – a novel proposition, at least for me. In any event, according to the argument, fairness and reasonableness have infused the law of contract to such an extent that ordinary principles, such as those relating to mistake, misrepresentation, cancellation and all else have been subsumed by constitutional fairness.

[28] I would be surprised if the judgment of Ngcobo J holds that an agreement to pay a loan on demand or on a given agreed day requires for enforcement an inquiry into the reasonableness of the creditor's decision to rely on the contractual right. It would mean that the debtor could argue that he needs time to pay; that the creditor does not require the money on the given day; and that enforcement could lead to the debtor's sequestration – all very unfair. I shall attempt to demonstrate that the CC did not do any such thing. For once we were not referred to any foreign constitutional jurisprudence with such far-reaching consequences, presumably because there is none.

[29] It is important to underscore a number of issues. The first is that the appellants specifically said before us that they do not suggest that the common law had to be developed. This came about when counsel was unable to formulate the exception to the implied term which would fit his case. The problem that faced the appellants in this regard was that it is inconsistent to accept that a contract of indefinite duration (including this one) may be terminated with reasonable notice but

at the same time to contend that this one could not without good cause. The two rules would be in conflict. This means that the provisions of s 39(2) of the Bill of Rights, which require a court to promote the spirit, purport and objects of the Bill of Rights when developing the common law, do not arise. Another consequence is that the relief now sought, which is identical to that sought before Lamont J, is hardly appropriate because it was based on a development of the common law.

[30] The second is this: although the appellants in the part quoted from the notice of motion recited nearly every provision of the Bill of Rights counsel stated that they do not suggest that the exercise of the right to terminate 'implicated' any constitutional principle. It is accordingly not their case that the closing of the account compromised constitutional democracy, or their dignity, freedom or right to equality and the like, and the expansive interpretation of the Bill of Rights does accordingly not arise (s 39(1)). The case is about fairness as an over-arching principle, and nothing more.

[31] Thirdly, lack of bona fides was not alleged nor was it argued that the Bank was not bona fide in closing the accounts.[11] Having read Dutch and German law on the subject of bona fides in contract law, which derives not from any bill of rights but from their codes, I also could not find any instance where a similar defence was raised.

[32] Lastly, the appellants also did not seek to rely on a revival of the *exceptio doli generalis*. Whatever its scope may have been, in the absence of another defence it cannot be fraudulent, unconscionable or inequitable to rely on a valid right, in this case the right to terminate on reasonable notice.[12] It is unfortunately necessary to say something more about the *exceptio* because an obiter footnote in *Crown Restaurant*[13] read with *Barkhuizen* has given some[14] the impression that the CC has revived the *exceptio doli generalis*, which was laid to rest by this Court in

[11] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), [2005] 4 All SA 168 (SCA) paras 28-34 expands on *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA). See also F D J 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' 126 (2009) *SALJ* 71.
[12] *Universal Stores Ltd v O K Bazaars (1929) Ltd* 1973 (4) SA 747 (A) at 762G-H.
[13] *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16, 2007 (5) BCLR 453. (CC) fn 1.
[14] A J Kerr 'The defence of unfair conduct on the part of the plaintiff at the time the action is brought: The exceptio doli generalis and the replicatio doli in modern law' 125 (2008) *SALJ* 241.

*Bank of Lisbon.*[15] The footnote states that it was generally assumed before *Bank of Lisbon* that the *exceptio doli generalis* provided a remedy against an unfair contract and against the unfair enforcement of contracts. With all due respect, the statement requires qualification.

[33] The majority in *Bank of Lisbon*, using a historical analysis, found that the *exceptio* had not been part of our law. It was part of the Roman law of procedure and never a substantive rule, and was used to alleviate the strictness of contracts that were not based on bona fides. Since all contracts in our law are considered to be bonae fidei, the *exceptio* had no purpose in modern law. The majority also pointed out (at 610F-611D) that according to the jurisprudence of this Court – and lower courts – a party is bound by a contract provided the contract is valid and untainted and that a party could not raise the *exceptio* merely because one party has exercised a right conferred by the contract.[16] As Innes CJ already said:[17]

'No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.'

[34] Jansen J was extremely sceptical about the *exceptio* as a self-standing defence; and he found it difficult to envisage an appropriate field of its operation.[18] In this Court, too, he (as a judge of appeal) had rejected the proposition that a party was not bound by the term of a contract because it was unfair.[19] In *Bank of Lisbon*, however, he relied in his minority judgment on a number of cases where the *exceptio* had been mentioned as a defence. But those cases were all covered by clear rules such as rectification, mistake and estoppel.[20] As in German law, the *exceptio* was simply a convenient label for a number of rules but it had no specific content.[21]

[35] The disquiet about facts similar to those in *Bank of Lisbon* had led AS Botha

---

[15] *Bank of Lisbon and SA Ltd v De Ornelas* 1988 (3) SA 580 (A).
[16] See also *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 50.
[17] *Wells v South African Alumenite Co* 1927 AD 69 at 73.
[18] *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 607F-608F.
[19] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 28F-G. See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893H-894B.
[20] Carole Lewis 'The demise of the exceptio doli: Is there another route to contractual equity?' 107 (1990) *SALJ* 26 at 33.
[21] Zimmermann & Whittaker *Good faith in European contract law* (2000) pp 19 and 29.

J in an earlier judgment to adopt the *exceptio* as a general principle.[22] In both cases a bank sought to use a deed of suretyship with a wide wording to secure debts that had not been within the contemplation of the parties when the agreement was entered into. In other words, the bank sought to rely on the deed for a purpose that was never intended at the time of execution. As Lewis has pointed out, the problem would not have arisen if the deeds had been appropriately interpreted. They should have been interpreted contextually in their matrix.[23] The result of a judgment is often determined by the issues defined by the parties.[24]

FIRST PRINCIPLES

[36] It is unfortunately necessary to say something about the much maligned principle that contracts have to be respected. Davis J, for instance, took issue with 'contractual autonomy' because it reflects in his view a libertarian view of the world which is in conflict with the spirit of the Constitution read as a whole.[25] This led to a counter by Wallis J[26] and a riposte by Davis J.[27]

[37] Much has been said about *pactum sunt servandum* as a holy cow. It may have been one during Germanic and early Roman times when the law 'laboured under the tyranny of the word and the rule of formalism'.[28] It has not been a holy cow nor has contractual autonomy existed since the time of Justinian. The maxim was derived from Codex 2.3.7 where in a particular context two Emperors had said that 'pacti conventionisque fides servanda est'.[29] Codex 2.3.6, stated that it is a self-evident principle that contracts (pacta) concluded contrary to laws, imperial constitutions,[30] or the boni mores are of no force or effect. See also Codex 2.3.29.[31]

---

[22] *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W).
[23] *KPMG Chartered Accountants SA v Securefin* Ltd 2009 (4) SA 399 (SCA), [2009] 2 All SA 523 para 39. See also *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) paras 28-34.
[24] Dikgang Moseneke 'Transformative constitutionalism: Its implications for the law of contract' 20 (2009) *Stell LR* 3 at 11.
[25] *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C), [2007] 4 All SA 1368 para 30.
[26] *Den Braven SA (Pty) Ltd v Pillay & another* 2008 (6) SA 229 (D), ([2008] 3 All SA 518).
[27] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C).
[28] Aquilius (FP van den Heever) 'Immorality and Illegality in Contract' 58 (1941) *SALJ* 337 at p 339.
[29] There is a more generalized statement in Codex 4.54.8 but read in context, especially Codex 4.54.4 which contains an early example of estoppel, it does not pretend to provide the last word on the subject.
[30] I used the rendition of W G Hiemstra and H L Gonin's *Trilingual Legal Dictionary* 2 ed sv 'pacta'.
[31] For a detailed discussion see *Edouard v Administrator, Natal* 1989 (2) SA 368 (D).

[38] This Court in *Sasfin*[32] consequently restated the obvious, namely that our common law does not recognize agreements that are contrary to public policy. Our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground.[33] Determining whether or not an agreement was contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values. Reasonable people, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was 'correct', ie, more acceptable.[34] Didcott J, for one, believed in relation to restraint of trade cases that the sanctity of contract trumped freedom of trade whereas AS Botha J (a former member of this Court who also died recently) together with Spoelstra AJ, thought otherwise while Vermooten J agreed with Didcott J.[35] The view of Didcott J was eventually adopted by this Court in *Magna Alloys*.[36] The disagreement in *Sasfin* between the majority and the minority did not affect the principle but its application to particular clauses and severability. Public policy considerations are also not static and their weight may change as circumstances change.

[39] Others have spoken more eloquently about the interaction between the Constitution and the common law, more particularly the law of contract, but I shall attempt to state the basics that have become trite but may not always have been observed. The common law derives its force from the Constitution and is only 'valid' to the extent that it complies or is congruent with the Constitution. Every rule has to pass constitutional muster. Public policy and the boni mores are now deeply rooted in the Constitution and its underlying values. This does not mean that public policy values cannot be found elsewhere. A constitutional principle that tends to be overlooked when generalized resort to constitutional values is made is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.

---

[32] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-9H.
[33] A good example is *Hurwitz v Taylor* 1926 TPD 81 declaring marriage brokerage contracts invalid in spite of the Roman Dutch law that recognised them.
[34] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 8.
[35] See the discussion in *National Chemsearch (SA) Pty Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1100H-1101B.
[36] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

[40] It is now time to quote from the judgment of Ngcobo J in *Barkhuizen* about the holy cow. He said (para 87):

*'Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it.'

THE BARKHUIZEN JUDGMENT

[41] Although the judgment of the substantial majority (per Ngcobo J), with due respect, appears to me to be clear and consistent, some have interpreted it differently. It is accordingly my unenviable task to construe the judgment to the extent that it impacts on this case.

[42] The case concerned the constitutionality of a time limitation clause in a short-term insurance policy. It provided that the insured had to institute any claim within three months after the claim had been rejected by the insurer. The case of the insured was that the term limited his right of access to courts guaranteed by s 34 of the Bill of Rights.

[43] The CC found that our common law has always recognised the right of an aggrieved person to seek the assistance of a court of law and that a term in a contract, which deprives a party of the right, is contrary to public policy (para 34). Section 34 not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy (para 33). The question whether the clause was contrary to public policy depended on whether it was inimical to the values that underlie our constitutional democracy '*as given expression to in section 34*' (para 36). (I emphasize the reference to the specific constitutional value involved in view of the appellants' admission that they do not rely on any particular value.) The CC applied the tests laid down in *Mohlomi,*[37] a judgment dealing with a statutory limitation of the right of access to courts, which implies that the application of constitutional values to legislation and contract does not differ. (It is trite that fairness is not the test for statutory constitutionality.)

[44] The clause in question did not deny but only limited the right to seek judicial

[37] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), (1996 (12) BCLR 1559).

redress (para 45). A limitation of this particular constitutional right is not *per se* contrary to public policy but it would be if the limitation were 'unreasonable or unfair' (para 51). The CC then turned to consider the two quoted questions, namely whether the clause itself was ex facie unreasonable and, if not, whether it should be enforced 'in the light of the circumstances which prevented compliance with the time limitation clause' (para 56).

[45] The first question requires no further attention. About the second the CC said this (para 58):

'The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply.'

This reflects the approach our courts have taken in relation to the enforcement of clauses in restraint of trade. One considers, in the light of the circumstances prevailing at the time of enforcement, whether or not it would be contrary to public policy to enforce the restraint.[38]

[46] The public policy considerations that apply at the enforcement stage are no different from those that apply at the first stage: is the limitation of the identified constitutional value – the right of access to courts –fair and reasonable in the circumstances? Significantly, the CC referred to only one example of unfair enforcement and that related to impossibility where application of the *lex non cogit ad impossibilia* rule could conceivably solve the problem. It did not raise simpler examples of unfair enforcement such as that of an insured who is unable to afford a lawyer and therefore not able to comply with a time limit.

[47] This all means that, as I understand the judgment, if a contract is prima facie contrary to constitutional values questions of enforcement would not arise. However,

---

[38] *National Chemsearch (SA) Pty Ltd v Borrowman* 1979 (3) SA 1092 (T) at 1107E-H; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 895D-I.

enforcement of a prima facie innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced. An example would be where a lease provides for the right to sublease with the consent of the landlord. Such a term is prima facie innocent. Should the landlord attempt to use it to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term will not be enforced.

[48] Similarly, if the value is subject to limitation, such as the right of access to courts or to practise a trade or profession, and was 'reasonably' limited within the meaning of s 36, the court must assess at the time of enforcement whether the limitation is still fair and reasonable in the circumstances.

[49] It is evident from the judgment that if evidence is required to determine whether a contract is in conflict with public policy or whether its enforcement would be so, the party who attacks the clause at either stage must establish the facts (paras 66, 84-85 and 93).

[50] With all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated.[39] Had it been otherwise I do not believe that Ngcobo J would have said this (para 57):

'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress.'

[51] It is also not without significance that there is no indication in either of the minority judgments of Moseneke ACJ and Sachs J of an over-arching requirement of fairness. Instead, both judgments dealt with the matter as one of public policy as found in the Constitution and there is nothing in them that supports the appellants'

[39] Employment contracts are affected by the right to fair labour practices: *Murray v Minister of Defence* 2009 (3) SA 130, [2008] 3 All SA 66 (SCA) para 11; *Nakin v MEC, Department of Education, Eastern Cape* 2008 (6) SA 320, [2008] 2 All SA 559 (CkHC) para 36. The CC did not subject the arbitration agreement in *Lufuno Mphaphuli & Associates v Andrews* 2009 (4) SA 529, 2009 (6) BCLR 527 (CC) or its enforcement to the fairness test.

argument.

[52] The appellants sought to bolster their argument in respect of a general doctrine of unfairness with reference to a number of instances that, they say, establish fairness as the basis of all our law. The cases concerned extortion and restraint of trade, and there was also a general reference to *Sasfin* where the court had struck down a contract as being *contra bonos mores*. It is difficult to understand the relevance of these instances. They all dealt with contracts that were *contra bonos mores* and were consequently invalid. Here the appellants have conceded the validity of the contractual term. They also relied on three judgments that deal with unlawful boycotts or blacklisting.[40] These cases related to claims in delict. It escapes me how they can be of any assistance in deciding the principles applicable to this case and so does the argument that administrative justice principles of fairness somehow 'inform' contract law.

FAIRNESS

[53] In the light of my conclusion that fairness is not a free-standing requirement for the exercise of a contractual right it is strictly unnecessary to consider the facts relating to fairness but because of the way the matter was argued it is preferable to deal with the issue.

[54] Fairness remains a slippery concept as was illustrated by the fact that Jajbhay J found that the closing of the account was unfair while Lamont J, on basically the same facts, found otherwise. I am in general agreement with the approach of Lamont J.

[55] The appellants' case in simple terms is this. They require bank accounts to conduct business locally. The closing of a bank account is a serious matter. If they were to approach one of the remaining three major banks in the country for an account they would have to disclose the fact of closure. Those banks would then establish from them the reason for closure.[41] When informed, they would not grant

[40] *Murdoch v Bulloch* 1923 TPD 495; *Hawker v Life Offices Association of SA* 1987 (3) SA 777, [1987] 2 All SA 100 (C); *Wolmarans v ABSA Bank Ltd* 2005 (6) SA 551 (C).

[41] It is not suggested that the Bank would have disclosed the reason for closing the accounts to other banks. That would have been a breach of confidentiality. The Bank did not even disclose its reason to the appellants and if the appellants had, before forcing the Bank to divulge its reason, approached other banks the foundation of the appellants' case would have fallen away.

the appellants banking facilities. The result of the closing of their accounts, they say, effectively 'unbanked' them (a term coined by counsel). This is due to the fact that the banking industry is in the hands of few who enjoy significant market power. It is accordingly a case 'where private power approximates public power or has a wide and public impact' when everyone 'is entitled to effective relief in the face of unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'.[42]

[56] The appellants' argument is in many respects circuitous, self-destructive and, in any event, without merit. They accept that in terms of the valid agreement the Bank was entitled to terminate without any cause but they ask for an order that the Bank may only terminate on good cause. This would require a tacit term or the development of the common law, both of which they eschew. But, they say, in this case the Bank cannot close the account with a bona fide reason because of consequences to them that cannot be laid at the door of the Bank.

[57] The fact that the appellants as business entities are entitled to banking facilities may be a commercial consideration but it is difficult to see how someone can insist on opening a banking account with a particular bank and, if there is an account, to insist that the relationship should endure against the will, bona fide formed, of the bank. There is also a factual issue. The use put by the appellants of their accounts shows without doubt that they do have other accounts, although maybe none locally. The second appellant, which is the commodities trader, does not hold a foreign currency account with the Bank. There is no indication that it uses its current account as a trading account. The fourth appellant, which appears to be a manufacturing company, only has a money market account with the Bank and not a business account.[43] And Bredenkamp's accounts were used for mundane matters only.

[58] The appellants also have a serious problem with causation. It is the listing (fair or unfair) that 'unbanked' the appellants, and not the closing of the accounts. Ms

---

[42] Dikgang Moseneke loc cit.

[43] An affidavit of Mr Bezuidenhout filed by the Bank refers to a current account held by the fourth appellant with number 023390778 which was once used to transfer a large amount to a bank account held by the second appellant in Switzerland. The current account has not been referred to in the notice of motion or in the relief now sought. Its status is unknown.

Ina Steyn of Absa Bank testified that the fact that the account of an aspirant customer was closed by another financial institution is an important factor to consider when deciding whether or not to accept the client. However, it is the reason rather than the fact of closure that would be its concern. Absa, she said, regards an applicant's status on a credible SDN list as a critical factor in reaching its decision. In the ordinary course of events Absa checks whether an applicant is an SDN. She mentioned that Absa had already refused the appellants banking facilities in view of the listing.[44] There is no suggestion that this was done because the accounts were closed.

[59] The fact that banks may not wish to provide listed entities with banking facilities is unrelated to the fact that there are only a few major banks in the country. A proliferation of banks would not have made any difference. The impact on the appellants was not caused by the decision to close the accounts; it was caused by the listing. It is therefore not a case of the abuse by the Bank of private power that approximates public power.

[60] I find it difficult to perceive the fairness of imposing on a Bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The appellants were unable to find a constitutional niche or other public policy consideration justifying their demand. There was, accordingly, in the words of Moseneke DCJ no 'unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'.[45]

[61] The appellants also submitted that the Bank's decision was procedurally and substantively unfair. This argument was built on quicksand because they abandoned an administrative law review; they do not suggest that the common law must be developed so that a party who is entitled to cancel a contract has to give the other party a hearing before cancellation; and they do not rely on a tacit term to that effect.[46] Furthermore, a hearing in the form of a discussion would not have had any effect and would have been an exercise in futility. Bredenkamp presumably would

[44] The appellants filed affidavits by Mr Marius Nel who is also an Absa employee. His evidence is somewhat different but it is clear that he is not qualified to speak about these matters. Furthermore, to the extent that his evidence is different, her evidence has to be referred on ordinary motion principles.
[45] Dikgang Moseneke loc cit.
[46] Such a tacit term was found to exist in the circumstances in *De Lange v ABSA Makelaars (Edms) Bpk* [2010] ZASCA 21 (23 March 2010).

have told the Bank that the listing was not justified, and he may have produced evidence to that effect. But the Bank's cancellation was not premised on the truth of the allegations underlying the listing; it was based on the fact of the listing and the possible reputational and commercial consequences of the listing for the Bank.

[62] The next submission was that the Bank had less drastic steps available: It could have asked for undertakings from the appellants to reduce its risks or could have kept their accounts under surveillance for questionable transactions. Whether these options were viable is doubtful but they cannot be related to the relief presently sought, namely that the Bank may not cancel without good cause.

[63] The appellants objected to the Bank's reliance on Bredenkamp's reputation. The first objection was that the facts were not true but, as indicated, the Bank did not seek to rely on the factual accuracy of the reports but on Bredenkamp's reputation itself. Their other complaint was that a bank is not entitled to take moral considerations into account when deciding to close an account. The answer is that the Bank did not make any moral judgment; it made a business decision to protect its reputation. The appellants then said that banks are inconsistent because some banks do deal with SDNs. The problem with the submission is that it is destructive of the appellants' whole case. It indicates that a listed entity or someone with a bad reputation is not for that reason necessarily unbanked. Lastly, in this context, the appellants object to the Bank's reliance on facts determined after its decision to close the accounts. There is no merit in the objection. A party has always had the right to justify a cancellation with objective facts unbeknown to that party at the time when the cancellation took place.[47] Counsel could not give a reason why the rule does not apply or whether and how it should be developed.

[64] This leaves for consideration the question whether the Bank had (in terms of the relief presently sought) good cause to close the accounts. The Bank had a contract, which is valid, that gave it the right to cancel. It perceived that the listing created reputational and business risks. It assessed those risks at a senior level. It came to a conclusion. It exercised its right of termination in a bona fide manner. It

[47] *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C); [1971] 1 All SA 381 (C); *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 832; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA) para 28.

gave the appellants a reasonable time to take their business elsewhere. The termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration. The Bank did not publicise the closure or the reasons for its decision. It was the appellants who made these facts public by launching the proceedings and requiring the Bank to disclose the reasons.

[65] The appellants' response was that, objectively speaking, the Bank's fears about its reputation and business risks were unjustified. I do not believe it is for a court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved. Fairness has two sides. The appellants approach the matter from their point of view only. That, in my view, is wrong.

[66] The appeal is accordingly dismissed with costs, including the costs of two counsel.

_____

L T C Harms

Deputy President

| | |
|---|---|
| APPEARANCES: | M Brassey SC (with him K Hopkins) |
| APPELLANTS: | Instructed by Wertheim Becker Inc, Johannesburg<br>E G Cooper Majiedt Inc, Bloemfontein |
| 1st RESPONDENT: | J J Gauntlett SC (with him R M Pearse) |
| | Instructed by Deneys Reitz Attorneys, Johannesburg<br>Webbers, Bloemfontein |