

Short notes on:

LIMITING PACTA SUNT SERVANDA

Introduction

When two parties conclude a contract, the terms and conditions of the contract are the rules that will govern the relationship between the parties. Once the contract is signed, rights and duties are created, and the parties will remain liable thereto until the contract is terminated. In this article, I will be exploring the principle of the *Pacta Sunt Servanda* (sanctity of a contract), which indicates that contracts freely entered into must be kept and the role of good faith in the law of contract.

Pacta Sunt Servanda

Pacta Sunt Servanda is one of the cornerstones of the law of contract. According to *Pacta Sunt Servanda*, parties to a contract have the freedom to choose with whom they wish to conclude a contract and the terms and conditions of that contract³. The effect of this principle is that when parties conclude a contract legally and voluntarily, the contract must be strictly enforceable on the parties with as minimal judicial interference as possible.

In giving effect to this principle, the courts are required to recognize the sanctity of a contract and therefore, they must strictly rely on the provisions of the contract when determining the enforceability of the contract⁴. Thus, if a dispute were to arise regarding the contract, a court may not rely on its judicial discretion when reaching a decision (subject to certain exceptions).

Public Policy and Good Faith

Although the parties to a contract are given the freedom to decide the terms and conditions of a contract independently, those terms and conditions may not interfere with public policy. If the terms and conditions of the contract are deemed to be grossly exploitive of one of the parties or unconscionable, then those terms will have violated public policy.⁵

³ Hutchison (ED), Pretorius C(ED), Naude T et al (2017), *“The Law of Contract”*, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.

⁴ Hutchison (ED), Pretorius C(ED), Naude T et al (2017), *“The Law of Contract”*, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.

⁵ *Sasfin v Beukes* 1989 (1) SA 1 (1).

Additionally, Good faith is a principle used to acknowledge the opinions of the general public when determining what is fair, reasonable and just. Good faith is based on the idea that the parties to a contract should behave in a manner that is honest and fair when executing their duties towards each other. The court in *Eerste Nasionale Bank van Suid Afrika Bpk v Saayman*, stated that the function of good faith was to give expression to the public's idea of what is fair, just and reasonable. Therefore, a party to a contract cannot insert terms that are so one-sided that they promote their interest at the expense of the other contracting party. In some cases, a party will even have the duty to advise the other contracting party of the implications of being bound by the proposed contract⁶.

Conclusion

In as much as the principle of *Pacta Sunt Servanda* safeguards the terms of the contract, a disadvantage is that the parties are strictly bound to the contract, and a court will have little discretion to deviate from the provisions. The exceptions to the strict application *Pacta Sunt Servanda* are the principles of good faith and public policy. The latter principles offer a balanced approach to the conclusion of a contract and prevent the inclusion of disproportionate contractual terms.

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⁶ *Eerste Nasionale Bank van Suid Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA)