

Short Notes on:

COMMERCIAL CONTRACTS AND THE CONSIDERATIONS

Introduction

The role of public policy considerations, norms of fairness and constitutional values such as Ubuntu in the law of contract, have long caused legal uncertainty. However, a recent decision in the Constitutional Court has now put an end to this.

In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*¹ the Constitutional Court held that parties to a contract could not escape the terms of the agreement solely because the enforcement of these terms would be disproportionate or unfair.

The dictum confirms the values such as good faith, fairness, and reasonableness and, in the South African context, the concept of Ubuntu, has not been given the status of stand-alone contractual requirements through the Constitution.

These values, though constitutionally enshrined, do not constitute a free-standing basis upon which a court may interfere in contractual relationships. Rather, they form important considerations to be taken into account when a court is required to determine whether the enforcement of a term is contrary to public policy.

The Constitutional Court has now effectively enunciated a two-pronged enquiry:

1. Whether the provision itself is on the face of it unfair, unjust and contrary to public policy.
2. Whether the enforcement of the provision in the specific circumstances, having regard to the factual context and circumstances of the parties, would be contrary to public policy considerations.

Conclusion

The ruling in Baedica has provided legal certainty as to the role of public policy considerations in enforcing contractual provisions. What it has not done is to entirely remove the element of subjectivity the application of these guiding norms by a specific court remains inescapably subjective.

Contact an attorney at SchoemanLaw for your legal needs.

