



DYASI M
INCORPORATED
ATTORNEYS

Which Court will Reign Supreme:
The Law of Contract, fairness, good faith, ubuntu and *pacta sunt servanda*.
Will traditional laws outweigh constitutional values?

SEPTEMBER 2021 | PREPARED BY KHWEZI ZONDI

TABLE OF CONTENTS

- 03** Introduction
- 04** Supreme Court Appeal's Approach
- 05** Constitutional Court's Approach
- 06** Conclusion
- 06** Bibliography



Which Court will reign supreme:
The Law of Contract, fairness, good faith,
ubuntu and *pacta sunt servanda*.
Will traditional laws outweigh constitutional
values?

INTRODUCTION

The law of contract involves the private contractual dealings between individuals.[1] Although Judges interpret contracts using existing rules of law, they do not have the power to amend them to an extent that it creates a new contract in its entirety. Judges cannot create contracts for individuals or enforce obligations on the parties which do not correlate with their initial purpose for entering into said contract.

Academic, B Mupangavanhu [2] states that common law is an uncodified body of law from precedents of the courts that bind lower courts within the hierarchy system, this is known as the *stare decisis doctrine*. Due to the history of our country, law of contract has a mixed system of “borrowed” doctrines from other legal systems.

It has been 25 years since South Africa became a democratic country and the Constitution of the Republic of South Africa has been the highest authority of the country since 1996. Having said this, many people are calling for the decolonisation of the legal system, particularly the law of contract. [3] This reigns in the question of whether our system of law of contract can be “decolonised” and made more customary to cater to the different cultures in South Africa or more specifically, is the system of law of contract capable of being made more customary by introducing the values that are enshrined in the Constitution?

This article seeks to evaluate the ongoing conflict between the Supreme Court of Appeal (SCA), which looks to interpret contract disputes in relation to principles such as *pacta sunt servanda* and on the premise that people have freedom to contract.⁴ Whilst on the other hand, the Constitutional Court (CC) wants to merge these principles with constitutional values such as ubuntu, fairness and good faith. [5]

[1] B Mupangavanhu ' Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011) ZACC 30' 2013 SPECJU 148.

[2] Ibid, 150.

[3] A Hutchinson 'Decolonising South African Contract Law: An Argument for Synthesis' 2017 The Constitutional Dimension of Contract Law 151.

[4] Ibid, 153.

[5] Mupangavanhu op cit note 1 at 154.

SUPREME COURT OF APPEALS APPROACH

The SCA is reluctant to interpret contracts by merging the existing principles with constitutional values due to the fact that the underlying cornerstone of the law of contract is freedom of contract and being bound to an agreement freely entered into by both parties (*pacta sunt servanda*). The most recent case to illustrate the SCA's approach is the Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd [6] where the Court had to decide whether *pacta sunt servanda* should be developed by introducing constitutional principles into the law of contract. The facts of the case are briefly as follows: Southern Sun was due to pay their monthly rental fee to Mohamed's Holdings.[7] This transaction was set to automatically take place but due to an error by Nedbank, the payment was not made. When Mohamed's Holdings instituted legal action to evict Southern Sun, they advanced an argument that implementation of the cancellation clause was unfair and went against public policy. Furthermore, they argued that the concept of public policy was determined by ubuntu, fairness and simple justice between individuals.

After the SCA weighed up the principle of *pacta sunt servanda* with considerations of public policy in order to determine whether the implementation of the cancellation clause was indeed unreasonable, it was held that no evidence had been produced to show that a constitutional right had been infringed by the enforcement of the cancellation clause and thus the principle of *pacta sunt servanda* should be strictly applied.

It is evident that the SCA is aiming to avoid any situation where Judges would become drafters of contracts. The SCA's approach suggests that they acknowledge that people are free to contract, they should be bound to said agreements unless the contract falls short of the standard of public policy. Although public policy is not defined, precedent denotes that it entails looking at what is considered correct by the community [8], however, it is not a static consideration as it changes over time and differs with each community. This approach ensures that people are bound to their contracts but it fails to consider other factors that might be important when interpreting contracts such as the fairness of certain clauses and whether they were entered into in good faith without the intention of prejudicing the other party.



[6] 2018 (2) SA 314 (SCA).

[7] Hutchinson op cit note 3 at 150.

[8] Sasfin (Pty) Ltd v Beukes [1989] 1 All SA 347 (A); Barkhuizen v Napier 2007 (5) SA 323 (CC).

CONSTITUTIONAL COURTS APPROACH

Conversely, the CC has a different approach to interpreting the law of contract. Sections 8(3), 39(2) and 173 of the Constitution provides that Courts have a mandate to assist in developing the common law by applying constitutional values.^[9] The CC's approach is more relaxed than that of the SCA as it is trying to foster a new era of introducing customary principles to different areas of law. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* ^[10] the facts are briefly as follows: Everfresh and Shoprite's predecessor had a business relationship which was established by way of negotiations made in good faith. Shoprite purchased a specific property from the original lessor which meant that Shoprite became Everfresh's lessor. Shoprite advised Everfresh about the date of the termination of their lease but Everfresh did not vacate the premises when the date arrived. ^[11]

When Shoprite instituted ejectment proceedings in the High Court and SCA, Everfresh contended that they qualified for a renewal of the contract and Shoprite had frustrated the process by refusing to negotiate in good faith. Even though Everfresh's argument did not succeed in both the High Court and SCA, the CC decided the matter on the basis that the argument raised by Everfresh was a request to develop the common law in light of section 39 (2) of the Constitution. ^[12] Moseneke DCJ concluded the matter by stating that a promise to negotiate in good faith was too uncertain and vague to be enforceable. ^[13] One of the reasons why Everfresh did not succeed was due to the fact that they only advanced the argument to develop common law for the first time in the CC. *Y Mupangavanhu* ^[14] argues that the CC missed an opportunity to develop the common law as section 39 (2) provides them to. By accepting the arguments raised by Everfresh, the CC could have resolved the ongoing conflict between itself and the SCA.



9 *Y Mupangavanhu 'Fairness is a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008'* (2015) 7 DE JURE 116. 10 (2011) ZACC 30.

11 *Ibid.*

12 *Ibid.*, 120.

13 *Ibid.*

14 *Ibid.*

CONCLUSION

As illustrated in the above cases, the SCA is adamant in continuing its traditional approach and enforcing principles such as *pacta sunt servanda*, *caveat subscriptor*, public policy and freedom of contract. The SCA is not willing to relax these principles to accommodate constitutional values because it upholds the principle of freedom to contract and where people knowingly entered into an agreement, they should be bound to the contents of that agreement. Whilst the CC is more dynamic in its approach, the above-mentioned principles will not be relaxed in instances where the Court feels that the parties freely contracted in good faith. The CC understands that times have changed and with such change, the Courts should be more accepting of the values that are enshrined in the Constitution. This conflict has arisen between the highest Courts in South Africa and has created confusion as to which interpretation should be followed in deciding whether a contract was fair or not. Surely the next case that comes before the CC will resolve any conflict or confusion and lay the issue to rest.

BIBLIOGRAPHY

Hutchinson A 'Decolonising South African Contract Law: An Argument for Synthesis' 2017 The Constitutional Dimension of Contract Law 151- 184.

Mupangavanhu B 'Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011) ZACC 30' 2013 SPECJU 148- 173.

Mupangavanhu Y 'Fairness is a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) 7 DE JURE 116 - 135.

Cases

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011) ZACC 30.

Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2018 (2) SA 314 (SCA).

Sasfin (Pty) Ltd v Beukes [1989] 1 All SA 347 (A)