Barkhuizen v Napier
Case CCT 72/05 [2007] ZACC 5 delivered on 4 April 2008

Constitutionality of a time bar clause in an insurance contract

1 Introduction

It is with a collective sigh of relief that lawyers and insurance companies take note that the saga of Barkhuizen and Napier has finally come to an end by the judgment of the Constitutional Court. The issue at the heart of the matter is the extent of the impact that the Constitution has on the contractual relationship between individuals, and the constitutionality of contractual provisions that limit a person's right of access to the courts. Time bar clauses that change prescription periods are not foreign to insurance or other contracts. Their purpose is to curb inordinate delays, procrastination and the protraction of disputes, and to bring about economic certainty and business efficiency. The time agreed upon should however not be so insufficient as to prevent the proper exercise of the right of access to the courts.

2 Facts

The applicant entered into a short-term insurance contract with a syndicate of Lloyd's Underwriters of London. The syndicate was represented in South Africa (SA) by the respondent. The policy covered various risks, including cover for loss caused by damage to the insured's motor vehicle, a 1999 BMW 328i, to be used for private purposes only. The vehicle was involved in an accident, causing damage beyond repair on 24 November 1999. On 2 December 1999, the applicant notified the respondent of the accident and claimed the amount of R181 000, being the sum insured. Even though the contract afforded the insured 30 days to lodge his claim with the insurer, he did so in only eight days. The respondent alleged that the motor vehicle was used for business purposes, contrary to the undertaking that its use would be limited to private use only, and subsequently repudiated the applicant's claim on 7 January 2000. Clause 5.2.5 of the contract between the parties stated the following: "[I]f we reject liability for any claim made under this Policy we will be released from liability unless summons is served . . . within 90 days of repudiation." The applicant served summons on the defendant more than two years later, on 8 January 2002.

The respondent's plea relied on the contractual time bar clause. The applicant's replication invoked not only section 34 of the Constitution (of the Republic of South Africa, 1996), in that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." The respondent pleaded that not only was he deprived of this fundamental right of access to the courts, but also of the common-law right of an insured to invoke the courts, and that the time bar clause served no useful or legitimate purpose and was

contrary to public interest as the period of 90 days was an unreasonably short period of time.

3 Brief Summary of the Pretoria High Court Judgment

In the Pretoria High Court, De Villiers J held that had it not been for the contractual time bar clause, the prescription period in this case would have been three years in accordance with section 11 of the Prescription Act (68 of 1969). As the right of access to the courts is foundational to our society, and as section 34 of the Constitution applies not only to the state but also horizontally to contractual relationships between private persons, any limitation of this statutory period required constitutional justification. Section 36(1) of the Constitution, that deals with the limitation of rights, refers only to limitation by a "law of general application". The court therefore found it necessary to interpret the principle of *pacta servanda sunt* as such a law of general application, in order to be able to apply the criteria found in section 36(1) to this specific situation. It was found that the limitation was not reasonable and justifiable, and that it did not offer the required constitutional justification for an enforceable contractual limitation of the constitutional right found in section 34. In this case, the court thus found the clause to be unconstitutional.

The clause was then interpreted to be "law" and, falling within the scope of section 172(1)(a) of the Constitution, the court could find the clause to be unenforceable. It can be noted that the court also relied on the cases of *Mohlomi v Minister of Defence* (1997 1 SA 124 (CC)) and *Moise v Greater Germiston Transitional Local Council* (2001 4 SA 491 (CC)) in which the constitutionality of statutory prescription periods came before the courts. In both instances the reduced prescription periods were found to be unconstitutional, yet the courts did not extend their discussions in these cases to contractual limitations. As the applicant did not rely on the argument that the clause was specifically contrary to the common-law requirement of public policy, the court refrained from dealing with this issue.

4 Brief Summary of the Supreme Court of Appeal Judgment

The Supreme Court of Appeal reversed the decision of the High Court. It also emphasised that the general premise that, in accordance with section 8(2) and (3) of the Constitution, all contractual terms are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract, is correct (pars 6–8). Courts may invalidate agreements that are contrary or offensive to public policy (*Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA) pars 18–30; *Brisley v Drotsky* 2002 4 SA 1 (SCA) pars 88–95; *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) par 12). The principles of dignity and autonomy "find expression in the liberty to regulate one's life by freely engaging in contractual arrangements"(par 12). The Constitution requires the courts to "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract' while seeking to permit individuals the dignity and autonomy of regulating their own lives" (par 13).

The court however found, for various reasons, that the unfairness of the time bar clause was not self-evident. The clause did not exclude access to the courts entirely. The claimant also had full knowledge of the details of the incident and the claim. No evidence was led on the insurance practices of the specific insurer such as the number of claims the specific insurer had to deal with, its claims investigations and procedures and the premium paid as a *quid pro quo* for the cover provided. Most insurance policies contained time bar and other limitation clauses, yet no evidence was available for a comparison of this insurer's specific insurance product and other products available in the market. Whether the time period is reasonable or not would depend on this information, which was not available to the court (par 10). The evidence was also so scant that the court could not determine the equality of the parties' bargaining power when concluding the contract (pars 14–15). The only right that the plaintiff enjoyed was the one that he acquired from the specific insurance contract, which required him to institute his claim within the agreed time limit. No pre-existing or broader unlimited right to insurance cover existed, as was implied by the High Court (pars 23–26).

Cameron, with Mpati, Van Heerden, Mlambo and Cachalia JJA concurring, found that the applicant concluded the contract freely while exercising his constitutional rights to dignity, equality and freedom. Nothing existed to invalidate the bargain he concluded, and that he must be held bound to his agreement (par 28).

5 The Constitutional Court Judgment

5 1 *Majority Judgments*

Ngcobo, with whom Madala, Nkabinde, Skweyiya, Van der Westhuizen JJ and Yacoob concurred, held as follows: The principle of *pacta servanda sunt* is not "a sacred cow that should trump all other considerations", as it is subject, as all law is, to constitutional control (pars 15 35). Clause 5.2.5 that limits the operation of section 34 of the Constitution is not a law of general application, and as such the limitations clause found in section 36(1) is not applicable. This was also an issue that the High Court struggled with. It circumvented this problem by interpreting sanctity of contract as the "law of general application". It is however uncertain why the High Court elevated the clause to "law" for the purpose of applying section 172(1)(a), but found that it was not sufficient to be elevated to a "law of general application" for purposes of section 36(1) (pars 24–26).

Contractual provisions can be disputed where they are contrary to public policy. Public policy is now deeply rooted in our Constitution and its underlying values, which simplify its interpretation. It does not deny, but accommodates, yet can limit, the application of the principle of *pacta servanda sunt* (pars 28–30). Section 34 not only gives expression to the fundamental value of the right to seek judicial redress that is fundamental to the stability of an orderly society, but it also constitutes public policy (pars 31–34). The court states the following in par 36:

> "The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional

> democracy, as given expression to in section 34 and thus contrary to public policy."

Although public policy was a point in law raised the first time on appeal, as it was covered in the pleadings, and its consideration involved no unfairness to the other party, the court was able to exercise its discretion to consider this point (par 39).

Public policy requires parties to comply with contractual obligations that have been freely and voluntarily undertaken (par 57). Clause 5.2.5 did not deny the applicant the right to seek judicial redress, but only limited the time within which he had to do so (pars 45v46). The Constitution recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This also reflects public policy (par 48). Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy (par 73). A person must be afforded an adequate and fair opportunity to seek judicial redress (par 51).

An inquiry must first be directed at the objective terms of the contract. Once these are found not to be inconsistent with public policy, then a second inquiry must be directed at whether the terms are contrary to public policy in the light of the relative situation and circumstances of the contracting parties. The inequality of bargaining power, for example, has the potential to affect whether it is in the public interest to enforce a clause agreed to while labouring under the inequality (pars 57–59). On the first enquiry, the 90-day period was found to be neither unfair nor inadequate. The applicant was possessed of all the information necessary to institute action (par 63). On the second inquiry, the court found that there was no evidence to indicate that there was unequal bargaining power, or that the contract was not freely entered into (par 66). No reasons were provided by the applicant on why he did not comply with the time clause, and why he waited two years before instituting action against the respondent. Due to the absence of stated facts, it was impossible for the court to decide on whether the enforcement of the clause against the applicant would be unfair and contrary to public policy (pars 84–86).

O'Reagan J concurred with the majority judgment, yet disagreed that the defences of good faith and impossibility in contract law, that were discussed in the majority judgment (under pars 73–83), yet were not applied, were relevant and warranted consideration in this specific case.

Langa concurred with this judgment, yet preferred to refrain from expressing an opinion on the direct application of the Bill of Rights to contracts.

The appeal was accordingly dismissed.

5 2 *Minority Judgments*

Sachs, however, dissented. He investigated and dissected all relevant documentation in great detail (pars 126–134), and based his judgment on the following facts: The clause was found in a standard form document (par 123), which was presented to consumers on a "take it or leave it" basis (par 135), and was not highlighted visually, but lay buried in an extensive or voluminous add-on policy document (pars 147, 180), which

was not signed by the applicant or brought to his attention (par 183). Consumers more often than not do not question, refuse or even sometimes understand the contents of these documents (pars 135–138). The standard form contract may be unreasonable, oppressive or unconscionable and in general inconsistent with our constitutional values of dignity, equality and freedom (par 140), and could prove to be contrary to public policy and unenforceable. In this case, as the contract engaged the expressly guaranteed constitutional right in section 34 (par 143); as the area of activity, namely insurance, is not a personal indulgence, but part and parcel of everyday life and therefore of considerable public concern (par 144); and lastly, as the clause was buried in a voluminous document (par 180) and not part of the actual bargain concluded (par 180), but sent to the applicant only after conclusion of the contract, considerations of public policy should dictate that the clause, which was drafted by the insurer's lawyers to their benefit and held no reciprocal benefit or corresponding advantage (par 123) for the insured, should not be enforced.

What is needed is neither a blanket acceptance of standard form terms, nor a blanket rejection, nor an *ad hoc* determination by each judge in accordance with his or her predilections as to what is fair or not, but rather a principled approach based on objective criteria that are consistent with the principles of contract law and with sensitivity to the way in which economic power in public affairs should be appropriately regulated to ensure standards of fairness in an open and democratic society (par 146). Some objective criteria examined in this judgment are international practice with regard to status and reviewability of standard form contracts (pars 162–168); research and proposals of the South African Law Review Commission (pars 169–174); academic opinion (par 175) and, lastly, relevant statutory provisions regarding prescription and time limits for bringing civil proceedings (par 176).

Sachs held that the potential unreasonableness leading to a violation of public policy, lay firstly in holding a person bound to one-sided terms of a bargain to which he apparently did not actually agree and, secondly, which was not drawn to his attention. Actual and imputed consensus are discussed at length (pars 151–156). Thirdly, the legal import in this case was that of which the reasonable person in his position should not be expected to be aware (par 148). The judge felt that, as proper notice and fairness were not met, it failed to meet the standards as set by the contemporary notions of consumer protection. Everybody, rich or poor, literate or illiterate, are entitled to the same fair treatment in their capacity as consumers (par 149).

Furthermore, he found that the clause offended public policy in our new constitutional dispensation and that it should not be enforced, based on the summary of the factors as discussed above, that open the enforceability of this specific contractual clause to challenge (pars 183–185).

Moseneke, with whom Mokgoro concurred, also dissented. In his view the fault in the reasoning of the majority lay in the way that it framed the enquiry into whether the clause offended public policy (par 94). He held that the issue was not whether the clause was well resourced or the person attempting to avoid the clause was in a position to do so (par 104),

but whether the stipulation itself clashed with public norms and was so unreasonable as to offend public policy (pars 96–98).

They found the clause to afford the insured an unreasonably short time to find litigation funds, to appoint an attorney, brief counsel and issue and serve summons. The likely impact of this clause was to provide the insurer with considerable financial gain due to its release from liability. The clause was also manifestly inflexible and therefore contrary to public policy (pars 109–111). The unseemly haste also did not appear to serve any legitimate purpose (par 113). The likely prejudice or harm to the insured seemed disproportionate to the interest that the insurer sought to protect (par 113). He also felt that the time bar clause was not reciprocal (par 114). In view of the Institution of Legal Proceedings against certain Organs of State Act (40 of 2002), in terms of which the prescription period for delictual claims against state organs was three years, as well as the six months' notice of proceedings that had to be given, these statutory trends should be indicative of the *boni mores* (pars 115–117). In view of these arguments, they found the clause at odds with public policy (par 119).

6 Conclusion

Where a contentious contractual provision is so unreasonable that it offends public policy, freedom to contract and the sanctity of contract should bear less weight and bow before public policy that requires the provision not to be enforced. This will also be the case where an inequality in bargaining power that offends public policy leads to agreement on the provision. The statements in the judgment that the time bar clause offered no "reciprocal benefit" to the insured, do bring echoes of aspects of the doctrine of valuable consideration, namely that of a required *quid pro quo*, to mind. It is important to note the caution as voiced by the Supreme Court of Appeal, that "intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements" (par 13). As these principles apply to all contractual provisions containing limitations, exclusions and restraints, such as, for example, restraints of trade, their impact should be noted throughout industry and trade where the appearance of these contractual clauses is prolific. As the diversity in the judgments given throughout clearly indicate, very little legal certainty can exist on the exact scope of what an acceptable limitation is. This is not only due to the role of the facts and circumstances in each situation, but also that, irrespective of our Constitution, one remains at the mercy of the various subjective interpretations, the "subjective yardstick" as stated by Moseneke (par 95), or an "*ad hoc* determination by each judge in accordance with his or her predilections as to what is fair or not" as stated by Sachs (par 146), or on whether a specific limitation is in line with constitutional values or not.

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