



Contractual Fairness as Validity Requirement

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1 Introduction

The South African law of contract dictates that no contract (or a term within the contract) or the enforcement thereof may be against statute or the common law. If so, the contract is labeled as either void, or valid (but unenforceable), depending on the reprehensibility of the contract as viewed through the lens of society. This article aims to discuss the current stance on fairness as contractual validity requirement as expressed by the Constitutional Court. In other words, is it possible for a plaintiff to raise unfairness of a contractual term or the enforcement thereof, to escape contractual liability? And if so, what will the courts regard as an unfair term in a contract between parties. As a member of society, one would like to think that contracts should be based upon good morals, but whether or not that is justifiable in a court of law remained a grey area for quite some time in South Africa.

2 Beadica v Trustee Oregon Trust: Theron J

Before the judgment of the Constitutional Court in *Beadica 231 CC v Trustee Oregon Trust 2020 (5) SA 247 (CC)* ("Beadica"), uncertainty reigned, as it was not clear if a plaintiff could rely on unfairness of a contractual term or the enforcement thereof to escape contractual liability. In the majority judgment of *Beadica*, Theron J affirms that the common law test for enforcement or validity of a contractual term is public policy. Alternatively stated, whether the contract or its enforcement is against public policy, linked

to whether the contract is contra bones mores (against good morals) or against public interest. Additionally, there is no self-standing rule that contracts must be reasonable and fair to be valid. They are values that promote that development of South African contract law and the constitutional mandate of developing the common law to achieve constitutional goals. Fairness and reasonableness are therefore important values in the South African law of contract, but are no rule. They are considered when balancing values such as Ubuntu during the application of the public policy test as explained above.

3 Conclusion

Considering the above mentioned in conjunction to the legal question posed, it is evident that fairness of a contractual term or the enforcement thereof is not a sole validity requirement. In conclusion, a plaintiff will not be able to escape contractual liability by solely alleging unfairness of a contractual term or the enforcement thereof. To do so, a plaintiff bears the onus of proving the relevant contractual term or the enforcement thereof to be against public policy, and in doing so, balance important values such as fairness, reasonableness and Ubuntu in support thereof.

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