Fairness in contracts

BRIAN MARTIN,
Executive Director Legal and Compliance,
Renasa Insurance Company Limited

The classical model of the law of contract in South Africa is based upon the assumption that the parties to a contract act out of freedom of choice and that when entering into a contact they enjoy more or less equal bargaining power.

This model is based on the premise that there is a near perfect degree of competition in the market place and the parties negotiate the terms of their contract on an equal footing. In reality this is seldom the case.

Historically, legal jurisprudence has favoured the sanctity of contract above the notion of fairness on the grounds that Courts seek to promote legal and commercial certainty by enforcing contracts which have been freely and properly entered into between the parties, even if the terms may be unfair and one sided.

However, the classical norms associated with the doctrine of sanctity of contract are increasingly being criticised as being out of touch with the realities of a modern consumer driven economy and with the provisions and values underlying the Constitution of the Republic of South Africa. Even the Constitutional Court itself has been slow to embrace the principle of good faith as in an essential component of a contract requiring fairness as an essential component of the contract (see *Everfresh Market Virginia (Pty) Limited v Shop Rite Checkers (Pty) Ltd 2012 (1) SA 256(CC)*.

Generally speaking, the doctrine of freedom of contract means that the parties to the contract are free to decide whether or not to contract with each other and if so, on what terms. The idea is that the creation of a contract should reflect the result of free choice, without any external interference and accordingly once a Court is satisfied that a contract has been entered into freely, with the intention of creating binding obligations, the provisions of the contract should be upheld and enforced and the court should only interfere with contractual provisions agreed upon between the parties in exceptional cases.

In following this approach, our Courts have favoured certainty about fairness and have adopted the narrow view that the role of the Court is to ensure procedural as opposed to substantive fairness in relation to contractual obligations. This rather idealist view of a contractual relationship overlooks the fact that frequently a party to a contract is in a weak bargaining position and has little option but to contract on harsh and oppressive terms. Often a party to a contract has no bargaining position at all, and is not able to negotiate the terms of the contract which are imposed on a "take it or leave it basis". This is particularly so in relation to service contracts where a supplier may have a monopoly or dominant position in a market.

"THIS RATHER IDEALIST VIEW OF A CONTRACTUAL RELATIONSHIP OVERLOOKS THE FACT THAT FREQUENTLY A PARTY TO A CONTRACT IS IN A WEAK BARGAINING POSITION"

Whilst the Constitutional Court has suggested that public policy would preclude the enforcement of a contractual term in circumstances where the enforcement would be unjust and unreasonable, good faith is an abstract value and cannot be employed alone to intervene in contractual relationships. The mere fact that a term of a contract is unfair or might operate harshly does not, in itself, render a contract open to attack and reasonableness and fairness are not free standing requirements for the exercise of the contractual right. Consequently, a Court will not refuse to give effect to the

implementation of a contract simply because the implementation is regarded by an individual Judge as unreasonable or unfair.

This traditional approach fails to give due recognition to the notion of good faith and the necessity for contracting parties to be subject to the values of society when exercising contractual rights. The notion of fairness on the other hand, is based on a recognition of what is economically and generally viable, fair and

reasonable. Whilst in theory public policy may be used to balance the interests of sanctity of contract and fairness this rarely happens in practice. A good example of fairness being used as a yardstick in contractual obligations is to be found in restraint of trade agreements. A Restraint of Trade which is unreasonable is regarded as being against public policy and will not be enforced. In such disputes Judges are required to balance the doctrine of freedom of contract and freedom of trade, which is also a right.

Our common law has long recognised that agreements which are contrary to public policy may be declared invalid on that ground. Public policy is rooted in the values that underline the constitution, which embraces notions of fairness, justice, equity and reasonableness. Making fairness and reasonableness the focus of any public policy enquiry may serve to better balance the concept of sanctity of contract with fairness in contract law. Greater emphasis should be given to ensuring fairness in all contractual obligations, rather than a blind adherence to the notion of freedom of contract which has proven to be susceptible to abuse.

The sentiment of considering fairness in relation to contractually assumed obligations has increasingly found favour with the Constitutional Court, which has held that *"the role of the Courts is not merely to enforce contracts, but also to ensure a minimum degree of fairness, which includes consideration of the relative position of the contracting parties be observed."* (see *United Reform Church, De Doorns v President of the Republic of South African & Others 2013 5BCLR573 (WCC))*. Consequently, in the future it may be expected that unequal bargaining power will be regarded as a relevant consideration in determining whether a contractual term is contrary to public policy or not.

These considerations should be extended to liability provisions in contracts, which primarily seek to deny a claimant judicial redress for wrong doing. Such provisions may be struck out on the grounds that they offend against notions of justice and fairness. Consequently disclaimer notices and exemption clauses, so often found in contractual relationships, may not in the future provide an owner of property and others in a similar position, with a mechanism for the avoidance of liability for wrong doing.

The notion of fairness is increasingly being employed in alternative dispute resolution and is a principle which underlies the operation of Ombud schemes and the Consumer Protection Act (CPA). The CPA attempts to protect the interest of consumers by achieving a better balance between principles and policies so as to achieve a greater level of justice and fairness in commercial contracts. The CPA seeks to embrace and entrench the constitutional values of dignity and equality recognising that contracts form part of the fabric of society and as such should exist and function within the realm of the values and interests of society. With this in mind, in terms of the Act certain terms and conditions in contracts are prohibited outright and are regarded as void to the extent of non-compliance with the Act. Examples of such terms are

those aimed at defeating the purposes and policy of the CPA, misleading or deceiving the consumer, or subjecting the consumer to fraudulent conduct.

Terms that directly or indirectly purport to waive or deprive a consumer of a right, and terms that set aside or override the effect of the provisions of the CPA, or which authorises the supplier to do anything that is unlawful, will be struck out. Furthermore, a term that purports to limit or exclude the liability of the supplier for harm caused by gross negligence, as well as a term that constitutes an assumption of risk by the consumer or which imposes an obligation on a consumer to assume the risk of handling of any goods, will likewise be regarded as invalid.

Whilst excluding liability for gross negligence, the CPA, by implication, still permits the exclusion of liability for ordinary negligence, provided that the exemption has been signed or initialled by the consumer. However, even where a contractual term is not prohibited outright by the CPA, it will still be subject to the requirement of fairness and reasonableness. Section 48 of the CPA confers upon a consumer the right to fair, just and reasonable terms and conditions.

In terms of the Act, a term that is unfair, unreasonable and unjust is one which is excessively one-sided in favour of the supplier, is so adverse to the consumer as to be inequitable or was induced by a supplier's false misleading or deceptive misrepresentation. Certain terms, their fact, nature and effect, must also be drawn to the attention of the consumer before a transaction is entered into and a consumer must be given adequate opportunity to receive and comprehend any provisional notice. A term will also be construed as being unfair, unreasonable or unjust where its existence, nature and effect were not adequately drawn to the attention of the consumer in a clear and conspicuous manner before the transaction was entered into.

Whilst the CPA represents a bold step towards the introduction of the notion of fairness and equity as a contractual norm, unfortunately the provisions of the CPA only apply to a consumer who is a natural person and who purchases goods for private purposes. Nevertheless, in the future, it is to be anticipated that the provisions of the CPA may increasingly oblige our Courts to reshape the established principles and doctrine of contract law to be in greater alignment with the principles enshrined in the CPA. It is to be hoped that our Courts will in the future develop the notion of fairness in all contracts, so that the doctrine permeates the whole scope of the law of contract. The problem with unfair contractual terms and the abuse of the doctrine of freedom of contract by a dominant party is prevalent throughout the entire scope of the law of contract. Fairness should be regarded as an overriding requirement in all contracts so as to ensure that freedom and sanctity of contract do not prevail over fairness and equity to the determent of a contracting party.

The duty to act in good faith should be regarded as the expected standard in all forms of contracts.