IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 55323/20

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

In the matter between:

M MAGOME INCORPORATED **APPLICANT**
(IN THE APPLICATION FOR LEAVE TO APPEAL)

And

MERCEDES-BENZ FINANCIAL SERVICES **RESPONDENT**
(IN THE APPLICATION FOR LEAVE TO APPEAL)

APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] This court granted summary judgment against the applicant (M Magome Incorporated) in favour of the respondent (Mercedes-Benz Financial Services).

[2] The applicant now applies for leave to appeal against the order and judgment granted on 25 January 2022.

[3] I do not intend repeating what is stated in the judgment. Suffice to point out that this court held that the written installment sale agreement ("*the agreement"*) was cancelled if regard is had to what is stated in the summons dated 28 October 2020. The cancellation was prompted by the fact that the applicant was in arrears with the monthly installments on the motor vehicle. The court accordingly held that the cancellation was lawful in the circumstances. Also, the applicant did not raise any triable issue in its plea. Most of what is contained in the plea is a bare denial and does not satisfy the requirements of Rule 32 of the Rules. Summary judgment was therefore granted in favour of the respondent.

[4] The applicant for the first time in argument raised the issue of the unlawful cancellation of the contract when the application for summary judgment was heard. This defense is nowhere to be found on the papers.

[5] Now in the application for leave to appeal, a further new submission is raised in the applicant's heads of argument to the effect that, when the Sheriff served the summons, the applicant had already left the premises and therefore there was no proper communication of the cancellation to the applicant.

[6] There is no merit in this submission. The summons was served at the chosen *domicilium citandi et executandi* which, if reference is made to the agreement, corresponds what is recorded therein in respect of the *domicilium citandi et executandi*. The applicant also initialed next to the recorded address which was corrected in the agreement. What this new version fails to appreciate is the fact that the applicant did in fact, and on 19 August 2021, file a notice of intention to defend. It

can therefore hardly now be contended that the applicant was not aware of the summons and what was contained therein (more specifically that the contract was cancelled).

[7] The further argument raised was that, in the event that this court finds that the contract was indeed cancelled, the court should find that the cancellation should not be confirmed because that would not be in the *interest of fairness and public policy* particularly in circumstances where the applicant had remedied the breach by effecting payment of all the arrears and in light of the fact that the applicant has paid in advance three of the remaining months of the contract (February to April 2022). The argument is formulated as follows in the heads of argument:

> *"It will be argued at the hearing of this Application that the Court has inherent powers to determine the proper constitutional approach with regards to the judicial enforcement of contractual terms, with a particular emphasis on the public policy grounds upon which a court may exercise its discretion to enforce or not to enforce particular terms.*
>
> *…..*
>
> *It is also submitted that the Learned Judge erred in not exercising judicial control over the Respondent persisting with termination of the Agreement in circumstances where such termination would be unfair and being against public policy."*

[8] It is accepted that courts may interfere with contractual terms which are incompatible with constitutional principles or public policy and declare such terms unenforceable. This much is clear from the decision in *Barkhuizen v Napier*.[1] In this matter the Constitutional Court said the following:

> *"[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the state is a party. This does not arise in this case.*
>
> *[28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy*

[1] 2007 (5) SA 323 (CC) ("*Barkhuizen*"). The facts relevant to that matter differ fundamentally to what is at issue in the present matter. In that matter the question was whether a time-limiting clause in insurance contracts are unenforceable if it resulted in unfairness or unreasonableness. The principles relating to unfairness and unreasonableness are, however, relevant to this matter.

represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.

<u>The determination of fairness</u>

[56] There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.

[57] The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded

to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.

[58] The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time-limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply."

[9] To recap: In the present matter, the applicant and respondent concluded an installment sale agreement in terms whereof ownership of the vehicle remained vested in the respondent. It is common cause that the applicant had failed to timeously pay the monthly installments. In terms of the contract the respondent had the right the cancel the contract and claim return of the vehicle, which the respondent did.

[10] Does public policy, subject to the considerations of reasonableness and fairness,[2] tolerate a cancellation clause in circumstances where the one contracting party fails to comply with a fundamental obligation in terms of the contract? This question must be considered with reference to the specific facts of this matter, particularly in light of the reason for the cancellation of the contract (non-compliance with the repayment obligations).

[11] A case in point is *Bredenkamp and others v Standard Bank of South Africa Ltd*[3] where the Supreme Court of Appeals considered whether a term entitling a bank to terminate a contract on reasonable notice is fair and reasonable and therefore not in conflict with any constitutional values. In that matter the case for *Bredenkamp* was not that the closing of his bank account compromised a constitutional value. The case was about fairness. The court specifically considered the decision in *Barkhuizen* and held as follows:

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[2] *Ibid* ad para [48].
[3] 2010 (4) SA 468 (SCA) ("*Bredenkamp*").

"[50] With all due respect, I do not believe that the judgment [Barkhuizen] held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated. Had it been otherwise I do not believe that Ngcobo J would have said this (para 57):

> *'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress.'*

[51] It is also not without significance that there is no indication in either of the minority judgments of Moseneke ACJ and Sachs J of an overarching requirement of fairness. Instead, both judgments dealt with the matter as one of public policy, as found in the Constitution, and there is nothing in them that supports the appellants' argument."

[12] The applicant in the present matter likewise presented no argument on the question whether the cancellation implicated any public policy considerations found in the constitution. The submission simply was that it was against public policy to cancel a contract where the arrears have been paid up.

[13] I can find no "*constitutional niche or other public policy consideration*"[4] justifying accepting the applicant's contention that the cancellation clause is contrary to public policy merely because the arrears have been paid up and because the applicant has paid three months' installments in advance, particularly in circumstances where the contract was cancelled due to a failure on the part of the applicant to timeously pay the installments on the motor vehicle. As the Court in *Bredenkamp* explained: The fairness of exercising contractual rights do not arise when no public policy

[4] *Ibid* ad para [60].

considerations or constitutional values are implicated.[5] Accordingly, I can find no reason to conclude that the cancellation of the contract was unfair.[6]

Application for leave to appeal: Test

[14] Section 17 of the Superior Courts Act[7], deals *inter alia* with applications for leave to appeal, and section 17(1) states as follows:

> "*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:*
>
> *(a)(i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"*

[15] The criterion of "*a reasonable prospect of success*" as is stated in section 17(1)(a)(i) of the Superior Courts Act, have been interpreted as requiring that a court considering an application for leave to appeal must consider whether another court "*would*" (not "*might*") come to a different conclusion. In the matter of the *Mont Chevaux Trust v Goosen and 18 Others*[8], Bertelsman J, explained what the threshold is for granting leave to appeal as follows:

> "*[6] It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave*

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[5] *Ibid*: "[*30] The second is this: although the appellants, in the part quoted from the notice of motion, recited nearly every provision of the Bill of Rights, counsel stated that they do not suggest that the exercise of the right to terminate 'implicated' any constitutional principle. It is accordingly not their case that the closing of the account compromised constitutional democracy, or their dignity, freedom or right to equality and the like, and the expansive interpretation of the Bill of Rights does accordingly not arise (s 39(1)). The case is about fairness as an overarching principle, and nothing more."*

[6] *Ibid: "[60] I find it difficult to perceive the fairness of imposing on a bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The appellants were unable to find a constitutional niche or other public policy consideration justifying their demand. There was, accordingly, in the words of Moseneke DCJ, no 'unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'*."

[7] Act 10 of 2013.

[8] 2014 JBR 2325 (LCC)

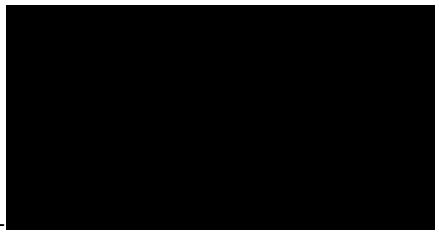
to appeal should be granted was a reasonable prospect that another court might come to a different conclusion: see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[16] I am not persuaded, having reconsidered the matter, that there is a reasonable prospect of success that another Court *would* come to a different finding for the reasons set out in this judgment.

Order

[17] In the event, the following order is made:

The application for leave to appeal is dismissed with costs.



A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 February 2022.

Appearances

For the defendant / applicant:	Adv Mataboga
Instructed by:	Magome Inc
For the plaintiff / respondent:	Adv CJ Welgemoed
Instructed by:	Strauss Daly Inc