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Wanders into the minefield: Value and reasonableness no guard for restriction of exchange

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Abstract

The constitution of the Republic of South Africa 108 of 1996 has an influence on the development of private law and specifically the law of contract. The Constitution imposes on every court, tribunal or forum a positive duty. The court must develop the common law in accordance with the Bill of Rights and the values underlying it, and that means that the common law must be tested against those values. Our present law of contract, for instance, still adopts an individualistic free market view as its point of departure. The emphasis placed on the law of contract on the rule that in principle contracts are concluded on the basis of consensus points to the recognition of private autonomy as the basis for contractual liability. Our present law of contract still accepts as its point of departure the presumed independence, economic equality, autonomy and responsibility of contactants. In principle, that on which the parties agreed, actually or constructively, is enforced without further ado. No other topic in the law of contract received as much attention during the last ten years in our case law as restraints. Any litigant who ventures into this minefield should treat it very carefully. The research questions are; is there an interest of one of the party which deserves protection after termination of the agreement? Is such an interest endangered by the other party? If so, does such interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? There is a scant opportunity for a contactant to avoid liability. He can do so only if he can rely on one of the *NUMERUS CLAUSUS* of available defences. This paper will prove that general considerations of equity and fairness cannot as such provide a defence and that those policies in the corporate arena must be changed.

Keywords: Defences, party autonomy, contract, restraints and free market.

INTRODUCTION

The constitution of the Republic of South Africa 108 of 1996 has an influence on the development of private law and specifically the law of contract. The constitution imposes on every court, tribunal or forum a positive duty. The court must develop the common law in accordance with the Bill of Rights and the values underlying it, and that means that the common law must be tested against those values. The provisions of the constitution are binding on all branches and organs of state. It also means that the provisions of the constitution have priority over any other laws in the country (Mubangizi, 2004).

Our present law of contract, for instance, still adopts an individualistic free market view as its point of departure. The emphasis placed on the law of contract the rule that in principle contracts are concluded on the basis of consensus points to the recognition of private autonomy as the basis for contractual liability. Private autonomy means *inter alia*, that everyone who makes a decision must assume responsibility for his decisions. The underlying reasoning is that contractants, as independent, free participants in legal intercourse contract with one another of their own free will and on an equal footing. Every contractant is autonomous; he or she is free to decide whether. With whom and on which terms they wishes to contract. As long as the contractants, judges externally, have reached consensus, the courts as a rule are not interested in the fairness of the transaction that has been concluded. The basic rule is *pacta suntsevanda:* agreements must be honoured. On the onehand, the emphasis fell on *pacta*, in other words that

mere agreement could be binding without recourse to form. On the other hand, the words *servanda sunt* indicated that it was imperative to honour simple agreements (Van der Merwe et al., 1999).

The law of contract still accepts as its point of departure the presumed independence, economic equality, autonomy and responsibility of contractants. In principle that, on which the parties agreed, actually or constructively, is enforced without further ado. There is scant opportunity for a contractant to avoid availability. He can do so only if he can rely on one of the *numerus clauses* of available defences. This paper will prove that general considerations of equity and fairness cannot as such provide a defence.

The limitations imposed by the common law on the rights of contractants are by their very nature of general application. A court need therefore only consider in addition whether the particular common law limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; in other words, whether the particular limitations comply with the requirements of reasonableness and justifiableness. This requirement does not, however, necessarily ensure that development of the law takes place. As can be expected, it is obviously very difficult for judges, who have been steeped in the principles of the common law during their entire adult life, to hold that the common law limitations on the rights embodies in the Bill of Rights are reasonable or in conflict with the values that underlie the Bill.

Jurisprudence on party autonomy in South African law appears not to be well developed. This paper therefore seeks to explore the concept of party autonomy with reference to the establishment of principles recognized both in foreign domestic systems of law and in international instruments. These principles include the choice of ‘choice of law’, its application, substitution and scission.

PARTY AUTONOMY

Party autonomy is premised on the notion that the parties to a contract are entitled not only to create rights and obligations between themselves but also that they are free to choose the law applicable to their contract. In other words, the parties to a contract are free to determine the law governing their contract. This choice of law by the parties to govern their contract is referred to as the ‘proper law’ or the ‘applicable law’ that is the *lexcausae* or the *lex voluntatis* of the contract. The former isgenerally used by academic writers on conflict rules in English and Commonwealth contract law (Edwards, 1989), and the latter by the drafters of international instruments.

According to the classical conception of private international law (a tradition which spans some five centuries in Western legal development from Bartolus to Von Savigny) choice-of-law rules contain a necessary connecting factor. Connecting factors which feature prominently in the category of contractual obligations include: the domicile of the parties, the place of incorporation, the intention of the parties, the flag of a ship, the place of making or performance of a contract and the *situs* or situation of property. Where the parties have not made a choice of law applicable to their contract, then the law with which the contract has the closest connection is the otherwise applicable law. The otherwise applicable law is generally determined by the courts and arbitration tribunals. In other words, choice-of-law rule lack material content and they serve merely as justification for the courts of the South African forum when they have to apply either South African substantive law or the principles of a foreign legal system, as the case may be.

The concept of party autonomy has been favoured by academic writers even to the point reverence (Forsythe, 1990) and developed by judicial decisions for the reason that it promotes certainty and predictability in contractual relations (Plender, 1999). There are other reasons too for the recognition of the notion of party autonomy. These may include the protection of justified expectations of the parties; the choice of a ‘neutral law’, though foreign to the parties, is nevertheless well developed in the particular field of business and is of wide application (Forsythe, 1990). Accordingly, party autonomy is an important principle embodied in the contract conflicts rules of private international law of all modern legal systems (Plender, 2002).

HISTORICAL BACKGROUND

In the early decisions of the English courts affecting contracts the tendency was to apply the *lex locicontractus* to each and every case regardless of thecontractual issue involved.

Certain principles which are derived from the notion of autonomy influence the doctrines, structure and content of the law of contract. Autonomy also entails that the decision-maker must accept responsibility for his considered actions (van der Merwe, 1999; 10).

The concept of party autonomy appears not to be widely developed in South African jurisprudence and consequently much reliance has been placed on other legal systems, particularly English law in its application (Edwards, 2000).

Numerous reported decisions in the South African *rechtskringen* (legal circle) attest to the search, fromroughly 1840 onwards, by the courts for the appropriate law to govern contractual matters involving a foreign element. In Livingston Syers & Co v Dickson, Burnie & Co (1841 2 Menz 239) one finds the Cape Supreme

Court, when dealing with a foreign bill of exchange, noting that the *lex loci contractus* "is not absolute and universally peremptory rule, but applies only in those cases intended that their contract should be ascertain and regulated by the law; and ceases to apply in any case in which the circumstances are such as to afford stronger grounds for presuming that the parties intended their contract to be ascertained and regulated by some other law, as for example the *lex loci solutionis.*

It was in the leading case of Standard Bank of S A Ltd v Efroiken and Newman (1924 AD 171) that the thinking behind the English concept of the proper law may fairly be regarded as having been received into South African private international law and is regarded as the seminal decision in South African jurisprudence relating to party autonomy. In this case the court held that in the absence of an express choice of law for their contract, the presumed intention of the parties should play a role in ascertaining the proper law of their contract. But that also must not be taken too literally, for, where parties did not give the matter a thought, courts of law of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties.

This decision was subsequently elaborated on in Guggenheim v Rosenbaum (1961 4SA 21 (W) 31A) where the Court held that the proper law of the parties' contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it (Edwards, 1990: 298). From this decision, it may be suggested that the proper law is determined by an express choice of law by the parties or by an implied or tacit choice of law by the parties or in the absence of that, the choice of law may be imputed to the parties.

PROBLEM INVESTIGATED: THE CONTINUING SEARCH FOR A FLEXIBLE CHOICE-OF-LAW RULE

Party autonomy, which is predicated on the philosophical premise of individual autonomy, would continue to play an important role in international commercial contracts. For that reason it would be necessary to examine those principles, which have evolved from judicial decisions and academic writings regarding its application.

Having decided that no single proper law (no matter how broadly based) can solve every potential point of dispute between the parties, a few comments seem necessary on the utility of the proper law doctrine especially in those cases where the parties have failed to select the law govern their contract. It has been said, and not without reason, that one of the major defects of the proper law doctrine, given the absence of a choice of law, is that the lack of specificity in the now accepted "closest connection" test may require a House of Lords decision to determine what law governs the disputed contract.

PRINCIPLES OF PARTY AUTONOMY

Choice of the proper law

As stated above, the choice of law may be express or tacit i.e. implied. An express agreement may be oral or written, usually in the form of a choice-of-law clause in a contract. In the case of an implied or tacit choice of law, this may be inferred from the terms of the contract (Wolfe, 2002) and the circumstances surrounding the conclusion of the contract (Edwards, 1989). In certain commercial contracts several indicia may establish an inferred or implied choice of law such as for example a jurisdiction or arbitration clause from which a strong inference may be drawn that the domestic law of the chosen forum or arbitrator should apply as the proper law of the contract. Other examples of indicia (indication) are the form of the document used, the use of business jargon or concepts peculiar to the business activity, a choice-of-law clause in previous dealings even a reference to the rules of a particular legal system (Collier 1998). It may even be inferred from the choice of law applicable to a particular aspect of the contract that the same legal system applied to the whole contract. (Wolfe 2002). Whether the choice of law is an express one or an implied one, the intention of the parties as to their choice is determinative (Wolfe 2002).

Application of the proper law

Once the proper law of the contract has been determined either by an express choice or an inferred one, and then the contract is governed by all the provisions of the legal system to which the proper law belongs (Wolfe, 2002). The proper law of the contract governs most of the contractual issues such as the nature, effect and interpretation of the contract, the ascertainment and extent as well as the discharge of the parties' obligations, essential validity, and mode of performance and the non-enforceability of the contract by reason of illegality (Edwards, 1990). However, contractual issues such as legality, formal validity and contractual capacity are governed by the otherwise applicable law as determined by a court of law or arbitral tribunal (Edwards, 1990).

Where there are changes in the law after the parties had agreed on their choice of law, the contract is subject to such changes in the application of the common law. But, in the case of statutory rules that the parties have agreed shall apply to their contract, the interpretation and application of the rules will be as they were at the time of the agreement (Wolfe, 2002).

Substitution of a previously chosen law

Another principle of party autonomy is that the parties

may substitute a new legal system for the one previously chosen provided that the new choice is bona fide and legal. The validity of the new choice of law is determined by the application of the previously chosen law (Plendar 2002).

Depecage or scission of the contract

Depecage or picking and choosing of a contract is a principle of party autonomy whereby the parties to a contract may divide a contract into several separate issues and agree that they may be governed by different systems of law and not by just a single proper law (Wolfe, 2002). In this sense depecage is indeed a logical manifestation of the principle of party autonomy. Like the choice of the proper law by the parties, such severability of the contract must be expressed or demonstrated with reasonable certainty. Thus for example, in a contract of sale the parties may agree that the law of the place of performance will govern the performance of their obligations. Similarly, the law of the place where payment is to be made will govern the currency in which payment will be made. The qualified application of this principle is recognised in the Rome Convention of 1980. Within the South African context the law relating to depecage, however, does not appear to be unequivocal (Edwards, 1990).

Limitations on party autonomy

The question that arises is whether limitations can be imposed on the extent of the parties' freedom in choosing a law to govern their contract.

Once the parties have chosen a law to govern their contract, they are bound by all the provisions of that legal system. All legal systems consist of provisions that are either compulsory i.e. that is imperative or prohibitory (the *ius cogens*) or optional (the *ius dispositivum)* that is thatis provisions of the otherwise applicable legal system which the parties may avoid by a choice of law. Where optional rules of a legal system are concerned the parties are free to deal with the operation of them in their con-tract. Thus for example, the parties to a contract of sale may exclude the warranty against latent defects or even make its application more stringent. And this is generally the case in the law of contracts (Forsythe, 1989).

However, with regard to whether the parties by their choice of law could avoid a *ius cogens* that is that is a mandatory provision of an otherwise applicable law, Wolfe is of the opinion that they cannot (Wolfe, 2002). The English case of Vita Food Products v Unus Shipping Company where the Court per Lord Wright held that the parties to a contract are free to select as the applicable law a system with which their contract has no factual connection provided that the intention expressed by the parties is bona fide and legal and provided also that there is no reason for avoiding the choice on the ground of public policy ([1939] ac (P.C.) 277 at 289 to 290 as cited in Wolfe n.1. Plendar, 89 n 15, Edwards 368 n 13). Thus with regard to the last qualification, where a choice of law governing a contract is contrary to the public policy (order public) of the forum it will not be enforced in that forum i.e. that is the *lex fori*. However, not every compulsory rule of law of the forum constitutes a rule of public policy (Wolfe 2002). Thus for example, where the lack of consideration in a contract under English law is a bar to its validity this is not so under South African law where intention of the parties is paramount. The South African law will be enforced in an English forum, as it does not offend against an English rule of public policy.

According to Wolfe the requirements of bona fide and legality are not without ambiguity. The mere intention of eliminating certain compulsory rules that would normally be applicable is neither necessary nor sufficient to constitute male fides. 'Some morally impeachable or some anomalous and unreasonable choice of law' would probably be required by the English courts to render the parties' intention as male fide (Wolfe, 2002). Therefore the English courts would uphold a choice of law, which avoids a mandatory rule for some 'sound idea of business convenience and common sense'. The term 'legality' however, has not been qualified but Wolfe speculates that it could be a reference to the legality of a contract or its performance according to the domestic law of the place of contracting or the place of performance (Wolfe, 2002).

In the Canadian case of United Nations v Atlantic Seaways Corporation ([1979] 2FC 514 - 555, 99 DLR (3rd) 609 621 cited in Edwards 363 n13) the requirements of "bona fide and legal" were interpreted to fashion an evasion doctrine in that the proper law must not have been chosen to evade a mandatory law with which the contract has its closest and most real connection (Edwards, 1990). The doctrine of evasion was applied in an Australian case where a choice of law by the parties, which sought to evade a statutory provision of Queensland, was held to be invalid (Edwards, 1990).

American jurisprudence also recognizes the notion of party autonomy as well as limitations on party autonomy. However, where a choice-of-law conflicts with the law of the forum state i.e. the *lex fori* it is not struck down merely for that reason. It is where the conflict 'rises to the level of public policy' that the American courts would consider striking it down and that too where the public policy is 'strong' or 'fundamental' (Scoles and Hay, 1992). Thus also in the case of adhesion contracts (Scoles and Hay, 1992) where an economically stronger party drafts a contract unilaterally, a choice-of-law clause would not be struck down simply because of inequality of bargaining power or a lack of negotiations. The choice-of-law clause will be struck down only if its operation would be to the

detriment of the weaker party (Scoles and Hay, 1992) as it would offend against a strong public policy.

As regards South African jurisprudence, it appears that the courts have never been called upon to determine the limits of party autonomy (Edwards, 1990). With reference to South African case-law, in Commissioner of Inland Revenue v Estate Greenacre (1936 NPD 225) and Premier Wire and Steel Co Ltd v Marsk Line (1969 (3) SA 499 (C) although it is not clear whether parties by their choice of law could avoid a *ius cogens*, Forsythe is of the opinion that it is possible. While academic writers are of the view that a wide concept of party autonomy should be favoured in South African law, its application should not be absolute. Thus a choice of law that evades a mandatory rule in favour of the weaker party in contractual relations such as those that protect consumers should not be upheld by a court for being *fraus legis.* An example of such a mandatory provision applicable to electronic contracts is section 47 of South Africa's Electronic Communications and Transactions Act of 2002 which provides for the protection of consumers irres-pective of the legal system applicable to the agreement in question. Section 48 provides that any agreement that excludes any rights of a consumer in terms of Chapter 7 of the Act shall be null and void. The Act may be described as a directly applicable statute that limits party autonomy. Directly applicable statutes may be either express or implied. An example of a directly applicable statute by implication is the Basic Conditions of Employment Act of 1983 in terms of which an employer may not avoid its provisions in favour of an employee by a choice of law which is not the *lex causae* (Rome Convention Articles 5 and 6). But the question that arises is whether and to what extent would a South African court apply a directly applicable statute or a principle of public policy of a foreign legal system. It appears that it would not do so where the performance of the contract is a crime in the place where the act is to be performed (Forsythe, 1990). In contrast, however, where the choice of law avoids a mandatory rule which otherwise would frustrate the commercial goals or business interests of the parties, such a choice ought to be recognised and applied (Edwards, 1990) Thus it may be stated that a choice-of-law clause in a contract would be struck down if it offends against some public policy embodied in a statute of a state whose law would have been the otherwise applicable law, or where it would result in substantial injustice to a party in an inferior bargaining position. It should be noted also that a choice-of-law clause may not be struck down by a statute in its entirety but only in respect of matters hit by it (Collier, 1998).

RECOGNITION BY THE APPEAL COURT

International conventions may also impose limits on party autonomy, examples of which are the International Monetary Fund Agreement (Bretton Woods Agreement) of 1944, the International Institute for the unification of Private Law (UNIDROIT) and Principles of International Commercial Contracts and the Rome Convention of 1980. States that are members of the International Monetary Fund agreement are bound by Article VIII 2(b) of the Bretton Woods Agreement not to enforce exchange contracts that conflict with the exchange control regulations of other member states imposed in deference to the Bretton Woods Agreement. The UNIDROIT Principles in Article 1.4 provides for the application of mandatory rules, whether of national, international or supranational origin, which are applicable in terms of the relevant rules of private international law. Also in terms of Article 1.5 it provides for mandatory Principles embodied in it from which the parties themselves may not derogate. The European Economic Community's Convention on the Law Applicable to Contractual Obligations (The Rome Convention of 1980) has been widely acknowledged and consequently accepted as the instrument embodying harmonized rules of the law applicable to contracts. It represents a codification of the private international law rules relating to contract that 'are similar, if not identical, throughout the common law world outside the United States.' A clear manifestation of this is the provision relating to the principles of party autonomy and the freedom of choice of law applicable to the contract in Article 3 under Title II Uniform Rules.

The view that a contractant must accept responsibility for his expressions of will and that of his co-contractant except in highly exceptional circumstances was once again recognised by the Appeal Court. In *Brisley vDrotsky* (2002 (4) SA 1 (SCA) paragraph 15g-16F) it wasdecide if one formally manifests consent to a proposed contract, one is bound because *pacta sunt servanda.*

In Afrox Health care v Strydom (2002 (6) SA 21 (SCA)) the Brisley decision was followed without considering the possible constitutional implications of enforcing the particular contract (86E/F -87D/E). Even in common law the rule that a contractant must keep his word is also not applied without exception. The contractant can avoid contractual liability by relying on the fact that the contract would be illegal or against public interest or that he was persuaded by misinterpretation, duress or undue influence to enter into the contract in spite of consensus has been reached.

In the case of Magna Alloys and Research v Ellis (1984 (4) SA 874 (A)) the Appeal court held, per Rabie CJ and relying on the rule *pacta sunt servanda,* that a restraint of trade was enforceable per se. In principle, a former employee was bound by a restraint of trade which he had taken upon himself contractually. If his erstwhile employer wished to enforce the restraint of trade against him, the onus rested on the former employee to satisfy the court that the restraint was invalid *ab initio* or at least

unenforceable against him. To achieve this he had to prove that the restraint clause was illegal or at least that the manner in which the former employer wished to enforce the clause against him was against public policy and interest.

In practice this judgement weakened the position of the employee as against the employer considerably. Previously, the English approach was followed in any number of decisions of the provincial and local decisions like in Van de Pol v Silbermann (1952 (2) SA 561 (A) 569E-F). According to this approach the point of departure was that restraint clauses were *prima facie* against public policy and as such unenforceable. The onus then rested on the former employer to persuade the court that in the particular instance enforcing the restraint clause would be in accordance with public policy. If the former erstwhile employer could not satisfy this onus of proof, the restraint clause was not enforced. What seemed in the Magna Alloys case to be a huge victory for the pure principles of Roman - Dutch law, turned out to be a huge step backwards for employees?

Until the 1980's the *exception doli generalis* was also at the disposal of a contractant who wished to escape the unfair consequences of a contract. This defence, stemming form Roman law, was used to oppose an action where the claim would be lawful strictly in terms of the normal requirements for contractual liability, but where bringing the action was it regarded as *dolus* (gross inequity in this context).

In Bank of Lisbon and South Africa v De Ornelas (1988 (3) SA 580 (A)), however, the Appeal Court decided per Joubert JA that the *exception doli generalis* was not part of modern law. This decision did away with yet another instrument for avoiding contractual liability on the ground of what is good and just.

More recently, our case law briefly recognised the possibility that the unfair consequences of a contract could be avoided by relying on *bona fides* as part of the basis of contractual liability. In his minority judgement in Eerste Nasionale Bank van Suidelike Afrika v Saayman (1997 (4) SA 302 (SCA)) Olivier JA reiterated that in Roma-Dutch Law all contracts were regarded as *negotiabonae fidei* (322C-I). This meant that both in concludingand in carrying out their contract contractants had a mutual duty of good faith. In this particular case an elderly woman was sued in terms of a contract of suretyship and a concomitant agreement of cession, which she had signed when she was already 85 years old and quite obviously physically weak and confused. Olivier JA held that in accordance with the requirement of *bonafides* the women could not be held liable in terms of thecontract or the cession. According to Olivier JA this was the position even though, on the facts, it could not be found that at the time of concluding the transaction the woman did not have the necessary capacity to act. In the particular circumstances public interest required the creditor to ensure that she properly understood the full and actual meaning and implications of the contract of suretyship and the cession. Because the creditor had neglected to do so, its claim was dismissed. The judgment of Olivier JA appeared to open door to more nuanced approach to contractual liability. Although it was a minority judgement, it was not rejected by the majority of the court. The majority judgement was simply based on different grounds.

PARTY AUTONOMY AND THE SOUTH AFRICAN BILL OF RIGHTS

Party autonomy, which has been nationalised on the universally recognised philosophical premise of individual autonomy, is an entrenched principle of private international law i.e. that is the conflicts law of a nation state. The question is whether it enjoys the same protection and respect as the fundamental rights and freedoms enshrined in the South African Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996).

At first blush, party autonomy is not a freedom or right that is specifically protected by the Constitution nor does the Constitution 'posit an independent right to autonomy' as stated in Jordan and Others v The State CCT 31/01 at [53] What the Constitution specifically recognizes and protects is the right to freedom of trade. Section 22 of the Constitution provides that '[e]very citizen has the right to choose their (sic) trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law' – law is understood to mean legislation, the common law and customary law. The choice of a trade suggests the pursuit of some commercial economic activity as distinguished from an occupation or profession. Implicit in such a construction is that freedom to trade would entail a freedom to contract of which party autonomy is a universally recognised principle. The inference is that the application of the principle of party autonomy is subject to constitutional scrutiny and for it to be recognised and protected it must pass constitutional muster.

It may be argued that the freedom to trade is applicable to 'citizens' who are considered to be natural persons and not necessarily applicable to a 'party' which may include artificial persons as well. Whether section 22 would be applicable to artificial persons is a question of interpretation of the Bill of Rights. Section 8 (4) specifically provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. But if 'citizen' is strictly interpreted as meaning a natural person, then it may be left to the courts to 'lift the corporate veil' and look to the members that control the affairs of the company (De Waal et al., 2000: 353).

If this cannot be so then recourse may be had to the doctrine of objective unconstitutionality. Thus where a law unconstitutionally violates a section 22 right of a citizen, it is objectively invalid. A corporate applicant having an interest in terms of section 38 of the Bill of Rights can challenge the constitutional validity of such a law without having to show that its own constitutional right has been infringed by that law (De Waal et al., 2000).

Alternatively, even if it is argued that the Bill of Rights does not protect those rights and freedoms not specifically enshrined in it and that the freedom to trade does not extend to include the freedom to contract, it is submitted that the notion of party autonomy and its application may still be subject to constitutional scrutiny with reference to other relevant provisions of the Constitution, viz sections 2 and 39 (3). The supremacy of the Constitution is specifically enunciated by the Founding Provisions of Chapter 1. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. As regards the interpretation of the Bill of Rights, section 39 (3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

RESTRAINT OF TRADE

To succeed in an application for an interdict on the ground of a restraint of trade an applicant must do the following:

- Must allege in his founding affidavit that the freedom of trade of the respondent is limited in terms of a contract or contractual provisions for the applicant's benefit.
- Must allege that his legitimate interests are protected by the restraint. Legitimate interests are the applicant's interest in trade secrets or the goodwill (the relationship with customers or clients, suppliers of goods and services and employees).
- Must allege that the respondent is infringing his aforesaid interests or that there is a reasonable apprehension that such an infringement will occur.
- Must in the notice of motion indicate the extent of the restraint which he wishes to be imposed on the respondent (the period of time and area the interdict should apply)?

The respondent may allege that the restraint of trade is unlawful since it infringes his constitutional right to choose his trade, occupation of profession freely (section 22 of the Constitution). He may in addition allege that the restraint is against good moral and therefore invalid from the start in that the restraint is couched in unreasonable wide terms and is terrorising and cannot be brought within legally acceptable limits by adaption of its wording or curtailment of the relief that is sought.

CONCLUSION

From the above it may be concluded that while party autonomy and the freedom to contract should be wide, it is nevertheless not absolute and may be limited by the common law, statutes and international conventions. But, however, since the very quintessence of the freedom of choice of law is an expression of individual autonomy, therefore any attempt to limit party autonomy should be exercised with considerable restraint whether by a court of law or by a law of general application.

The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness. For this reason, the law of contract has a dynamic and changing nature (Van der Merwe S et al.). The notion of party autonomy and its application therefore may still be subject to constitutional scrutiny. The respondent has a constitutional right to choose freely his trade, occupation or profession and is limited by the rules of the common law which must be reasonable and justifiable.

Restraint of trade contracts must not be against good morals or public interest and therefore the court could not be satisfied on a preponderance of probability. This paper will prove that general considerations of equity and fairness cannot as such provide a defence and that those policies in the corporate arena must be changed. Policy makers to make some options regarding framing the policies.

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Conventions and Instruments:
Convention on the Law Applicable to Contractual Obligations (The Rome Convention of 1980)
UNIDROIT Principles of International Commercial Contracts