Judicial Review of the Exercise of Discretionary Contractual Powers: South African Divergence?

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In common law jurisdictions, judicial review of the exercise of discretionary contractual powers (e.g. to terminate; to vary performance) tends to be tightly circumscribed. In English law, for example, courts are limited to ensuring that a contracting party’s discretion, as a matter of necessary implication, was exercised honestly for the purposes for which it was conferred, as well as rationally. In South Africa, by contrast, the equivalent judicial powers seem to be wider and growing. This divergence appears to flow from three local influences deriving from Roman law, from African customary law, and from South Africa’s 1996 Constitution and its Bill of Rights. This paper shall examine these developments in South African contract law to determine the extent to which it is now charting a different course.

This requires an examination of the three local influences mentioned. First is the civil law concept of *arbitrium boni viri*, which has been held by South African courts, in certain circumstances, to require contractual powers to be exercised ‘reasonably’. Is this distinct from the English standard of rationality or *Wednesbury* unreasonableness? Are South African courts willing, on this basis, to substitute their own judgment for that of a contracting party? The second is the African legal concept of *ubuntu*, which connotes a sense of human interdependence and communality. The Constitutional Court has indicated that *ubuntu* ought to inform the development and application of contract law, and may, on occasion, entail a duty to negotiate in good faith.

The third local influence is, of course, the Bill of Rights, which applies ‘horizontally’ to private relations. In the context of contract law, constitutional rights have been given indirect effect via the common-law rule that contractual terms, and exercises of contractual powers, must comply with ‘public policy’ as judicially developed. Earlier cases tackled consumer issues. For example, the courts have addressed the implications of the right to have access to adequate housing for mortgage contracts, and the impact of the right of access to court on short-term insurance contract time-
limits. But the influence of the Bill of Rights appears to be extending to the sphere of commercial, business-to-business contracting. The latest question, currently before the South African courts, is whether the removal of an advertisement on a billboard by the billboard owner – in terms of a discretionary contractual power of censorship – was contrary to the advertisers’ right to freedom of speech, in circumstances where the advertisement had political content that offended a section of the population.

An examination of these local influences – civilian, African, and constitutional – will reveal the ways in which the courts’ willingness to second-guess exercises of discretionary contractual power, in both consumer and commercial settings, is changing in South Africa. That, in turn, will contribute to understanding the extent to which a ‘mixed’ jurisdiction, which previously borrowed so much from English law, is loosening its ties with the common law tradition.