THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 569/04
REPORTABLE

In the matter between:

RONALD STUART NAPIER Appellant

and

BAREND PETRUS BARKHUIZEN Respondent

BEFORE: **MPATI DP, CAMERON JA, VAN HEERDEN JA, MLAMBO JA and CACHALIA AJA**

HEARD: **3 NOVEMBER 2005**

DELIVERED: **30 NOVEMBER 2005**

Constitution – application to law of contract – applies horizontally
Insurance – Time bar clause – not unconstitutional

JUDGMENT

CAMERON JA:

[1] Are time-bar clauses in short-term insurance contracts unconstitutional?

In the Pretoria High Court De Villiers J ruled that they are. The respondent

(plaintiff) insured his 1999 BMW 328i motor vehicle for R181 000 with a syndicate of Lloyd's underwriters of London, represented in South Africa by the appellant (defendant).[1] The policy provided:

> CLAIMS PROCEDURE AND REQUIREMENTS
>
> 5.2.5 if we reject liability for any claim made under this Policy we will be released from liability unless summons is served … within 90 days of repudiation.

On 24 November 1999 the vehicle was involved in an accident. The plaintiff informed the insurer of the incident timeously, but on 7 January 2000, it rejected liability. The plaintiff served summons on the defendant more than two years later, on 8 January 2002.

[2] The defendant's plea relied on the time-bar clause. The plaintiff's replication invoked the Constitution. He pleaded that the time-bar constituted a limitation period which was contrary to public interest on the grounds that it afforded the insured an unreasonably short period after repudiation to institute action; it was a drastic provision which infringed the

1 Section 59(1) of the Short-Insurance Act 53 of 1998 provides that a claim against a Lloyd's underwriter under a South African short-term insurance policy shall be cognisable by a court in the Republic, and s 59(2) that the Lloyd's representative may be cited in the name of his office as nominal defendant or respondent.

common law right of an insured to invoke the courts; it served no useful or legitimate purpose; and, in breach of s 34 of the Bill of Rights, it deprived the insured of his right to have a justiciable dispute decided in a court of law.

[3] These facts are easy to state, since the parties set them out in an agreed statement of case to enable the high court, in a separation of issues, to rule on the validity of the defendant's reliance on the 90-day time-bar. De Villiers J upheld the plaintiff's contentions. He found the time-bar unenforceable because it conflicted with s 34 of the Constitution:

> **Access to courts**
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[4] The learned judge found that the rights in s 34 applied not only against the state, but horizontally in contractual relations between private persons.[2]

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2 Constitution s 8(2):
'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'
Constitution s 8(3):
'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

He reasoned that without the clause the plaintiff would have had three years under the prescription legislation to institute his action.[3] He considered that any limitation of this period of itself required constitutional justification. In his view, s 34 grants a contracting party a right of access to court in respect of any dispute arising from the contract. By corollary, he ruled, the provision imposes on the other party a duty not to obstruct access to court. Applying *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) and *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC), he held that the right of access to court is foundational to our society, and that (applying a limitations analysis) the insurer had failed to justify the 90-day time-bar on instituting action.

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1).'

3 Prescription Act 68 of 1969, s 11:
'The periods of prescription of debts shall be the following:
…
(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[5] This reasoning raises two questions. The first is the extent to which Bill of Rights provisions apply between contracting parties. The second is whether, if they do apply, s 34 renders the time-bar unconstitutional.

Constitutional supervision of the creation and enforcement of contractual rights

[6] The high court's approach entailed the significant presupposition that contractual terms are subject to constitutional rights. It is important to emphasise that this general premise is correct. In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 88-95, the essential principles of which were endorsed in *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA), this court affirmed that the common law of contract is subject to the Constitution. This means that courts are obliged to take fundamental constitutional values into account while performing their duty to develop the law of contract in accordance with the Constitution.

[7] *Brisley* rejected the notion that the Constitution and its value system confer on judges a general jurisdiction to declare contracts invalid because of what they perceive as unjust, or power to decide that contractual terms cannot be enforced on the basis of imprecise notions of good faith (para 93). Yet it re-asserted that (in addition to proscribing fraud) the courts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus, 'public policy' now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.

[8] Though this court in *Afrox* rejected a constitutional challenge to a clause excluding liability for negligently caused injury in a private hospital's

contract of admission (to the dismay of many commentators),[4] it affirmed that inequality of bargaining power could be a factor in striking down a contract on public policy and constitutional grounds. The problem the court found was that 'there was no evidence whatsoever to indicate that when the contract was concluded [the plaintiff] was in fact in a weaker bargaining position' than the hospital (para 12; my translation). In *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) para 12, the majority considered that contractual exclusion of liability for negligently caused death could be unconstitutional.

[9] *Afrox* turned on the evidence presented there, and here too we are obliged to decide the constitutional challenge on the facts before us. Those the parties' lawyers captured for the purposes of the proceedings in a terse

4 D Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*' (2002) 17 *SAPL* 473; K Hopkins 'The influence of the Bill of Rights on the enforcement of contracts' *De Rebus* August 2003 p 22; J Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330; C-J Pretorius 'Individualism, collectivism and the limits of good faith' 2003 (66) *THRHR* 638; R-M Jansen & B S Smith 'Hospital disclaimers' 2003 *Journal for Juridical Science* 28(2) 210; NJ Grové 'Die kontrakereg, altruisme, keusevryheid en die Grondwet' (2003) 35 *De Jure* 134; L Hawthorne 'The end of bona fides' (2003) 15 *SA Merc LJ* 271; L Hawthorne 'Closing of the open norms in the law of contract' 2004 (67) *THRHR* 294; T Naudé and G Lubbe 'Exemption clauses – a rethink occasioned by *Afrox Healthcare Bpk v Strydom*' (2005) 122 *SALJ* 441; D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited', forthcoming in (2006) 123 *SALJ*.

statement of case (conveyed in para 2 above). That is the sole evidence before us. This has a two-fold impact on the proceedings. First, the evidential basis from which we can infer whether constitutional values have been impeached is extremely slim.

[10] Thus, though the learned judge found that the contract's time-bar was unfair, this conclusion does not present as self-evident, and on the evidence I cannot find any warrant for it. An insurer has an undeniable interest in knowing within a reasonable time after repudiating a claim whether it must face litigation about it. Whether 90 days is reasonable for this purpose the evidence is simply too meagre to allow us to assess. Although the period is much shorter than the statutory prescription period of three years, the clause certainly does not exclude the courts' jurisdiction entirely.[5] And details of the claim and of the incident that caused it are usually uniquely within the claimant's knowledge (making a shorter time

5 For discussion of circumstances in which contractual clauses ousting the jurisdiction of the courts may be against public policy, see RH Christie *The Law of Contract* (4ed, 2001) pp 405-407.

limit easier to justify). Whether the period is in fact reasonable, and thus whether the clause is 'fair', would depend, amongst other things, on the number of claims the insurer has to deal with, how its claims procedures work, what resources it has to investigate and process claims, and on the amount of the premium it exacts as a quid pro quo for the cover it offers. Of all this, we know nothing.

[11] The second consequence of the limited evidence before us is that the ambit of the plaintiff's constitutional challenge to the term is very narrow. In argument before us plaintiff's counsel referred to the constitutional values of dignity, equality and the advancement of human rights and freedoms. But these provide no general all-embracing touchstone for invalidating a contractual term.

[12] Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle. As explained in *Brisley* (para 94), the Constitution prizes dignity and

autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements. Their importance should not be under-estimated.

[13] As stated in *Brisley* (para 95), the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.

[14] It is relatively easy to see how the Constitution's foundational values of non-racialism and non-sexism [6] could lead to the invalidation of a contractual term. Less immediately obvious is how the values of human dignity, the achievement of equality and the advancement of human rights and freedoms[7] may affect particular contractual outcomes. But *Brisley* and *Afrox* and *Stott* opened the door to precisely such determinations. As *Afrox* indicated, a factor of particular importance is the parties' relative bargaining positions, for it is here that the constitutional values of equality and dignity may prove decisive.

[15] In the present case, the evidence is so scant that we can only speculate on the plaintiff's bargaining position in relation to the insurer. This is because there was no evidence regarding the market in short-term insurance products; whether a variety of such products is available; the number of suppliers, and their relative market share; whether all or most

6 Constitution s 1(b).
7 Constitution s 1(a).

short-term insurers impose a time-bar;[8] whether a diversity of time-limits is available to those seeking short-term insurance cover, and over what range they fall; whether for a person in the plaintiff's position (who travels in a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle) short-term vehicle insurance is an optional convenience, or an essential attribute of life.

[16] All this would bear on the critical question, which is whether the plaintiff in effect was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires this court to develop the common law of contract so as to invalidate the term. But without any inkling regarding the issues set out above, the broader constitutional challenge cannot even get off the ground. I therefore turn to

8 Kevin Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155 suggests that 'most short-term insurance policies contain time limitation clauses that curtail the period within which legal action can be instituted', but even if this were accepted, it is less precise than factual determination would require.

the right of access to courts protected by s 34, on the basis of which the high court invalidated the time-bar.

What does the right of access to courts protect?

[17] In considering the high court's decision, it is useful to start with *Mohlomi* and *Moise*. In *Mohlomi*, a member of the public sought to recover damages for injuries allegedly inflicted when a soldier intentionally shot him. The Minister of Defence pleaded a statutory time-bar[9] that precluded claimants from instituting action if a period of six months had elapsed since the cause of action arose. The Constitutional Court (CC) held that rules limiting the time within which litigation may be launched serve a valuable purpose in curbing inordinate delays and the harmful consequences of procrastination, but a limitation that leaves insufficient time to exercise the

9 Defence Act 44 of 1957, s 113(1):
'No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months … has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.'
See now the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

right of access to court may be unconstitutional. The normal statutory prescription periods were a yardstick by which the adequacy of the time allowed could be judged. The cut-off in question was conspicuously harsh, however, in –

> 'a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance they need so sorely is often difficult for financial or geographical reasons.' (para 14)

The CC held that the statutory time-bar could not be justified.

[18] *Moise* applied *Mohlomi* where a statute barred the institution of legal proceedings against a local authority 'unless the creditor has within 90 days as from the day on which the debt became due, served a written notice' on the local authority.[10] No justification was proffered for the provision (which the legislature was about to replace with a six-month

10 Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, s 2(1)(a).

period).[11] The CC struck down the 90-day notice requirement as unconstitutional.

[19] Like *Mohlomi*, *Moise* involved a claim for delictual damages arising from personal injury. This fact provides the essential setting for both decisions. Their rationale is that where a plaintiff has a pre-existing right to legal redress – such as compensation for personal injury – the legislator may not limit the right of access to court by super-imposing an unreasonable time-bar or other unreasonable clog on the institution of legal proceedings.

[20] The decisions presuppose that the plaintiff has an existing right of compensation or redress, but that a legislative time-bar unfairly impedes it. In both cases, statutory provisions imposed a general bar on instituting action, without differentiating between plaintiffs or causes of action. Neither decision dealt with contractually negotiated time-limits. More specifically, the CC did not find that the state (or a local authority) may not

11 Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(2)(a). The Act repealed Act 94 of 1970 with effect from 28 November 2002.

in a specific setting negotiate a time-bar for enforcing rights created by contract. The focus, as *Moise* explained (para 10), was 'special statutory provisions' that single out proceedings against specific kinds of defendants (the state or local authorities) and attach '*specific extraneous preconditions*' to their enforcement. The decisions do not mean that a right whose enforcement requires the institution of proceedings within a specific time can never be created, contractually negotiated or conferred.

[21] The plaintiff here had no pre-existing entitlement against the insurer. The insurer did not injure his person, damage his property or violate his reputation or his dignity, nor did it commit any other wrong against him. Outside the contract, it owed him no money. Before the contract was concluded, it had no relationship with him at all. It offered him insurance cover, which he agreed to take on clearly specified terms. Those terms defined the rights he derived from the agreement by specifying that there

would be no liability unless summons were served within 90 days of repudiation of a claim.

[22] The plaintiff's claim arose because of a voluntary arrangement with the insurer: one that entitled him, against payment of a premium, to insurance in respect of his vehicle, on the conditions set out in the policy. The insurer's defence therefore did not super-impose a time-bar on a pre-existing entitlement: it arose from the very agreement that defined the ambit of the right in creating it.[12]

[23] The approach the learned judge took implies that the plaintiff had a pre-existing right to insurance, which the time-bar unfairly and improperly impeded by requiring him to institute his claim within 90 days. That in my respectful view is wrong. The only right to insurance the plaintiff enjoyed was the one he acquired from the contract; and this required, as a

12 It follows that I am unable to endorse the approach underlying the discussion by Kevin Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155, who suggests that 'the limitation clause found in most short-term insurance policies amounts to a waiver of the insured's right of access to court' and that 'the enforcement of a limitation clause would mean, in effect, the limitation of the insured's constitutional right' (at 172).

precondition of its enforcement, that he institute his claim within that period. Failing this, he acquired no right at all. To afford him a different and larger right is to create a contract for the parties to which neither agreed.

[24] To equate this case with those where the legislature has super-imposed a statutory time-bar on otherwise enforceable rights therefore improperly characterises the right at issue, and omits to recognise that the source of the time-bar is not statutory but contractual. This is not to sanctify contract. It is to recognise that rights differ in their nature and in how they originate, and consequently in how they are enforced and protected. The question whether statutory abridgment of access to court to enforce an existing right is justifiable cannot be equated with the question whether an apparently freely concluded contractual term is constitutionally suspect. The Bill of Rights itself requires us to take these distinctions into account.

[25] This case is thus not similar to *Mohlomi* and *Moise*, but to *Geldenhuys & Joubert v Van Wyk* 2005 (2) SA 512 (SCA).[13] There a special time-bar applied to claims against the Road Accident Fund that involved unidentified vehicles. In such cases, injured victims by definition have no remedy, since they do not know and cannot trace the wrongdoer who inflicted their injury. The legislation therefore creates a right of recourse against the Fund where no enforceable right existed before; but limits the right at inception by requiring that it be enforced within a shortened time period. In *Geldenhuys & Joubert* (paras 23-24) this court accordingly rejected the argument that the legislative time-limit unfairly restricts the claimant's right, since this misconceives its nature. The Fund is not a wrongdoer, and the claimant is not its victim. In creating a previously non-existent right of recourse, the Minister thus had power to require claimants to submit claims within the shorter period.

13 To similar effect is *Paiges v Van Ryn Gold Mines Estate Ltd* 1920 AD 600 at 617.

[26] Similarly here. The high court's implicit premise was that the plaintiff had a pre-existing right to insurance. This led it wrongly to impose on his contract with the insurer a protection that was not designed for the parties' situation at all. Section 34 does not preclude the creation or conferral of rights subject to a time-limit for their enforcement.[14] The focus of the right lies elsewhere. It is 'an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions', which 'requires not only that individuals should not be permitted to resort to self-help, but also … that potentially divisive social conflicts must be resolved by courts, or by other independent and impartial tribunals.'[15]

[27] The plaintiff's right to insurance cover arose from his contract with the defendant, which in creating his right stipulated at its inception that a claim,

14 Compare, albeit in an entirely different context, *Mkontwana v Mandela Metro Municipality* 2005 (2) BCLR 150 (CC) para 71 ('Section 34 does not extend so far as to prevent the imposition of any restriction on any right without the order of a court first having been obtained') (Yacoob J).
15 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) paras 61-63 per Ngcobo J.

to be enforceable, had to be instituted within 90 days of repudiation. The access to courts provision in the Bill of Rights does not prohibit this.

[28] To summarise. On the evidence before us, there is nothing to suggest that the plaintiff did not conclude the contract with the insurer freely and in the exercise of his constitutional rights to dignity, equality and freedom. This leads to the conclusion that constitutional norms and values cannot operate to invalidate the bargain he concluded. That bargain contained at its heart a limitation of the rights it conferred. The defendant's plea invokes that limitation, and there is nothing before us to gainsay its defence.

[29] The appeal must therefore succeed and the defendant's plea be upheld. The order is as follows:

1. The appeal succeeds with costs, including the costs of two counsel.

2. The order of the court below is replaced with the following:

‘The defendant’s special plea is upheld with costs, including the costs of two counsel.’

E CAMERON
JUDGE OF APPEAL

CONCUR:
MPATI DP
VAN HEERDEN JA
MLAMBO JA
CACHALIA AJA