

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Barend Petrus Barkhuizen v Ronald Stuart Napier

CCT 72/05

Decided on: 4 April 2007

MEDIA SUMMARY

The following media summary is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court gave a decision in a case involving a constitutional challenge to a time limitation clause in a short-term insurance contract. The clause in question required the claimant to institute court proceedings within 90 days after the insurance company had rejected the claim.

The applicant, Mr Barkhuizen, only instituted legal proceedings in the High Court two years after his claim had been rejected by the insurance company. In response to this claim, the company alleged that Mr Barkhuizen's claim was barred because he had not instituted legal action within 90 days as required by the contract. In reply, Mr Barkhuizen alleged that the clause relied upon by the insurance company violated section 34 of the Bill of Rights which guarantees the right to approach a court for redress as well as public policy which also protected this right. He submitted that the clause was therefore unconstitutional and that it should not be enforced.

The Pretoria High Court upheld the challenge holding that the clause violated section 34 of the Bill of Rights. On appeal to the SCA the Appeal Court reversed the decision of the High Court. It held that section 34 does not prohibit time limitation clauses. In addition, it held that there was no evidence that Mr Barkhuizen did not freely and voluntarily conclude the insurance contract. It concluded that the time limitation clause did not therefore violate the provisions of the constitution.

Ngcobo J, with whom Madala J, Nkabinde, Skweyiya J, Van der Westhuizen J and Yacoob J concurred, held that the proper approach to Mr Barkhuizen's constitutional challenge is to determine whether the time limitation clause is contrary to public policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. The question was whether time limitation clause is contrary to public policy and whether it gives Mr Barkhuizen an adequate and fair opportunity to seek the assistance of a court. The period of 90 days allowed to him to sue was not inadequate or unfair. When the 90 days period commenced to run, Mr Barkhuizen had all the information that was necessary for him to sue the insurance company as he had already lodged his claim with the insurance company and the insurance company had rejected his claim. In addition, there was no evidence that the contract was not freely concluded between persons with equal bargaining power or that Mr Barkhuizen was not aware of the clause. Although the

contract required him to submit his claim to the insurance company within 30 days, Mr Barkhuizen submitted his claim to the insurance company within 8 days of the accident through his insurance broker.

Ngcobo J further found that Mr Barkhuizen waited for two years after being told of the rejections of his claim but did not furnish any reason for non-compliance with the clause. In the circumstances the clause was not unfair or unreasonable. Ngcobo J accordingly dismissed the appeal and made no order as to costs.

O'Regan J concurred with the majority judgment. Although she agrees with the order, the conclusions drawn by Ngcobo J and with the majority of discussion supporting those conclusions, she disagrees that the defences of good faith and impossibility in contract law warrant consideration in this case. On the facts of the case, O'Regan J concludes that the defences are not in issue and thus it is unnecessary to contemplate the development of the common law in that respect.

Sachs J dissented. He held that considerations of public policy, as animated by the Constitution, dictated that the time-bar clause, which limited access to courts, should not be enforced. This was not merely because it was in small print, nor because it bore harshly on the insured, but because the clause was contained in a standard form document; did not form part of the actual terms on which reliance was placed by the parties when the agreement was reached; was prepared with legal expertise for the benefit of the insurers without any apparent reciprocal benefit for the insured; lay buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent on to the insured after negotiations had been completed and generally failed to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies.

In another dissenting judgment, Moseneke DCJ, with whom Mokgoro J concurred, agreed with Sachs J that the clause was against public policy and unenforceable. In the circumstances of this case, he would uphold the appeal, dismiss the respondent's special plea and remit the matter to the High Court for the final adjudication of Mr Barkhuizen's claim.

In assessing whether a contractual term is at odds with public policy, the appropriate test, Moseneke DCJ said, is not whether the party seeking to avoid the consequences of the time bar clause was well-resourced or in a position to do so. On the contrary, the proper approach is whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend against public policy.

Moseneke DCJ held that the impugned time clause is, on the facts of this case, unreasonably short and inflexible with the result that it denies Mr Barkhuizen a reasonable and adequate opportunity to seek legal redress.

Langa CJ, although concurring in the judgment of Ngcobo J, preferred not to express an opinion on the direct application of the Bill of Rights to contracts.