

### INTRODUCTION

*The distinction between void and unenforceable contract:*

- a void contract has legal consequences (obligations).

- a unenforceable contract is valid from the beginning but the obligations cannot be enforced if against public policy and illegality.

#### Causes of Illegality

1) statutory illegality

2) common-law illegality

An underlying principle of the law is that agreements seriously entered into should be enforced. (*sanctity of contract/pacta sunt servanda*)

Agreements contrary to public policy cannot be enforced.

#### Public Policy

At its core, public policy is what government bodies (national, provincial & local) decides to do or not to do.

This includes elected officials (presidents, mayors, and members of parliament), appointed officials (agency heads) and even courts.

Public policy ensures that private agreements do not harm society, undermine justice or violate constitutional values.

No matter how two parties freely agree or how clearly they write their contract, a court can step in and declare it void or unenforceable if it goes against public policy.

### INTRODUCTION (cont)

- Agreements that are *contrary to public are illegal* and consequently, *unenforceable by law*.

- The courts are saying: "we value your right to make a contract, but we value the integrity of our legal system and well-being of society more. If your contract threatens that, we will not help enforce it."

### EXAMPLES OF ILLEGAL CONTRACTS

#### (1) Contracts that Waive Fundamental Rights

e.g. an employment contract where an employee agrees to work for less than the minimum wage.

#### (2) Exculpatory Clauses (Waivers of negligence)

e.g. a landlord trying to waive liability for all injuries caused by their failure to maintain safe premises.

#### (3) Contracts to Commit an Illegal Acts

### PUBLIC INTEREST

Agreements that are contrary to good morals (*contra bonos mores*) or against public policy?

- it is difficult to determine whether a contract is *against good morals* or the public interest, because good morals and public policy may differ from time to time and from community to community.

### PUBLIC INTEREST (cont)

- *Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)* is the leading authority on when a court can declare a contract void because it *violates public policy*.

#### SASFIN (PTY) LTD V BEUKES

*The Parties:* the case involved Sasfin, a finance company (the appellant), and Dr. Beukes, a medical specialist and anaesthetist (the respondent).

*The Agreements:* In February 1985, Dr. Beukes entered into a cession agreement with Sasfin.

Dr. Beukes ceded (transferred) to Sasfin all claims, rights of action, and receivables that were currently due or might become due to him in the future.

*The Disputes:* a dispute arose when Sasfin claimed Dr. Beukes had breached the discounting agreement and owed them money (around R108,000). Sasfin then tried to enforce its rights under the deed of cession to recover the debt by claiming all of Dr. Beukes' future earnings from his practice.

*HIGH COURT (Court a quo):* Dr. Beukes argued the cession was against public policy. The court agreed and dismissed Sasfin's application, declaring the deed of cession *invalid and unenforceable*. Sasfin's was granted to leave to appeal.

### PUBLIC INTEREST (cont)

*SUPREME COURT OF APPEAL:* "Agreements which are clearly inimical of the interest of the community, whether they are *contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy not be enforced."*

#### NB - *Sasfin (Pty) Ltd v Beukes*

stands for the proposition that while *freedom of contract* is a cornerstone of our law, it is **not absolute**.

### ILLEGAL CONTRACTS THAT ARE VOID

The interests of the community/society as a whole are of paramount importance.

#### Recognised public interests:

- as far as possible, contracting parties should have *equal bargaining power*.

- voluntarily concluded contracts should be complied with and enforced.

- the safety of the State should be preserved.

- public service should function properly.

- the full exercise by persons of their legal rights should not be interfered with.

#### *Barkhuizen v Napier:*

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

The correct approach in challenging the **constitutional validity** of a contractual term is to determine whether the term is *contrary to public policy* as informed by the **constitutional values - particularly those contained in the Bill of Rights**.

**The Conclusion, Performance and Object of Contract must be Lawful**

Contracts are **void** because their mere conclusion is *contrary to statutory provisions, good morals or public policy*:

- statutory prohibitions

- **pacta (pactum) successoria** - (succession agreement). A contract that aims to regulate how a person's estate will be inherited after their death.

The contract itself **bypasses** a will entirely and directly determines who will inherit the assets. (**Clash with freedom of testation**)

- agreements that *oust the jurisdiction* of the courts.

#### BARKHUIZEN V NAPIER

**The parties:** Mr. Barkhuizen (the insured) entered into a **short-term insurance contract** with a syndicate of Lloyd's Underwriters, represented by Mr. Napier (the insurer).

**The contract:** the policy insured Mr Barkhuizen's BMW motor vehicle against *loss or damage*.

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

**The Time-Bar Clause (Clause 5.2.5.):** the policy contained a *time-limitation clause* which stated: "*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.*"

**The incident:** on 24 November 1999, the vehicle was involved in an accident and damaged beyond repair. Mr Barkhuizen lodged a claim for R181,00 on 2 December 1999.

On 7 January 2000, the insurer repudiated the claim, alleging that the vehicle was being used for business purposes contrary to the policy terms.

Mr Barkhuizen only served summons on the insurer on 8 January 2000, more than two years after the repudiation and long after the **90-day period** had expired.

**Finding:** in the High Court, ruled in favour of Mr Barkhuizen, finding the **90-day time-bar clause unconstitutional**.

**The SCA**, in a unanimous judgement, overturned the High court's decision and **upheld** the **time-bar clause**.

**ConCourt:** *fairness, justice and reasonableness* cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals, informed by the concept of **Ubuntu**.

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**Performance in contracts must be legal:**

- contracting with a party to commit a crime (*robbery, kidnapping, murder*) or a **DELICT**.

- where contract can be carried out in a **lawful and unlawful** manner: presumption is that it was intended to be carried out in a lawful manner.

The **purpose and object** of the contract must be **lawful**.

#### Examples of Illegal or Invalid Contracts

**(A) Contracts against good morals:**

- good morals refer to good behaviour in community.

- Immoral and sexually reprehensible conduct: **an agreement to pay a 'prostitute' for sexual intercourse or insurance of a brothel**.

**Maseko v Maseko**

- *plaintiff* in order to protect her house against possible attachment by one of her creditors, agreed to marry the *defendant*, transfer the house into his name and thereafter *divorced*.

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

- the *defendant* undertook to re-transfer the house after the threat of attachment was over.

- the *plaintiff* was **never insolvent** at any stage, but the court held that the agreement was illegal on **3 grounds**:

(1) it was morally reprehensible because; **it was designed to mislead potential or existing creditors as to the plaintiff's worth**;

(2) perpetuated fraud against the court in divorce proceedings.

(3) perpetuated fraud against the court in divorce proceedings.

- **court remarked that the first ground was both immoral and against public policy (interaction)**

**(B) Statutory Illegality:**

Statute may **prohibit certain types of agreements** or the **inclusion of certain provisions in an agreement**.

Consequently, such agreements or provisions in an agreement will not have any legal force.

Contracts aimed at circumventing statute are **illegal** and thus **void**.

**s90 of the National Credit Act (NCA): Certain clauses in a credit agreement are illegal and there are remedies available.**

- **sever** the unlawful contractual provision from the agreement;

- **alter** the agreement to render it lawful; or

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

- **declare the agreement entirely unlawful**

**s51 of the Consumer Protection Act: prohibits a number of clauses in consumer contracts.**

What if the statute does not expressly stipulate that a contract or contractual provision of a certain nature is *void*? Then it ought to be determined whether the legislature impliedly intended the nature of an agreement or provision to be **void... HOW?**

**Gambling and wagering**

- **s16(1) of the National Gambling Act:** bets arising from unlawful gambling activities are unenforceable and does not expressly state that **wagering contracts are void**.

- looking at the overall intention of the legislature, it seems it is implied that wagering contracts arising from unlawful gambling activities are *void*.

- e.g. wagering contract - **Betway (sports betting)**

**(C) Pacta de quota litis, Champerty and Maintenance:**

These **3 terms** are closely related concepts that lie at the intersection of **contract law, legal ethics, and public policy**.

They deal with the question of who can fund or profit from litigation and under what circumstances.

**Pacta de quota litis**

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

It is an agreement between lawyer and their client, made before the conclusion of the case, in which the lawyer's fee is set exclusively as a percentage of the proceeds from the lawsuit.

**Key characteristics:**

(1) the lawyer's right to payment depends entirely on the outcome (pure contingency fee).

(2) the fee is calculated as a percentage of what the client recovers

(3) if the case is lost, the lawyer receives nothing.

(4) the client owes nothing for the lawyer's services unless they win.

**Maintenance**

It is when a 3rd party with no legitimate interest in a case improperly provides financial or other support to help one party prosecute or defend a lawsuit.

**Key Characteristics:**

(1) a 3rd party (the "*maintainer*") provides support

(2) the **maintainer** has no legitimate interest in the case

(3) the support enables the litigation to proceed

(4) **unlike champerty**, the maintainer does not necessarily expect a share of the proceeds.

**(D) Unfair Contracts:**

Contracts must be **fair, reasonable & just** to the parties.

### ILLEGAL CONTRACTS THAT ARE VOID (cont)

The **unfairness and unreasonableness** of the contract towards one of the parties and the interest they seeks... are taken into account.

**Barkhuizen v Napier 2007 (5)**

**SA 323 (CC)** is the leading Constitutional Court case on the interface between constitutional rights (particularly the right of access to courts) and the *common law of contract*.

- it establishes the framework for determining when a contractual term is *unenforceable* because it violates public policy, as informed by the Constitution.

### CONSUMER PROTECTION ACT 68 OF 2008

**S48(1)(a)** prohibits a supplier from offering goods or services at an *unreasonable price* or on terms that are **unfair, unjust and unreasonable**.

**S48(2)** gives examples of *prohibited agreements and terms*.

If a court finds that a contract is **unconscionable, unjust, unreasonable or unfair**, it may order that the money or goods be returned to the consumer or that the consumer be compensated his or her *losses, expenses, and court proceedings*.

### CONSEQUENCES OF A CONTRACT THAT IS VOID

- illegal contracts **cannot be enforced** as they create no obligations.

### CONSEQUENCES OF A CONTRACT THAT IS VOID (cont)

- if illegality only affects a *part* of the contract: the illegal part be severed from the rest of the contract in certain circumstances.

- where parties performed in terms of a void contract: *performance cannot be claim back where the parties are equally guilty*, unless the court allows them.

**Contract cannot be enforced (ex turpi rule):**

"From a dishonorable cause, no action arises."

- illegal contracts *create no rights and obligations* and thus *cannot be enforced*.

- if a party *suffers damage as a result of an illegal contract*, they *cannot claim contractual damages* from the other party (ex turpi rule).

- rule cannot be relaxed by the courts under any circumstances and there are **no exceptions** to the rule.

- performance by either party to the contract does not make the agreement legal.

**Severing the Illegal Part of a contract:**

- sometimes a contract can be **partially illegal**.

- courts have in certain instances allowed the *illegal parts to be severed* from the rest, thus permitting the remainder of the agreement to remain in force.

### CONSEQUENCES OF A CONTRACT THAT IS VOID (cont)

- in some instances the courts have refused: *public policy required the entire contract to be declared void*.

*Whether or not an illegal part is severable from the rest of the agreement depends on the intention of the parties:* see **Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd:**

- illegal part of the contract is grammatically or notionally distinct from the rest of the agreement? e.g. illegal part form an **independent** clause of the contract...

- illegal part subsidiary or collateral to the main purpose of the contract, so if that it is removed, the *substantive character* of the contract remains unchanged

- **would the parties have entered into the contract** without the illegal part?

- All answered in the affirmative? The severability is possible.

**Reclaiming performance that has been made in terms of an illegal contract (par delictum rule)**

In principle, *restitution* of what has been performed must be granted.

*ownership of performance not passed:* reclaim performance through *rei vindicatio*

*ownership of performance passed:* unjustified enrichment

### CONSEQUENCES OF A CONTRACT THAT IS VOID (cont)

*par delictum rule:* parties are **equally morally guilty**, the one in a stronger position will prevent restitution from taking place.

**Rules based on Public Policy Considerations:**

- court must not assist those who approach it with '*unclean hands*'

- unlawful contracts should be discouraged

**Rule can be relaxed due to Public Policy Considerations:**

e.g. if the rule *indirectly* enforces an illegal contract, defendant will be enriched at the expense of the plaintiff, etc.

### EXTRA

#### ILLEGAL CONTRACTS THAT ARE 'VALID' BUT UNENFORCEABLE

- wagering and gambling contracts

- agreements in **restraint of trade**