

REFLECTING ON THE APPLICABILITY OF FREEDOM, SANCTITY AND PRIVITY OF CONTRACT IN ZIMBABWEAN LAW OF CONTRACT

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ABSTRACT

This paper examines the applicability of the long established contractual doctrines of freedom of contract, sanctity of contract and privity of contract in modern day Zimbabwean law of contract. It argues that even though the three doctrines are still applicable, there are instances where they have not be strictly adhered to and in some cases redefined.

Key words: *freedom of contract, sanctity of contract, privity of contract, contract.*

1. INTRODUCTION

The doctrines of freedom of contract, sanctity of contract and privity of contract are foundational principles upon which Roman-Dutch law of contract was initially established. This article analyses the three doctrines and reflects on the extent to which these doctrines are still applicable in the current Zimbabwean law of contract.

2. FREEDOM OF CONTRACT

The doctrine of freedom of contract provides that one is free to enter (not to enter) into a contract without interference or restriction.² A person has the freedom to choose with whom to contract, whether or not to contract, and on what terms to contract. In *Printing & Numerical Registering Company v Sampson*, the court underscored the doctrine of freedom of contract when it held as follows:³

If there is one thing more than another that public policy requires, it is that man of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be

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^{2.} Maja, I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare.

^{3.} *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 465.

held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that the courts are not likely to interfere with this freedom of contract.⁴

It is interesting to note that in *Munyanyi v Liminary Investments & Anor*,⁵ the court established that freedom of contract is not limited only to the freedom to make a contract but also freedom to vary the contract. The parties have the liberty to change their minds as many times as it suits them as long as at each time that they do so, they are acting in concert and their minds meet.⁶

In *Chanakira v Mapfumo & Anor*,⁷ the court established that public policy upholds – as a fundamental principle – the freedom and sanctity of contract and requires that commercial transactions should not be ‘*unduly trammelled by restrictions on that freedom.*’

Inherent in the doctrine of freedom of contract is the acknowledgment that individual citizens and or corporations have delegated sovereignty that enables them to participate constantly in the law-making process. The consent of contracting parties embodied and expressed in a contract creates law. Viewed from this perspective, freedom of contract decentralises the law-making process. As a result, law is not only an order imposed by the state from above upon its citizens but also an order created from below.⁸

A critical look at the current law of contract shows that there are a number of circumstances where the doctrine of freedom of contract is not strictly applied. First, freedom of contract is limited by the requirement that all contracts should be legal. This means that any contract which is entered into freely and voluntarily but which contravenes some legal rule in statute or public policy in common law cannot be enforced at law based on illegality.

4. See also *Chanakira v Mapfumo & Anor Limited* S-86-06; *Tonderai Hamandishe & Anor v Maffack Properties (Pvt) Ltd* HH-160-10; and *International Trading (Pvt) Ltd* 1993 (1) ZLR 21 (H).

5. *Munyanyi v Liminary Investments & Anor*, HH-38-2010.

6. See Kessler, Friedrich, ‘Contracts of Adhesion-Some Thoughts About Freedom of Contract’ (1943). *Yale Law School Faculty Scholarship Series*. Paper 2731. *Chanakira v Mapfumo & Anor* HH-155-10.

8. ⁸See Cohen, M ‘The Basis of Contract’ (1933) 46 *Harvard Law Review* 553, 585; & Note, E Mutuality in ‘Exclusive Sales Agency Agreements’ (1931) 31 *Columbia Law Review* 830.

Second, an agreement entered into freely and voluntarily with a person without contractual capacity is deemed void in the law of contract. For instance, contracts entered into freely and voluntarily by minors, insane persons, intoxicated persons, prodigals, insolvents etc. cannot be enforceable at law. This limits freedom of the parties to choose the person with whom to contract.

Third, monopolies restrict the freedom of parties to choose with whom they want to contract. For example, in Zimbabwe the Zimbabwe National Water Authority monopoly on water and the Zimbabwe Electricity Supply Company monopoly on electricity limit the consumer's freedom to contract with whosoever they please. Consumers are compelled to contract with these institutions only.

Fourth, covenants in restraint of trade also restrict freedom of contract. A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he or she chooses.⁹ Such contracts place restrictions upon the parties' freedom to contract with whosoever they want and wherever they choose.¹⁰

Fifth, quasi-mutual assent potentially limits freedom of expression. Quasi-mutual assent binds a party to a contract – no matter what his or her real intention is – if (s)he conducts himself in a manner that makes the other party reasonably believe that (s)he has assented to the terms of a contract. This rule may lead to the imposition of non-consensual obligations and therefore restrict the doctrine of freedom of contract.

Finally, standard form contracts also limit freedom of contract. Examples of standard form contracts include bank account opening contracts, insurance policy contracts, air tickets, mortgage contracts, university enrolments etc. For practical reasons and cost considerations, it is more expedient for banks, insurance companies, airlines, building societies, and universities to couch their contracts in a standard manner thus limiting the freedom of contract on the part of the contracting client.

⁹. Seddon, N; Bigwood, R; Ellinghaus, M (2012) Cheshire and Fifoot's *Law of Contract* 351.

¹⁰. See *Mangwana v Muparadzi* 1989 (1) ZLR 79 (S

Clearly, even though the doctrine of freedom of contract is still part and parcel of the current law of contract, it has not been strictly applied in some instances.

3. SANCTITY OF CONTRACT

Sanctity of contract provides that once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it.¹¹ According to Sir David Hughes Parry:¹²

When all persons interested in a particular transaction have given their consent to it and are satisfied, the law may safely step in with its sanctions to guarantee that right be done by the fulfillment of reasonable expectations.

A similar sentiment was echoed in *E. Underwood & Sons Ltd v B. Baker*¹³ where the court held as follows:

To allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations that he has undertaken, *prima facie* at all events, is contrary to the interest of any and every country.

In *Madoo (Pty) Ltd v Wallace*¹⁴ the Court held that '[o]ur system of law pays great respect to the sanctity of contract. The Courts would rather uphold than reject (contracts).' The Zimbabwean case of *Old Mutual Shared Services (Pvt) Ltd v Shadaya*¹⁵ established that the doctrine of sanctity of contract holds in Zimbabwe. *Mwayipaida Family Trust v Madoroba and Others* buttresses this point by holding that '[i]t is the policy of the law to uphold, within reason, the sanctity of contracts.'¹⁶

*Beale, Bishop and Furmston*¹⁷ argue convincingly that sanctity of contract has a double emphasis. The first emphasis is that if parties hold to their bargains, they are treated as masters of their own bargains and the courts should not indulge in *ad hoc* adjustment of terms that

^{11.} Maja, I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare.

^{12.} Sir David Hughes Parry *The Sanctity of Contracts in English Law* (1959) *The Hamlyn Trust Series* 1-2.

^{13.} *E. Underwood & Sons Ltd v B. Baker* 1899 (1) CH 305.

^{14.} 1979 (2) SA 957.

^{15.} HH-15-2013.

^{16.} S-22-04; 2004 (1) ZLR 439 (S).

^{17.} Beale HG; Bishop WD & Furmston MP *Contract Cases and Materials* (2008) 58.

strike them as unreasonable or imprudent. The second emphasis is that if parties must hold to their bargains, then the courts should not lightly relieve contractors from performance of their agreements.

A number of decisions have upheld the application of the doctrine of sanctity of contract in Zimbabwe. For instance, in *Mangwana v Mparadzi*¹⁸ the court held that, '[t]he principle that contracts are to be obeyed (i.e. that they are sacrosanct) takes precedence over the principle of freedom of trade.' In *Book v Davidson*¹⁹ the court held as follows:

I cannot see why a person, who has agreed to the restraint with both his eyes open, should be allowed to aver that the restraint was unreasonable without showing the courts the circumstances that make it unreasonable or unfair to him.

In *Meyers-Mbidzo N.O v Chipunza and Another*,²⁰ the court took the view that poor business decisions and greed cannot be allowed to interfere with the sanctity of contracts and that courts should uphold sanctity of contract.²¹ Again, in *Warren Park Trust v Pahwaringira and Others*,²² the court established that sanctity of contract is upheld even by ensuring that termination of contract is done by following the mode of termination to the letter.²³

A number of principles underpin the doctrine of sanctity of contract. First, there is the golden rule of interpretation of contracts whose major cannon is that contracts are interpreted using the ordinary grammatical meaning of words used. A case in point is *Total SA (Pty) Ltd v Bekker*²⁴ where the court held that:

... [t]he underlying reason for this approach is that where words in a contract, agreed upon by the parties thereto and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention.

18. *Mangwana v Mparadzi* 1989 (1) ZLR 79 (S)

19. *Book v Davidson* 1988 (1) ZLR 365 (S).

20. HH-3-2009.

21. See *Unilever South East Africa v Viewleen Investments (Pvt) Ltd* HH 37-07. See *BP Southern Africa (Pty) Limited v Desden Properties (Pvt) Limited & Anor* 1964 RLR 7(G) 11H-I; 1964 (2) SA 21 25 G-H; *Fisc Guide Investment v Tazarura & Ors* HH-28-2005.

22. HH-39-2009.

23. See also *Minister of Public Construction & National Housing v Zesco (Pvt) Ltd* 1989 (2) ZLR 311 at 316

The net effect of such interpretation is to preserve the sacrosanct nature of a contract.

Second, there is the parole evidence rule that empowers the courts to interpret express terms of a written contract within the four corners of the agreement without admission of extrinsic evidence except in limited circumstances. The assumption is that parties intended the written document to reflect all the express terms of the contract and courts should consider the written document sacrosanct. In *Nhundu v Chiota and Another*,²⁵ the court held as follows:

When a contract has been reduced to writing, the document is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties, no evidence to prove its terms may be given, save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.

Third is the principle of *caveat subscriptor* that indicates that a signature appended on a written contract binds the signatory to the terms of the contract. *Muchabaiwa v Grab Enterprises (Pvt) Ltd*²⁶ established that '*[t]he general principle, commonly referred to as caveat subscriptor, is that a party to a contract is, in general, bound by his signature, whether or not he read and understood the document...*'. Implicit in *caveat subscriptor* is that once a person signs a contract the contract becomes sacrosanct and binding. This upholds sanctity of contract.

Interestingly, the current law of contract has some principles that limit the application of the doctrine of sanctity of contract. For instance, the legal principle that a covenant in restraint of trade is not enforced if it is contrary to public policy²⁷ limits sanctity of contract. It follows, therefore, that a court can intervene and alter a term in a covenant in restraint of trade that it considers against public policy, thus curtailing sanctity of contract.

^{24.} *Total SA (Pty) Ltd v Bekker* (1954) 35 ALR 434, at 437.

^{25.} 2007 (2) ZLR 163 (S).

^{26.} 1996 (2) ZLR 691 (S).

^{27.} In *Basson v Chilwans* 1993 (3) SA 742, it was held that '*[t]he contract in restraint of trade is against public policy if it restricts a party's freedom of economic activity in a manner or to an extent that is unreasonably judged against the broad interests of community and the interests of the contracting parties.*'

The doctrine of severability of some aspects of a contract – the blue pencil test – also limits the application of the doctrine of sanctity of contract. The blue pencil test allows the court to sever unreasonable parts and enforce only the reasonable parts of a contract. This was demonstrated in *Mangwana v Mparadzi*²⁸ where the court shortened the time restriction imposed on the appellant from five years to three years and limited the restraint clause to Chinhoyi and not the rest of Zimbabwe on the basis that the restraint of trade was unreasonable. It is clear that the doctrine of severability of a contract limits the sanctity of the contract to the extent of the severability of the provisions deemed unreasonable.

The principle of severing illegal parts of a contract and enforcing legal parts impacts sanctity of contract. For instance, in *Niri v Coleman and Ors*,²⁹ as well as *Muleya v Bulle*,³⁰ the Court established that the charging of excessive interest prohibited by the law does not disentitle the lender to recover the debt together with lawful interest. This essentially replaces the illegal excessive interest with lawful interest and makes the contract with illegal sections enforceable to some degree. In *Sibanda v Nyathi and Ors*,³¹ the Court held that a court has a power to sever an illegal part of the contract concerning a purchase price³² and declare the true purchase price to reflect the true agreement between the parties.

It is clear from the above that the doctrine of sanctity of contract is predominantly used in the current law of contract in Zimbabwe.

4. PRIVACY OF CONTRACT

The doctrine of privity of contract provides that contractual remedies are enforced only by or against parties to a contract, and not third parties, since contracts only create personal rights.³³ According to Lilienthal,³⁴ privity of contract is the general proposition that an

28. In16 above.

29. 2002 (2) ZLR 580 (H) 588.

30. 1994 (2) ZLR 202 (H).

31. 2009 (2) ZLR 171 (H).

32. In this case, \$70 million was the illegal purchase price and \$130 million was the true purchase price.

33. See Bhana, D; Bonthuys, E & Nortje M *Students' Guide to the Law of Contract* (2009) 18.

34. Lilienthal JW 'Privity of Contract' (1887) 1 (5) *Harvard Law Review* 226.

agreement between A and B cannot be sued by C even though C would be benefited by its performance. Lilienthal further posits that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.

In *Gwanetsa v Green Motor Services*,³⁵ the Court established as follows:

The general rule is that an agent may not depute another person to do that which he has himself undertaken to do. There is no privity of contract between the sub-agent and the principal.³⁶

In the same vein, *Kennedy v Loyne*³⁷ held that:

... [t]he rule is that where an agent has employed another person to perform the duty entrusted to him, no action accrues to the principal against the sub-agent; but he must sue the agent, who on his part, must sue the sub-agent.³⁸

Zimbabwean courts have been consistent in applying this doctrine where parties to agency contracts have sought to escape liability based on having engaged sub-agents. In such cases, the courts have insisted on placing liability on the contracting parties, thus upholding the principle of privity of contract. The test to determine whether there was privity of agreement or not is a factual one requiring a careful consideration of the factual matrix.³⁹

There are a number of instances where the doctrine of privity of contract is not applied in the law of contract in Zimbabwe. First, privity of contract will not apply in cases of an undisclosed principal. For instance, if A has made a contract with B, C may intervene and take A's place if he can show that A was acting throughout as his agent.⁴⁰

³⁵. HH-159-03.

³⁶. See *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co* (1915) AC 847 853.

³⁷. ³⁷ (1909) 26 SC 271, at 279.

³⁸. ³⁸ See *Ncube v Mpofu & Ors* HB-69-06.

³⁹. *Terra Graphics (Pty) Ltd t/a Terra Works v MEC: Department of Police, Road and Transport Free State Provincial Government and Anor* (3489/2012) (2013) ZAFSHC 11 (7 February 2013).

⁴⁰. Inn 8 above 404. See also *Watson v Gilson Enterprises (Pvt) Ltd* 1997 (2) ZLR 318-319.

Second, privity of contract has limited application in trusts. A trust forms an equitable obligation to hold property on behalf of another. The law of trusts can enable a third party beneficiary to initiate action that will enforce the promisor's obligation. Using the above example, if B had contracted with A in the capacity of trustee for C, C as beneficiary under the trust has enforceable rights. These rights arise because the law of trusts gives a beneficiary certain rights against a trustee. In the context of privity, if C is a beneficiary under a trust, C can bring an action against B, the trustee, which has the effect of compelling B to sue A for breach of contract. In formal procedural terms, C sues in an action in which B and A are joined as defendants. The use of trust law here does not give rise, in the strict sense, to an exception to the doctrine of privity. In conceptual terms, B pursues the action against A, albeit at C's insistence.

Third, privity of contract is usually limited in instances where contracts are made for the benefit of third parties – commonly known as *stipulatio alteri*. *Astra Steel & Eng Supplies (Pvt) Ltd v PM Mfg (Pvt) Ltd*⁴¹ establishes that for a *stipulatio alteri* to exist, the stipulator and the promiser must intend to create a right for the third party to adopt and become a party to the contract. Until acceptance of the benefit by the third party takes place, the contract remains one between the actual parties.

Fourth, there are statutory exceptions to the doctrine of privity of contract. For example, the Road Traffic Act⁴² empowers a party injured in a motor accident to recover compensation from an insurance company once he or she has obtained judgment against the insured.

5. CONCLUSION

It is clear from the above analysis that even though the doctrines of freedom of contract, sanctity of contract and privity of contract are still applicable to the current Zimbabwean law of contract, there are areas where these principles have not been strictly applied.

⁴¹. HH-393-12.

⁴². [Chapter 13:11].