THE PROPRIETY OF STATE INTERVENTION IN THE ENFORCEMENT OF CONTRACTS IN ZIMBABWE

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ABSTRACT

The traditional and classical model of contract law is predicated on the idea that the parties involved generally have a genuine freedom of choice and that the parties' bargaining power is comparable to one another. It finds expression in such principles as freedom of contract and the sanctity of contracts. However, finding the right balance between freedom and sanctity of contract on one hand and considerations of fairness and reasonableness on the other hand, remains one of the problems facing modern contract law. It is this very challenge that has brought to the fore the conflict between freedom of contract and state intervention discussed in this article.

Key words: freedom of contract; sanctity of contract; state intervention; classical contract law; modern contract law; public policy; fairness; reasonableness

1. INTRODUCTION

The propriety of state intervention in the enforcement of contracts in Zimbabwe depends on which lens you use between the classical and modern law of contract. The paper is divided into five sections. The first section deals with the classical law of contract. Section 2 deals with the modern law of contract. Sections 3 discusses the aspect of state intervention in the law of contract. Section 4 gives the theoretical justification of state intervention in contracts. Section 5 concludes the discourse.

2. Classical law of contract

This classical contract theory emerged in the late nineteenth century with the objective of providing a foundation for the principles that governed the formation, performance, and enforcement of contracts.[850] It is based on the political and economic tenets of individualism, liberalism, and laissez-faire.[851] According to Stefan Groitl,[852] the expression 'laissez-faire' first appeared when the famous French mercantilist minister, Jean-Baptiste Colbert, questioned a group of businessmen what he could do for them. One of the businessmen, a merchant named Legendre replied, '*Laissez nous faire*' meaning 'Leave us alone'.[853] This idea of non-interference by the state in private affairs was supported by the famous Adam Smith, whose famous hands-off policy is often connected to laissez-faire. In his own words, Adam Smith stated that *'the sovereign should never attempt to control or influence the economic decisions of private individuals and should limit itself to three tasks."*[854]

Carolyn Edwards[855] submits that this classical theory of contract is founded on the belief that the unrestricted exercise of freedom of contract between contracting parties who possess equal bargaining power, equal skill, and knowledge of relevant market conditions maximizes individual welfare and promotes the most efficient allocation of resources in the marketplace. The assumption

850 Carolyn Edwards Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues 2009 Marquette University Law School.

851 Hutchison & Pretorius (eds) The Law of Contract in South Africa (2012) 23

852 Stefan Groitl Classical liberalism and the laissez-faire policy Seminar Paper, 2011.

853 Keynes, J.M., 1926. THE END OF LAISSEZ-FAIRE, London: The Hogarth Press.

854 Gibson, D, 2011. Wealth, Power, and the Crisis of Laissez Faire Capitalism, Basingstoke: Palgrave Macmillan.

855 Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues 2009 Marquette University Law School.

under individualist is that individuals have equal standing in a free market where they freely and voluntarily enter into furtive and distinct contracts. Their meeting in the market is brief and they have exclusive control over who they want to contract with, the terms thereof and even not to contract. Contracts facilitate competitive exchange where traders deal at 'arm's length' on an equal footing.

Contractual liability is thus, based on the parties' free will (upholds the will theory) and that they contract on equal standing. It is centred on freedom of contract and sanctity of contracts. Individuals decide what is in their best interests and are free to contract on terms they wish subject only to the broad limits of public policy and criminal law.

Once a contract is concluded based on free will, it is then considered 'sacred' and has to be enforced. It cannot be rewritten. Sanctity of contracts should be upheld[856] and the principle of *pacta sunt servanda (*which basically means that agreements must be kept) applies. The doctrines of freedom of contract and sanctity of contract are aptly described in Book v Davidson [857] as follows:

> If there is one thing which more than another public policy requires, it is that men 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 held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not likely to interfere with

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856 In *Zimbabwe Revenue Authority v Chester Mudzimuwaona* SC 4-18, the Court held that '.... *sanctity of contracts confines the court only to interpreting a contract and not creating a new contract for the parties. It entails that the court should respect the contract made by the parties and give effect to it'*.

857 Book v Davidson 1988 (1) ZLR 365 (S).

> this freedom of contract – 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 which he has undertaken is, prima facie at all events, contrary to the interests of any and every country.

Preference is on free will and subjective intention, thus contract law is governed by the principles of consensualism, freedom of contract and sanctity of contracts/ *pacta sunt servanda*. The contract's role is seen as primarily to facilitate voluntary choices by giving them legal effect.

In terms of form, the classical notion of contract expresses contractual law doctrines as rules to be applied in a mechanical fashion. Classical contract law sees the restricted role of State or very limited state intervention in contract law. The State does not intervene as individual parties are considered legislatures on their own right. The ideal of free market system allows for self-regulation as opposed to intervention by the state.

Under classical contract, the role of courts is limited to being 'referees' to parties' exercise of their individual autonomy. Courts adhere only to matters of procedural fairness and the courts have no concern over fairness of contracts. The courts have limited discretion and mechanically apply the set rules of contract law to disputes before them – this is known as formalism. Courts do not strike down contracts on the basis of fairness or reasonableness of contracts. Courts primarily concern themselves with formalism. In other words, Courts are concerned with the formal validity of consensus also known as procedural fairness not substantive fairness. They mechanically apply already established rules of contract law. The courts' interpretation of public policy is narrow.

Contracts are not be invalidated as being contrary to public policy on the basis that the terms were grossly unfair or harsh.

Despite the fact that it is self-evident that these presumptions are potentially inaccurate in the modern conception of the law of contract, contract law continues to be a field in which individual autonomy finds particularly conspicuous expression.[858]

3. **The modern law of contract**

The modern conception of contract law has a collectivist outlook. It fosters communitarian values where there is the replacement of a free-floating self by a member connected to the community or living in a collective society. The autonomy is more collective as opposed to personal autonomy. Contractual liability can be imposed on the basis of the other party's reasonable reliance on the other's apparent consensus.[859] It substantively diminished or eroded freedom of contract and sanctity of contracts.

The operative ideology accepts that in a free market there is an uneven bargaining power and therefore exists weak and naive members of a collective society who need protection as they interact frequently. There is a welfarist state or intervention in free market to protect the interests of the community. There is limit to individual autonomy due to the growth of consumer welfarism that is consumer protection and the advancement of the contractual principles of reasonableness and fairness. Community interests and policy considerations influence enforcement of contracts, in particular. Contracts can be set aside if they are considered unconscionable or unfair consumer contracts.

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858 Cserne Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach (2012) 81.

859 This upholds the reliance theory.

The modern theory of contract law is characterised first and foremost by the increased control by the state of the contract regime.[860] Contracts in a free market require legislative and judicial intervention to police bargains resulting from unequal bargaining power. The modern concept of contract adheres to close regulation of contracts with more emphasis on substantive fairness and that courts can set aside contracts on the basis of reasonableness and fairness usually within the context of consumer protection. This is why there is increased State control over the regime of contracts through legislative and judicial interventions. The state intervenes in the interests of the community as there are weaker parties in a contractual set up. There is also increased state regulatory and legislative interventions in the free-market system to protect the interests of society.

In terms of form, the modern notion of contract expresses contractual law doctrines as standards or principles which result in purposive adjudication. These standards allow courts to have a wider discretion to make value decisions by looking at policy considerations and the general interests of the community. Standards of fairness and reasonableness which are the axis on which consumer welfarism rests would apply – this is known as realism or pragmatism. This is why Courts under modern contract are more pragmatic to protect communitarian values or collective autonomy. Courts can strike down contracts on the grounds of fairness or reasonableness under consumer welfarism. Courts concern themselves increasingly with substance than formal requirements of a valid contract – substantive fairness. They are obliged to do more than mechanically applying

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860 Jack Beatson and Daniel Friedmann Introduction from Classic to Modern Contract Law 1995.

contractual rules as they have to invoke all standards relevant for them to make value judgments. Courts interpret public policy widely and can invalidate a contract on the public policy ground for being unconscionable.[861]

4. STATE INTERVENTION

State intervention refers to instances where state organs interfere with exercised free will in contracts. These organs of the state include the executive, the legislature, the judiciary. As argued above, interventionism is a departure from the classical contract law theory which did not reflect the harsh realities of the marketplace. Equal parties did not exist and strong parties were able to impose unfair and oppressive bargains upon those who were weak and vulnerable.[862] Modern contract law deviates from classical contract, with the result that society was no longer considered as being made up of individuals but rather as being made up of distinct groupings, mostly economic classes. The existence of social gaps and inequalities was used to support the argument that the notion of freedom of contract is nothing more than a cunning legal tactic used by those in positions of authority to maintain the status quo and keep the lower classes helpless and penniless.

The best example of such views can be found in the writings of ***L H Hobhouse***. For him, contracts between parties which were not equal could not be free:

> The agreement was coerced. The weaker man agrees just as someone who is about to fall over a cliff would agree to donate all of his wealth to someone who will throw him a rope on no other circumstances. True consent is free consent, and complete freedom of

861 See *Sasfin v Beukes* 1989 (1) SA 1 (AD).

862 Grant Gilmore, The Death Of Contract 13 (1974)

> consent implies that both parties are willing to negotiate on an equal footing. Government secures a greater degree of freedom for all by every restriction it imposes with the intention of preventing one from using any of his advantages to the detriment of others, just as it did when it first prevented the physically stronger man from killing, beating, or destroying his neighbors.[863]

This position is therefore the justification for attempts to address the negative effects of such inequalities, such as various attempts to have certain contractual terms declared unenforceable due to the perception that they were excessively harsh or unfair to the weaker party and would not have been included in the contract if the stronger party had not, in essence, used its power to force the weaker party into accepting them.[864]

In dealing with this, ***Hutchinson***[865] postulates that in order for a commercial enterprise to have a solid footing, the parties involved should be aware of the fact that if either of them fails to uphold their end of the bargain, the other may seek the assistance of the law in order to force them to comply with the terms of the agreement. When it comes to the enforcement of private agreements, the state will only use its power if it is convinced that it is justifiable and appropriate to do so under the given set of circumstances.

4.1 Executive intervention

Executive intervention in contracts takes the form of the Executive and State Institutions issuing statutory instruments that have the effect of interfering with

863 L H Hobhouse, Liberalism (Oxford University Press, New York, 1964) [1911] p 50.

864 John R Peden, The Law of Unjust Contracts: Including the Contract ReviewAct 1980 (NSW) With DetailedAnnotation, Procedure and Pleadings (Butterworths, Sydney, 1982); Hugh Beale, "Inequality of Bargaining Power" (1986) 6 Oxford Journal ofLegal Studies 123-36

865 Hutchison & Pretorius (eds) The Law of Contract in South Africa (2012

contractual provisions. On diverse occasions, the regulator of all banks, the Reserve Bank of Zimbabwe (RBZ) has issued directives that have the effect of altering the traditional contractual banker customer relationship, which requires the bank to repay to the customer on demand the same value as the money that was deposited by the customer. For example, in 2018, the RBZ issued the Exchange Control Directive No. RT120/2048 whose effect was to separate RTGS foreign currency accounts from Nostro foreign currency accounts based on the source of the funds in question. This meant that all those who had money in their banks which at some point were United States Dollar balances, such money then became RTGS foreign currency accounts which was payable in bond notes and not in United States Dollars. What justification can be given for the RBZ to issue directives whose effect is to interfere with the freedom of contract exercised by the bank and its customer when they established their banker customer relationship through a contract? Their initial terms of agreement would be that the bank, on demand would pay back the customer the same currency that would have been deposited by the customer.

4.2 Legislative intervention

Protagonists of legislative intervention posit that classical law theorists had a narrow scope of social duty which they implicitly assumed. As they were premised on the notion that *'No man is his brother's keeper; the race is to the swift; let the devil take the hindmost.'*[866]

In the Zimbabwean context, a contract has to pass the test legality for it to be enforceable. The first test is obviously

866 Barber, Government and the Consumer, 64 MICH. L. REv. 1203, 1205-17 (discussing legislative efforts to protect the health, safety, and economic welfare of consumers in the early 1900s).

the constitutionality test. The question is whether the contract itself or its enforcement does not violate the provisions of the supreme law of the land or any rights contained in the declaration of rights. In Zimbabwe, section 2 of the Constitution[867] provides that the Constitution is the supreme law of the land. The section also proscribes law, practice, custom or conduct inconsistent with the constitution. Also, section 44 of the Constitution obliges all institutions, including the judiciary to respect the rights and freedoms contained in the Declaration of Rights. Section 46 (1) (b) calls upon the courts, when interpreting the Declaration of Rights to promote values and principles that underlie a democratic society and some of those values and principles expressly stated are openness, justice, equality and freedom which have a strong bearing on the law of contract. Section 64 has entrenched freedom of profession, trade or occupation. Contracts that will have to do with acquisition of property will also have to be negotiated, entered into and interpreted in line with the provisions of section 71 of the Constitution which guarantees property rights. To that end therefore, the Constitution will to a great extent influence the development of contract law in Zimbabwe.

The second test is whether a contract complies with provisions of an Act of Parliament. A contract the violates the law is deemed to be illegal, void and unenforceable. There are a number of variations to this. The first is that a statute may expressly prohibit a certain type of contract and declare such a contract void, invalid or of no force or effect. Such a contract is unenforceable. The second is that a statute may expressly prohibit a certain type of contract

867 Constitution of Zimbabwe Amendment No. 20 of 2013.

but make no express provision about its validity. Here, court usually look at the intention of the legislature to determine validity or otherwise. The intention can be gleaned from (a) use of peremptory terms, (b) use of discretionary terms and (c) whether declaring a contract illegal solves the mischief that the statute aimed to prevent. The third variation is that a statute may not expressly prohibit a specific type of contract but make it a criminal offence. Here, courts ascertain the intention of the legislature to ascertain whether the statute intended the criminal sanction to be the only sanction.

The fourth variation is that parties, conscious of the statutory prohibition, may draft a contract in such a way as to circumvent the statutory provision. Courts usually take a 3-pronged approach (a) grammatical interpretation, (b) Does the contract fall within the ambit of the statute? (c) was the contract designed craftily to circumvent the statute?[868]

The two foremost pieces of legislation that are there to reflect state intervention are the Consumer Protection Act [Chapter 14:14] and the Contractual Penalties Act [Chapter 8:04]

a.The Contractual Penalties Act[869]

The Contractual Penalties Act is another legislative intervention in the field of contracts which seeks to regulate unfair contractual terms. It empowers Courts to strike down or reduce an unfair penalty stipulation in a contract. Section 4 (2) provides as follows:

868 See Maja, Ibid 59-61

869 Chapter 8:04]

> If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may—
>
> a. reduce the penalty to such extent as the court considers equitable under the circumstances; and
> b. grant such other relief as the court considers will be fair and just to the parties.

Section 8 of the Act is there to prohibit and restrict the seller's rights with respect to the acceleration of payment of the purchase price or termination of the contract.

The import of this provision is such that through legislation, courts are empowered to intervene in the enforcement of contracts through importing the concepts of fairness and justice in the enforcement of contracts.

The Consumer Protection Act[870]

The Act seeks to protect consumers from the effect of unreasonable and unfair terms in contracts such as exemption clauses. It also intends to give more protection to consumers of goods and services in the market and eliminate unethical suppliers and improper business practices.

Sections 18 to 25 provide for the right to choose. It gives customers the freedom to choose the products or services they want from the supplier they choose, free from undue influence or pressure from the manufacturers or service providers. This includes the freedom to accept or reject a specific item from a list of offered commodities before the transaction is completed as well as the freedom to exchange items. Section 35 affords consumers the right to

870 [Chapter 14:14]

fair and honest dealing and protection from unconscionable conduct. The net effect of this is that, suppliers and consumers can no longer include any term they so wish in their contract but are now guided by what is permissible in the Act.

In dealing with contractual terms, section 41 regulates unfair, unreasonable and unjust terms in consumer contracts. ***Section 42(1)*** of the Act provides that:

> No supplier, service provider of goods or services, owner or occupier of a shop or other trading premises shall display or cause to be displayed any sign or notice that purports to disclaim any liability or deny any right that a consumer has under this Act or any other law.

The foregoing is best elaborated in the case of ***Cabri (Pvt) Ltd v Terrier Services (Pvt) Ltd***.[871] In an instance where one party had performed a contract in a careless manner, the court, citing the Consumer Protection Act, nullified a provision in the contract that attempted to release the other party from duty for loss that was spurred on by negligence. In ***OK Zimbabwe Ltd v Msundire***[872] it was held that *'[a] party cannot exempt himself from liability for wilful misconduct, or criminal or dishonest activity of himself, his servants or agents or from damage resulting from gross negligence on his part or that of his servants.'*
It is therefore clear from the above that the consumer protection Act premises state intervention on the grounds of fairness. This is also confirmed by the fact that the preamble to the Act reads as follows:

871 2004 (1) ZLR 267 (H)

872 S-23-15

> To protect the consumer of goods and services by ensuring a fair, efficient, sustainable and transparent market place for consumers and business…

Thus, it is evident that the Consumer Protection Act is a type of government interference in the contract's execution. Therefore, the true freedom of contract is now limited by regulation during the modern era of contract law under the ambit of welfarism.

4.3 Judicial intervention

Over time, courts have incorporated the doctrines of good faith, fairness and unconscionability into the common law and this has created a new vision for contract law[873].

It would also appear that owing to the expansive nature of the Zimbabwean Bill of rights and the duty of the courts to develop common law, notions of judicial activism actually influence courts when dealing with the enforcement of contracts. As such it is abundantly clear that under the new Constitutional dispensation, judges are not there to play second fiddle and rubber-stamp the wishes of the contracting parties, but rather they have an active role to play. This is so because in dealing with interpretation, Constitutional values are of great bearing.

In particular, ***Section 46*** provides that:

> 46 Interpretation of Chapter 4
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> (1) When interpreting this Chapter, a court, tribunal, forum or body –
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> (a) must give full effect to the rights and freedoms enshrined in this Chapter;
>
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity,

873 D Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99, 117, cited in *Beadica SCA* (note 12 above) at para 37.

> equality and freedom, and in particular, the values and principles set out in section 3; …
>
> (2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

What is clear from the foregoing is that Courts are guided by the provisions of the Constitution even in interpreting agreements between private parties. As such the Constitution has a bearing with regards to interpretation and enforcement of contracts by the courts.

4.3.1 Forms of judicial intervention

4.3.1.1 Contracts contrary to public policy

Courts can set aside a contract if it is against public policy. According to Sasfin v Beukes:

> Agreements which are clearly inimical to the interests 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. No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.’

Fender v St John-Mildmay[874] also weighed in and held that:

> [t]he doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.

The South Africa Constitutional Court had this to say in the case of *Barkhuizen v Napier*,[875]

> [t]he proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the values that underlie our constitutional democracy, and which find expression in the Bill of Rights. Public policy represents the legal convictions or general sense of justice of the community, the *boni mores* and the values held dearest by our society; it takes into account the necessity to do simple justice between individuals; and it is informed by the concept of ubuntu. 'Public policy imports the notions of fairness, justice and reasonableness.' Accordingly, while public policy endorses freedom and sanctity of contract, it would also preclude the enforcement of a contractual term in circumstances where such enforcement would be unjust or unreasonable… A term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

4.3.1.2 Covenants in restraint of trade

Maja points out that the existing law of contracts includes some factors that restrict the use of the sanctity of contract doctrine. For instance, the sanctity of contracts is limited by the legal notion that a covenant in restraint of trade is not enforceable if it is in conflict with public policy.

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874 (1938) AC 1 at 12

875 2007 (5) SA 323 (CC).

Therefore, it follows that a court has the authority to step in and modify a provision of a covenant in restraint of commerce if it believes that the provision violates public policy, thereby undermining the sanctity of the contract.[876]
The law on restraint of trade seems to have been summarised by the Supreme Court in ***Commercial and Industrial Holdings (Pvt) Ltd v Leigh- Smith***[877] as follows:

> 1. All restraints, whether general or partial, are by definition unlawful because they are against public policy.
> 2. A constraint will be upheld if it can be demonstrated that it is appropriate and reasonable in light of both the public interest and the interests of both parties.

Therefore, a restraint of trade agreement cannot be enforced unless it is a reasonable between the parties and consistent with the public interest.[878] Further to that, in the case of ***Mangwana v. Muparadzi***[879] the Court refused to enforce a covenant in restraint of trade for reasons that it was unreasonable and contrary to public policy.

The current approach towards covenant in restraint of trade is thus indicative of judicial intervention in the enforcement of contracts, because the courts are there to disregard the agreement between the contracting parties under the guise of fairness and public policy.

4.3.1.3 The doctrine of severability

In general, the blue pencil test allows the court to sever unreasonable parts and enforce only the reasonable parts of

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876 Maja I, *The law of contract in Zimbabwe*, page 28

877 1982 (1) ZLR 247

878 R. H. Christie, Business Law in Zimbabwe (1998) at 92

879 Mangwana v Muparadzi 1989 (1) ZLR 79 (S)

a contract[880]. This was demonstrated in ***Mangwana v Mparadzi*** [881] consequently, on the grounds that the trade constraint was unreasonable, the court reduced the appellant's time restriction from five to three years and only applied it to a specific location.

The test for severability as articulated in ***Bligh-Wall v Bonaventure Zimbabwe (Pvt) Ltd & Another***[882] is basically whether the offending clause is substantially at the core of the contract or is subsidiary. If it is subsidiary and the parties would still have entered into the contract without the offending aspect of the clause then that part is severable and the courts can enforce the contract.

This approach makes it clear that in as much as the court may have regard to the intention of the parties and other considerations, the doctrine of severability directly involves the courts in the enforcement of contracts and it can be said that this is inimical to both the freedom and sanctity of contracts.

4.3.1.4 Severing illegal parts of a contract and enforcing legal parts

In ***Muleya v Bulle***[883] wherein the applicant sought to recover the sum advanced by him to the respondent under a loan agreement. The respondent contended that the loan agreement was invalid and unenforceable, because the applicant had charged interest at a rate in excess of that which he was entitled to charge in terms of the Moneylending and Rates of Interest Act [Chapter 299]. The court held that where, on the other hand, s 13(1) has not been complied with, there is nothing to stop the applicant from abandoning reliance on the loan agreement and

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880 Maja, *ibid*

881 Mangwana v. Muparadzi, supra

882 1998(2) ZLR 264 (SC) at 268

883 1994(2) ZLR 202 (H)

instead recovering the loan amount by way of the remedy of condictio. The effect of this is such that it essentially replaces the illegal excessive interest with lawful interest and makes the contract with illegal sections enforceable to some degree.

In the case of ***Sibanda v Nyathi***[884] wherein dealing with an agreement that had been concluded for the sole purpose of avoiding capital gains tax and stamp duty. The court held that undoubtedly what is null and void in this case is the agreement to reflect the purchase price as $70 million instead of $130 million. The court thus stated that it was at liberty to properly declare the true purchase price as being $130 million so as to reflect the true agreement between the parties.

4.3.1.5 Enforcement through interpretation

In the case of ***Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd and Another***[885] it was held that;

> The golden rule of interpretation states that language should be interpreted in accordance with its grammatical and common sense unless doing so would be nonsensical, repugnant, or inconsistent with the rest of the instrument. Never should a word or phrase be interpreted in isolation (in vacuo) by itself during construction. After determining the word or phrase's literal meaning, the correct method for using the golden rule of interpretation is, generally speaking, to take into consideration:
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> a. The word or phrase's use in connection to the contract's overall context, taking into account the contract's nature and purpose.

884 2009 (2) ZLR 171 (H).

885 SC-83-06

b. To the background circumstances that explain the origins and goals of the contract, i.e., to issues that were probably on the parties' minds when they entered into the agreement.

c. When the language of the document is unclear on its face, extrinsic evidence about the surrounding circumstances may be applied by taking into account earlier discussions and correspondence between the parties, as well as later behavior of the parties that demonstrates how they acted in accordance with the document, barring direct evidence of their own intentions.

From the foregoing, it is apparent that judicial intervention can also come through the way in which the courts interpret the provisions of a contract.

In dealing with this ***Maja***[886] postulates that in the enforcement of contracts, the ordinary grammatical meaning is not applied in instances where it leads to absurdity or repugnancy. This approach proposed by ***Maja*** can thus be surmised to extend to the need to factor in both unconscionability and fairness in the interpretation of contract. The High Court case of ***Vuya Resources (Pvt) Ltd v Mahachi & Ors***[887] adopted the modern contract law ideology to achieve substantive justice as opposed to the strict adherence to legal doctrines and rules or formalism under classical theory. Tsanga J said:

> Thus the modern law of contract of contract which is founded on realism puts more emphasis on contextualising the facts of a particular case in order to keep law real and achieve substantive as opposed to formal equality. Formalism, on the other hand or the classical approach which the plaintiff now seeks

886 Maja, *ibid*, page 80.

887 HH-107-16

> to rely on, is based on strict and logical adherence to legal doctrines and principles and rules.

In this regard, the court dismissed the plaintiff's claim for a refund of the purchase price of a motor vehicle he had purchased but had been repossessed by the seller over non-payment of the balance of the purchase price. The court rejected an attempt to insist on application of strict formalist contractual rules by the plaintiff on the basis that those classical rules had no place in modern law of contract. This approach is thus not only reflective of judicial activism, but also of judicial intervention in the enforcement of contracts as the Courts are prepared to depart from formal doctrines imposed by classical contract law.

4.4 Theoretical justification for state intervention

In Zimbabwe it would appear that state intervention is premised on the need to realise fairness, reasonableness and the pursuit of public policy.

4.4.1 Harm principle

This appears to be the broad consideration for state intervention in the enforcement of contracts. It is a consideration of utmost importance which manifests itself in various principles such as good faith, fairness and reasonableness. ***John Stuart Mill***'s "*Harm Principle,*" posits that the state will only be involved in enforcing morality in contract law in circumstances where there is harm that may befall one of the parties to the contract. ***Mill*** thus strenuously states that ordinarily, there is no justification for the use of coercive force[888] except to prevent harm to others.

The harm principle, according to ***Raz***, sets out the parameters for the use of state power but is interpreted as

888 John Stuart Mill, On Liberty Ch. 1, at 69 (Gertrude Himmelfarb ed., Pelican Books 1974) (1859).

a broad harm principle. It permits the state to *'use coercion both to prevent people from taking actions that would reduce their autonomy and to force them to take actions that are necessary to improve people's options and opportunities.'*[889] Because autonomy infuses damage and justice principles into one, it gives the state the right to impose autonomy's morality and associated obligations on us.[890] ***Raz*** writes: *'[t]o enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals.'*[891] In so doing, ***Raz*** argues that it is the threat of imminent harm that justifies enforcement of promises.
However, ***Stephen Smith*** propounds and objects to the *"harm principle"* as he posits that it is improper for the state to enforce promises which are otherwise made in private, and thus the state must be doing something other than enforcing promises when it enforces contracts. It is for this reason that promissory theories for justifying state intervention are not plausible."[892]

4.4.2 Fairness and reasonableness

Following the disenchantment from the individualist notions of party autonomy as per the classic theory of contract law, the principles of reasonableness and fairness have now been elevated with a view to counter balance the bargaining power of the contractants. Fairness and reasonableness are thus a ground for state intervention from both a judicial and a legislative intervention perspective.

In this respect, it is worthwhile to note that fairness, justice, equity, and reasonableness are inseparable from public policy. This is so because public policy embodies *'the*

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889 Raz, J. (1987) 'Autonomy, Toleration and the Harm Principle', in Gavison, R. (ed), Issues in Contemporary Legal Philosophy, 313. Oxford: OUP; Gardner, 1989, 18-19.

890 *ibid*

891 Raz, Promises, supra note 43, at 937.

892 Stephen A. Smith, Contract Theory 69 (2004).

legal convictions of the community; it represents those values that are held most dear by the society.' Taking into account *'the necessity to do simple justice between individuals'* while at the same time being *'informed by the concept of Ubuntu.'* Fairness, justice, equity, and reasonableness are inseparable from public policy and they ought to be factored in when enforcing contracts[893].

It follows that notions of fairness and reasonableness also permeate into key Constitutional values and rights. In dealing with this, ***Ngcobo J***[894] developed a two-stage test in order to establish whether or not a provision in a contract may withstand constitutional examination. The tests are as follows:

(1) If the "objective terms" of a contract "are not inconsistent with public policy on their face," then

(2) the second stage of the test is triggered, which is to determine if the contractual *'terms are contrary to public policy'* in relation to the *'relative situation of the contracting parties.'*

In this particular respect, if the terms are contrary in areas where constitutional rights or values are at issue, courts have the authority to refuse to enforce contractual conditions that are in violation of the law.

4.4.3 Economic considerations

The use of oppressive and unfair terms was not the only instance of contract behavior that made it difficult for parties to conduct business in the market. A fall in the prosperity of the society was predicted by economists and legal theorists as a result of selfish and greedy contract behavior that happened throughout the entire bargain transaction. They thought that in order to restore economic

893 Napier v Barkhuizen 2006 9 BCLR 1011 (SCA)

894 Napier v Barkhuizen 2006 9 BCLR 1011 (SCA)

stability and security in the marketplace, a new model of the institution of contract, which set the border between the use and abuse of negotiating power, was required[895].

In this material respect, it is clear that in the interests of the economy, and in order to realise a fair economic balance, the state may thus intervene in the enforcement of contracts.

5. Conclusion

From the foregoing, it is clear that State intervention is there in the practise of the law of contract in Zimbabwe. It is minimal in classical contract law and more pronounced in modern contract law. It takes the forms of executive intervention, judicial intervention and legislative intervention. Within the Zimbabwean context, it would also appear that in most times, state intervention is premised on the need to realise both reasonableness and fairness.

895 Douglas G. Baird, "Llewellyn's Heirs," 62 Louisiana Law Review 1287 (2002).