



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 181/2022

In the matter between:

ETHEKWINI MUNICIPALITY

APPELLANT

and

COOPEPATIVA MURATORI & CEMENTISTI -

CMC DI RAVENNA SOCIETA COOPERATIVA

RESPONDENT

Neutral citation: *Ethekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa* (Case no 181/2022) [2023] ZASCA 95 (12 June 2023)

Coram: VAN DER MERWE, MOCUMIE, MATOJANE and WEINER
JJA and OLSEN AJA

Heard: 10 March 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court

of Appeal website, and release to SAFLII. The date for hand down is deemed to be 12 June 2023 at 11h00.

Summary: Contract – decisions on adjudication of disputes under construction contract – enforcement by court – whether contrary to public policy – specific performance – whether judgment for payment of debt due under decisions is a discretionary remedy.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban
(Lopes J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Olsen AJA (Van der Merwe, Mocumie, Matojane and Weiner JJA concurring)

[1] Ethekwini Municipality, the appellant before us, concluded a written contract with the respondent for the construction by the latter of the ‘C9-Cornubia interchange to Meridian Drive’. The form of contract employed by the parties was the ‘General Conditions of Contract for Construction Works (Second Edition, 2010)’. I will refer to the parties as they were in the contract, namely as ‘employer’ and ‘contractor’ respectively.

[2] Something must be said at the outset about the identity of the respondent. The respondent was the applicant in the court *a quo* where it was described as ‘CMC Di Ravenna South Africa Branch (in business rescue)’, a company registered under South African law as an external company. In later court documents the epithet ‘in business rescue’ became ‘in liquidation’. The employer raised an issue as to the *locus standi* of the named party. In the result an application for the amendment of the contractor’s name to ‘Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa’ was made and

granted without opposition. The case was argued before the court *a quo*, and in this Court, on the basis that the contractor was the company bearing the amended name. It is an Italian company, registered as such in that country. For no disclosed reason the court papers which have been delivered since the amendment was granted continue to use the name in which the contractor was originally cited. This has been corrected in this judgment, *inter alia* to avoid confusion, especially in Italy, where the use of the original incorrect citation may not be easily explained.

[3] The contract between the parties was a fairly substantial one, judging from the figures mentioned in the papers. Expenditure on it exceeded R300 million. It was concluded in 2015, but cancelled by the contractor in December 2018. The cancellation of the agreement was not challenged by the employer.

[4] The contract allowed for the submission of unresolved disputes between the parties to adjudication, a common feature of construction contracts. Three referrals to adjudication made by the contractor gave rise to the present litigation. The referrals were in each case to a Mr K B Spence. He delivered two decisions on 8 August 2019 and one on 10 August 2019. The contentious elements of the decisions from the perspective of this litigation are the findings that the employer must pay the contractor the sums of R2 049 130.48 and R8 129 492.42, together with interest thereon as stipulated in the contract.

[5] The employer failed to comply with the decisions of the adjudicator. The contractor applied to the high court for orders making the decisions orders of court, and for an order directing the employer to pay the amounts just mentioned to the contractor. The high court granted that relief, and subsequently granted the employer leave to appeal to this Court.

[6] The validity of the referral to adjudication of the disputes is not challenged by the employer. The decisions of the adjudicator are not challenged on the basis that there was any deviation from what was required and permitted to be done by the adjudicator. The employer approached the case in the high court, and before this Court on appeal, on the basis that the decisions are legitimate, but may nevertheless in due course be revised .

[7] The provisions of the contract which operate in such circumstances are the following.

‘10.6.1 Either party shall have the right to disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the contract;

Provided that:

10.6.1.1 The decision shall be binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable in terms of the contract.’

A further proviso regulates the timing and manner of notification of any dispute raised by a party with regard to the adjudicator’s decisions. Compliance with those provisions is on the face of it mandatory. The employer has notified the contractor that the decisions are disputed, and commenced action in the high court to have them revised. The contractor contends that the employer’s notification of the dispute was not in compliance with the provisions of the contract, as a result of which the adjudication decisions have become final. In the view I take of the matter there is no need for that issue to be decided in this appeal. We were advised during argument that the issue features in the pleadings in the action.

[8] The employer accepts that in the ordinary course the fact that the decisions are binding on the parties, as they have been since they were made, means that the contractor would ordinarily be entitled to its money now; which

means that the order the contractor sought in the high court would have been properly granted. But the employer contends that given the particular circumstances which prevail in this case, relief should not have been granted.

[9] The business and affairs of the contractor are presently conducted subject to the provisions of a regime established under Italian law for the benefit of distressed companies and their creditors, and in this case imposed under that law by Italian courts on the application of the contractor. The regime is described in an affidavit of an Italian lawyer who is a specialist in corporate bankruptcy law. His affidavit is not challenged. Under the regime to which the contractor is subjected, the directors continue to perform their functions as such, with a specific emphasis on the recovery of what is owed to the company. The position appears to be that an arrangement with creditors with a view to achieving the long-term survival of the contractor is planned, but bankruptcy is clearly another potential outcome. These facts or circumstances lie at the centre of the employer's arguments, which rest in the main upon the proposition that there is a risk that if it pays in accordance with the adjudicator's decisions, and then succeeds in its action to have the awards overturned, it may not get its money back. This is not disputed by the contractor. The risk of liquidation occurring, according to the contractor's reply, is 'an unknown at this stage'.

[10] The employer argues that the high court had a discretion to exercise when asked to grant the money judgments, either because what the contractor asked for was an order for specific performance; or because the enforcement of the decisions would in this case be contrary to public policy. (A contention that a discretion to stay execution exists in terms of rule 45A of the uniform rules was rightly not pressed before us, as no question of execution arises until after an order for payment of money has been granted.) The proper exercise of that

discretion, the employer argues, ought to have resulted in the dismissal of the application.

[11] It is convenient first to deal with the contention that in the particular circumstances of this case, the enforcement of the adjudication decisions would be contrary to public policy. The contractor disputes this contention. It points out that the parties willingly agreed to a process of adjudication for the interim and preliminary resolution of disputes between them, the outcome of which would affirm or deny the existence of immediately enforceable obligations. Being the beneficiary of such obligations, and the employer having failed to discharge the obligations, the contractor was entitled to approach the court for the relief which it sought in the high court in order to secure the benefit of the provisions of our law relating to the enforcement of judgments of our courts. The high court was relieved of the usual obligation of establishing the existence of the obligations in question. That had already been done through the process of adjudication agreed upon by the parties in the contract.¹ All of this is common cause between the parties.

[12] The principal authority relied upon by the employer in support of its contention that the orders granted by the high court offend public policy is *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others*² (*Beadica*). The facts before the court in *Beadica* bear no resemblance at all to those of this case. They did, however, afford an opportunity for the Constitutional Court to clarify the proper approach to determining:

(a) whether contractual provisions are in themselves contrary to public policy and therefore unenforceable; and

¹ *Framatome v Eskom Holdings Soc Ltd* [2021] ZASCA 132; 2022 (2) SA 395 (SCA) para 23; *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* [2019] ZAGPJHC 300; [2019] 4 All SA 495 (GJ); 2020 (1) SA 204 (GJ) para 69.

² *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*).

(b) when a term itself is unobjectionable, whether its enforcement in particular circumstances would be contrary to public policy.

The employer's case involves the second of these enquiries, there being no dispute over the proposition that the regime of adjudication established under the contract is not offensive to public policy.

[13] With specific reference to *Barkhuizen v Napier*³ and *Botha and Another v Rich N.O. and Others*,⁴ the majority judgment in *Beadica* explained that the perception that there is a divergence between the jurisprudence of the Constitution Court and this Court on the subject of public policy in the contractual context is misconceived. The judgment continued, at para 80, as follows:

'It emerges clearly from the discussion above that the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.'

[14] The central thesis of the employer's argument is that this is a case where the principle of *pacta sunt servanda* (agreements are to be observed) should not

³ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 223 (CC); 2007 (7) BCLR 691 (CC).

⁴ *Botha and Another v Rich N.O. and Others* [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC).

apply. However, *pacta sunt servanda* is a central element and feature of public policy. It was put this way in *Beadica*.

‘This court has emphasised that the principle of *pacta sunt servanda* gives effect to the “central constitutional values of freedom and dignity”. It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.’⁵ (Footnotes omitted.)

As pointed out in *Beadica* that does not mean to say that *pacta sunt servanda* is ‘the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values’.⁶

[15] The case for the employer has been presented upon the basis that *Beadica*, and the cases from which it stems, establish that, even in the case of a claim for payment of money due in terms of a contract, a court has a discretion to grant or refuse the remedy on public policy grounds. However, the enquiry is not directed at the exercise of a judicial discretion. The party resisting enforcement of such a contractual obligation on public policy grounds has a duty to place the relevant facts before the court. It is for the court to decide whether on the facts the enforcement of the obligation would be contrary to public policy. If the answer is in the affirmative, no question of a discretion arises at all. Our courts may not enforce contractual obligations when it would be contrary to public policy to do so.

[16] The employer has not established that the contractor is actually insolvent, that is to say that its liabilities exceed its assets. It is, however,

⁵ *Beadica* para 83.

⁶ *Ibid* para 87.

undisputed that the contractor is financially distressed. The cause, or the causes, of that condition are not apparent on the papers; liquidation is a possibility. All that can be said, and need be said, is what is conceded by the contractor: that there is a risk that if the employer discharges its payment obligations under the adjudication decisions and is successful in having them overturned, it will not be able to recover some or all of its money.

[17] The employer adds two considerations to its argument that public policy is offended by the notion that it should be subjected to the risk just described:

- (a) The first is that the contract had already been terminated at the time the adjudication took place, with the result that the monetary awards did not serve the purpose of ensuring an adequate cash flow for the contractor, enabling it to continue with work.
- (b) Secondly, it is argued that it would not be appropriate for scarce public funds to be put at risk despite the provisions of the contract.

[18] As to the first of these considerations, it is answered in the contract itself. The subject of termination of the contract is dealt with in clause 9. The clause has three parts. The first might be loosely described as being about termination when there is no fault. It deals with subjects such as the outbreak of war and states of emergency. The second part deals with termination by the employer and is fault based. The third part deals with termination by the contractor. It is also fault based. Having set out in clause 9.3.1 the circumstances in which the contractor may cancel the contract, clause 9.3.2 provides as follows:

‘9.3.2 Upon such termination:

9.3.2.1 All the provisions of the contract, including this clause, shall continue to apply for the purpose of:

9.3.2.1.1 resolving any dispute, and

9.3.2.1.2 determining the amounts payable by either the employer or the contractor to the other of them.’

The employer's argument ignores the import of clause 9.3.2.1. In my view, the argument that cancellation of the contract bolsters the employer's case concerning the risk of not recovering its money is without merit.

[19] The second of the above additional considerations, namely that it is public funds being put at risk, is equally unhelpful to the employer's case. The Constitutional Court had this to say in *Beadica*:

'[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.' (Footnotes omitted.)

The employer asks us to privilege public funds at the cost of private entities which contract with public ones. Whilst, given the profit motive, such an approach may not entirely disincentivise persons from contracting with public entities, it might reasonably be expected to incentivise the charging of a premium to public entities, to cover the risk inherent in contracting with a party which may be afforded a privileged status by the courts in the adjudication of contractual disputes. That cannot be in the public interest.

[20] In presenting the argument for the employer counsel was unable to move beyond the mere assertion that granting the contractor its relief, as was done in the high court, is contrary to public policy. The assertion amounts to the proposition that putting the employer at the risk complained of it is so unfair, so unreasonable and so inequitable as to lead to the conclusion that to do so would be in conflict with public policy.

[21] In my view, a closer examination of the situation leads to a contrary conclusion:

- (a) We are not dealing with parties which concluded a contract from unequal bargaining positions.
- (b) No constitutional values have been identified by the employer as implicated to its advantage in the consideration of public policy in this case. On the contrary, it appears to me that the only constitutional values involved here are those which have been held to support the enforcement of contracts.⁷
- (c) As to equity, what is proposed by the employer is that it should be released from its existing contractual obligation to pay because there is a risk that it may in due course acquire a right to payment which the contractor may be unable to meet. There is an imbalance in that contention favouring the employer at the expense of the contractor, which is not *prima facie* equitable. One must add to that the fact that the major money judgment sought and obtained by the contractor (payment of a little over R8 million) is in fact the sum of five monthly interim certificates duly issued for payment by the employer to the contractor, which the employer refused to pay in breach of the contract. The certificates all predated the cancellation of the contract. According to the adjudicator's report the contractor terminated the contract asserting that the non-payment of these interim certificates was a material breach of the contract.
- (d) The availability of adjudication, notwithstanding the cancellation of the contract, has already been dealt with above. The provision is itself not unreasonable. Bare reliance on unreasonableness (or equity or fairness for that matter) is not sufficient to deny the relief the provision is intended to provide, even when peculiar circumstances have arisen which suggest

⁷ Ibid para 83.

that the operation of the provision may not be as equitable as might have been hoped. Something more is required to engage public policy. Here the employer, in fact, does no more than invite this Court to reach and act on a subjective view that enforcing the awards would be unfair, unreasonable and unduly harsh. However, ‘[t]he enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the “idiosyncratic inferences of a few judicial minds”.’⁸

- (e) As counsel for the contractor has correctly argued, the risk of insolvency, or of a contracting party falling into distressed financial circumstances, is an ordinary commercial one. The employer accepted this risk when it entered into the contract with the contractor, which is a standard contract in the industry. Ultimately the employer seeks to be released from its obligation under the contract, simply because this risk may eventuate. Public policy clearly does not justify that.
- (f) It cannot be overlooked that the only objective assessments of whether the money in question is owed by the employer are to be found in the adjudicator’s reports and in the payment certificates issued under the contract by the engineer acting as the employer’s agent.

[22] The argument that the order granted in the court *a quo* is one which offends public policy must be rejected.

[23] I turn to the argument advanced by the employer for the proposition that this case is one about specific performance, as a result of which the court has a discretion to grant or refuse it, as discussed and explained in *Haynes v Kingwilliamstown Municipality*⁹ (*Haynes*) and *Benson v SA Mutual Life*

⁸ Ibid para 81.

⁹ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A).

*Assurance Society*¹⁰ (*Benson*). The facts and circumstances relied upon by the employer in this regard are no different to those already discussed above. The essence of the argument is that specific performance may be refused in the exercise of a judicial discretion when to grant it would cause unreasonable and undue hardship to be visited upon the person against whom it is sought to be enforced.¹¹ It is argued that this is such a case, despite the fact that the judgment sought by the contractor is for payment of a money debt presently due, owing and unconditionally payable, and despite the fact that there is no alternative or substitute relief which can be granted in such a case without the court in effect rewriting the contract to create one. The court is being asked to deny the only remedy available to the contractor, notwithstanding that the contractor's right to the remedy has been established.

[24] The parties agreed before the high court that there were three issues to be decided. The first was whether the order sought by the contractor was one for specific performance. The second was whether the court had a discretion to grant or refuse the order for the payment sought by the contractor, and the third was whether that discretion (if it exists) dictated the grant or refusal of the relief. These questions were answered by the learned judge as follows.

- '(a) Inasmuch as specific performance is one of the remedies for breach of contract, which includes orders both *ad factum praestandum* (an order to perform a specific act) and *ad pecuniam solvendum* (an order to pay money in performance of a party's contractual obligations), the order prayed in the notice of motion is one for specific performance.
- (b) I do not believe that I am entitled to exercise my discretion where no other remedy is sought, save payment of a contractual obligation, and where no other remedy is available to the applicant.
- (c) Accordingly, I must grant the order sought.'

¹⁰ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

¹¹ *Haynes* at 378H-379A.

[25] The question which arises immediately is whether it is correct that the judge had a discretion to exercise at all. In ordinary language, one can undoubtedly say that any order enforcing a specific obligation due to be performed in terms of a contract, including one for the payment of money, is an order for specific performance. (I will refer to that sense of the term as ‘specific performance in the wide sense’.) However, that is not the sense in which the term has been used in our law consistently, judging from reported judgments, since the nineteenth century in the context of the discretion to grant or refuse an order for specific performance. In this sense the term is used to denote an order for the performance of a contractual obligation to do something; that is an order of ‘specific performance *ad faciendum*’,¹² or more frequently, an order *ad factum praestandum*.

[26] When the contract provides for the performance of an act by the guilty party, the innocent party may sue for performance of the act, seeking an order *ad factum praestandum*. A tender of payment of damages for non-performance of the act is not a defence to such a claim. The position is as set out in *Farmers' Co-Operative Society v Berry*¹³ (*Farmers' Co-Operative Society*), a case in which an order *ad factum praestandum* was sought:

‘*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson v Pullinger* (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment

¹² *Schierhout v Minister of Justice* 1926 AD 99 at 111.

¹³ *Farmer's Co-operative Society v Berry* 1912 AD 343.

of money. For in the words of Storey (*Equity Jurisprudence*, Sec. 717 (a)), "it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it." The election is rather with the injured party, subject to the discretion of the Court. Now it is not necessary for the purposes of this case to lay down any general rule as to when a Court will and when it will not decree the specific performance of a contract. Because it is clear that where, owing to the difficulty of assessing damages or otherwise, it is not possible to do justice by an order for the payment of money, and where it is in the power of a defendant to carry out his undertaking, then such a decree is the only appropriate remedy.'¹⁴

[27] One of the principles which emerges from *Farmers' Co-Operative Society*, and equally from *Haynes and Benson*, is that the discretion the court has to deny an order *ad factum praestandum* rests on the existence of a choice between two remedies. The one is to order performance. The other closes the door on enforcement of the acknowledged right to performance, on the basis that the remedy of damages for non-performance is available to the plaintiff.

[28] From the first edition of RH Christie *The Law of Contract in South Africa* (1981) at 505–510, to the current one, GB Bradfield *Christie's Law of Contract in South Africa* 8 ed at 14.2 ('Christie'), the learned authors have espoused the principle that an order enforcing a contractual obligation *ad pecuniam solvendum* is as much an order for 'specific performance' as one enforcing a contractual obligation *ad factum praestandum*.

[29] In the first edition *Ras and Others v Simpson*¹⁵ was cited as authority for the proposition, and later *Leviseur & Co. v Highveld Supply Stores*¹⁶ was added. In my view the observations made in those judgments amounted to no more than that an order for the payment of a contractual debt amounted to specific

¹⁴ Ibid at 350-351.

¹⁵ *Ras and Others v Simpson* 1904 TS 254.

¹⁶ *Leviseur & Co. v highveld Supply Stores* 1922 OPD 233.

performance in the wide sense, and they may be accepted as far as they go. There was no issue in those cases as to whether the grant of a money judgment was a discretionary remedy, nor any occasion to equate or contrast orders *ad factum praestandum* and *ad pecuniam solvendum*. These judgments, therefore, do not provide an answer to the question whether a discretion to grant or refuse an order for specific performance arises when payment of a money debt is claimed.

[30] It is not entirely clear what *Christie* says in this regard at 658–659 of the 8th edition. To the extent that the author could be understood as answering this question in the affirmative, it has to be pointed out that none of the cases referred to in this regard provides authority for that proposition. These are *South African Harness Works v South African Publishers Ltd*¹⁷ (*Harness Works*), *Industrial and Mercantile Corporation v Anastassiou Brothers (Industrial and Mercantile Corporation)*¹⁸ and *Unibank Savings and Loans Limited v ABSA Bank Limited (Unibank Savings and Loans)*.¹⁹

[31] As *Christie* recognises, the judgment in *Harness Works* is devoid of any reference to the exercise of a judicial discretion or to ‘specific performance’. It rests upon the erroneous proposition that a contracting party can bring a contract to an end by a unilateral act of unlawful repudiation. The judgment is no authority for the proposition that where a plaintiff seeks, and has established a right under a contract to, a judgment sounding in money, the court has a discretion to refuse the remedy and insist that the plaintiff be satisfied with damages.

¹⁷ *South African Harness Works v South African Publishers Ltd* 1915 CPD 43.

¹⁸ *Industrial and Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W).

¹⁹ *Unibank Savings and Loans Limited v ABSA Bank Limited* 2000 (4) SA 191 (W).

[32] *Industrial and Mercantile Corporation* involved a contract for the supply and installation of certain machinery and equipment for a shopkeeper at a fixed price. The shopkeeper repudiated the contract, and the plaintiff sued for the price, tendering performance. The judgment was granted. The issue as to whether there was a discretion to refuse a judgment sounding in money was not raised. What was raised belatedly was an argument that judgment for the price ‘against delivery and installation by the plaintiff’ should not be granted because of difficulties which might be experienced in determining whether the acts upon performance of which the money order was conditional had been performed. Ultimately this judgment says no more on this point than that the court should avoid becoming ‘supine and spineless in dealing with the offending contract breaker by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform’, and that the plaintiff was entitled to an order for specific performance. It cannot be said to have recognised a discretion to refuse specific performance of a claim *ad pecuniam solvendam*.

[33] The facts in *Unibank Savings and Loans*, simply stated, were the following. A contract was concluded between ABSA Bank and Unibank in terms of which certain employees of ABSA would be seconded to Unibank for a fixed period. ABSA would pay its employees so seconded, but Unibank would reimburse ABSA for that expenditure. Unibank repudiated the contract. ABSA refused to accept the repudiation and tendered the services of the employees. After the relevant period of employment had passed ABSA sued for the reimbursement to which it was entitled in terms of the contract between the two parties. The court of first instance granted the order sought. An appeal against that order was dismissed by a majority. The majority judgment (para 5) indicates that it dealt with the matter on the basis that ABSA’s claim was for the enforcement of the obligation to reimburse and the assumption that the

difference between that and the enforcement of a contract of employment was immaterial. This at least smacks of enforcement of an obligation to act. In the circumstances the decision that there was no ground for interference with the exercise of the discretion of the court of first instance could hardly constitute authority for the proposition under consideration.

[34] My research uncovered only one judgment that recognised a discretion to refuse an order for specific performance of a money claim, namely *Morettino v Italian Design Experience CC*²⁰ (*Morettino*). *Morettino* involved a contract for the supply and installation of kitchen units by the plaintiff at a price of R120 000, an initial deposit of R60 000 being payable. A few weeks after having concluded that contract, and not yet having paid the deposit, the buyer (defendant) signed a contract with another supplier at a much lower price, and those units were installed. The defendant repudiated the agreement with the plaintiff which then sued for the deposit. Notwithstanding the finding that the contract remained in force, the appeal court nevertheless refused to allow the judgment for payment of the deposit granted by the trial court, to stand. It held that the money claim was one for specific performance, and that the court could refuse it in the exercise of a discretion. The court upheld the appeal on the basis that the work to be done under the contract would involve the wasteful and unproductive use of resources on a facility for which the buyer no longer had any use. On the question as to whether the discretion existed, the learned judge referred to *Christie* and the cases referred to there. For the reasons already mentioned, they do not provide authority for such a discretion and this judgment should not be followed.

[35] In my view the judgments discussed either offer no support, or are flawed authority, for the proposition that a court has a discretion to refuse judgment for payment of a contractual debt on the basis that such a claim is to be equated to a

²⁰ *Morettino v Italian Design Experience CC* [2000] 4 All SA 158 (W).

claim to enforce a contractual obligation to perform an act. This Court has, for more than a century, laid down that the discretion to grant or refuse an order for specific performance arises when a claim *ad factum praestandum* is made and an alternative of awarding damages is available. As I have demonstrated, there is no authority to the contrary. I need not consider whether an order for payment of a contract price against performance of a plaintiff's obligation to act, could be classified as an order for the defendant to accept the performance and thus, in effect, an order *ad factum praestandum*. We were not asked to develop the law by extending the discretion to the enforcement of all contractual obligations. For the reasons that follow I, in any event, do not perceive any basis or need to do so.

[37] An order to perform an act (*ad factum praestandum*) may prove difficult to enforce. The spectre of contempt proceedings as a consequence of non-compliance with an order *ad factum praestandum* hovers over proceedings in which a party seeks such an order which may have become difficult to perform, or even impossible to perform, despite the fact that the obligation continues to subsist. Those, and perhaps some of the other considerations of the type furnished as examples in *Haynes*,²¹ are the origin of the principle in our law that, whilst a plaintiff has a right to claim specific performance of an act, as opposed to damages for non-performance, the court has a discretion in an appropriate case to refuse to enforce performance, leaving the plaintiff to claim damages for non-performance. It is difficulties arising with respect to the order for performance of the act which generate the need for a discretion. No such difficulties arise in the case of money judgments.

²¹ *Haynes* at 378H.

[38] The very essence of the strict or true discretion involved, is the choice between permissible alternatives.²² Such a discretion could not exist in the absence of a choice between alternatives. A claim for payment of money due under a contract has no alternative, and consequently generates no choice as to remedy which might engage the exercise of the court's discretion, as is the case when the claim is for the performance of an act. That being the case, the grant of an order *ad pecuniam solvendum* is not the product of the exercise of a discretion. Put otherwise, an order for payment of a contractual debt is not a discretionary remedy.

[39] It should be added that there is a resonance between the statement by Hefer JA in *Benson*, that '[a]nother principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy',²³ and the statement in *Beadica* that '[i]t is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.'²⁴ Amongst the grounds listed in *Haynes* on which courts have in the past exercised a discretion to refuse orders *ad factum praestandum* are these: where damages would be adequate compensation; where enforcement would cause the defendant unreasonable hardship; where the contract itself is unreasonable; where the enforcement order would cause injustice or be inequitable. It is consistent with *Beadica* and *Benson* that pleas against enforcement of contractual obligations on such grounds must be founded on public policy, even when the obligation in question may be the performance of an act.

[40] Allowing courts a general discretion to refuse judgments for contractual money debts, perhaps 'in the interests of justice' or to 'avoid undue hardship',

²² *Benson* at 781I-782A.

²³ *Benson* at 783D.

²⁴ *Beadica* para 80.

gets perilously close to rendering the simplest instances of judicial enforcement dependent on the ‘idiosyncratic inferences of a few judicial minds’.²⁵ The power of a court to refuse judgment for a money claim arising from contract, when to grant it would be contrary to public policy, is a sufficient brake on excesses. The ambit of that relief has been carefully delineated, as has its position under the Constitution. Allowing the courts to refuse such a judgment in the exercise of a discretion may disturb the vital balance set in our public policy rules which are designed, *inter alia*, to ensure that the public interest in the values underlying the doctrine of *pacta sunt servanda* are adequately served and protected.

[41] I conclude that there is no merit in the employer’s argument that the contractor has made a claim for specific performance which engages the discretion which our courts have to grant or refuse such orders when the contractual obligation sought to be enforced is one *ad factum praestandum*.

[42] Finally, counsel for the employer argued that the employer should have succeeded in the high court because the money claims which are the subject of the adjudication awards had been overtaken by subsequent certificates or a certificate issued by the engineers in terms of the contract. The documents relied upon for this were put up with the employer’s answering affidavit. A reading of those documents, insofar as they can be understood, does not generate a conclusion to the advantage of the employer. The deponent to the answering affidavit has not explained how the documents should be read in order to generate the conclusion contended for, which appears to be in effect that set-off has occurred. The alleged defence was inadequately pleaded by the employer in six lines of the affidavit which constitute no more than bare assertions. (In reply to these contentions of the employer the contractor has

²⁵ *Beadica* para 81; *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; [1989] 1 All SA 347 (A); 1989 (1) SA 1 (A) at 9C-D.

gone so far as to assert that on this issue the employer ‘deliberately seeks to deceive’ the court. No finding on that issue is necessary for the disposal of this appeal.)

[43] In the circumstances, the appeal is dismissed with costs.

P J OLSEN
ACTING JUDGE OF APPEAL

Appearances:

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Ms SBR Lushaba

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