



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Ethekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa [2023] ZASCA 95

Today, the Supreme Court of Appeal (SCA) dismissed an appeal from the KwaZulu-Natal Division of the High Court, Durban (high court). The appellant, Ethekwini Municipality, concluded a written contract with the respondent, a construction company based in Italy, for the construction of a certain roadworks. The contract allowed for the submission of unresolved disputes to adjudication, which subsequently resulted in the appellant having to pay certain amounts to the respondent. The appellant failed to pay the required amounts, and respondent approached the court to make the adjudication decisions orders of court. The high court did so, which prompted the appellant to approach this Court upon appeal.

The appellant underpinned its argument on two considerations, the first being public policy and the second specific performance. With regards to the first, the appellant contended that the high court had a discretion to exercise when asked to grant a money judgment if the enforcement of the decisions of the adjudicator would be contrary to public policy; had the discretion been exercised properly, the result would have been that the application would have been dismissed. The case made out by the appellant was based on the premise that South African jurisprudence established that a court has a discretion to grant or refuse the remedy sought on public policy grounds. However, this Court held that the enquiry was not directed at the exercise of a judicial discretion. A party resisting enforcement of a contractual obligation on public policy grounds had a duty to place the relevant facts before the court. It was the court's duty to determine whether on the facts the enforcement of the obligation would be contrary to public policy. If enforcement was found to be contrary to public policy the court would be bound to refuse relief. The appellant argued that the principle of *pacta sunt servanda* (agreements should be observed) should not have applied, as to do so would be contrary to public policy. However, the SCA held that the agreement did not offend public policy as the parties were on equal contractual footings, no constitutional values were infringed and the agreement entered into between the parties was one bearing the ordinary risks, rights and responsibilities associated with such an agreement in an ordinary commercial setting.

With regards to an order for specific performance, the argument was that even an order for payment of a contractual debt could be refused in the exercise of a discretion if it would impose undue and unreasonable hardship on the debtor. The high court found that it had a discretion but declined to

exercise it in favour of the appellant. The SCA considered whether the judge had a discretion to exercise at all. The Court indicated that it could undoubtedly be said that any order enforcing a specific obligation due to be performed in terms of a contract, including one for the payment of money, was an order for specific performance in a wide sense. The SCA highlighted that this was, however, not the manner in which the term has consistently been used in South African jurisprudence, where, in the context of enforcement of contractual obligations, it refers to the enforcement of an obligation *ad factum praestandum*,

The SCA 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. There is no such alternative when the contractual obligation is the payment of money, and accordingly no discretion to be exercised by a court. No authority to the contrary was provided and the Court did not perceive the need to develop the law further. Allowing courts a general discretion to refuse judgments for contractual money debts in the interests of justice or to avoid undue hardship, despite the fact that to do so would not be contrary to public policy, comes dangerously close to rendering the simplest instances of judicial enforcement dependent on the idiosyncratic inferences of a few judicial minds. The appellant's argument that the high court had a discretion to refuse an order enforcing the respondent's money claim was rejected.

In the result, the SCA dismissed the appeal.

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