MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION CONCERNING ITS INVESTIGATION INTO UNREASONABLE STIPULATIONS IN CONTRACTS AND THE RECTIFICATION OF CONTRACTS (PROJECT 47)

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The South African Law Commission has submitted its Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts (Project 47) to the Minister of Justice.

The object of Project 47 is to consider whether the courts or other bodies should be enabled to remedy contracts or contractual terms that are unreasonable, unconscionable or oppressive and thus to modify the application to particular situations before the courts or other body or bodies of such contracts or terms so as to avoid the injustices which would otherwise ensue.

The background to the Report is that the Commission published a Working Paper during May 1994 and a Discussion Paper during July 1996 for general information and comment. The Report reflects mainly the comments received in respect of the Discussion Paper.

The problems concerned in this area of the law were, inter alia, set out as follows in the Discussion Paper:

It happens daily that individuals voluntarily enter into contracts with one another, or with banks, building societies, financial institutions, wholesalers or retailers, in the expectation that the contracts will satisfy their needs and aspirations, only to find subsequently that, in practical application, the contracts as a whole or some of their terms are unjust or unconscionable. Common examples of such situations abound, but a few examples will suffice: the head of a homeless family urgently in need of a roof over their heads signs a lease which gives the lessor the right to raise the rent unilaterally and at will, and the lessor doubles the rent within five months; an uneducated man signs a contract of loan in which he agrees to the jurisdiction of a High Court, to find out only later, when he is sued that a lower court also had jurisdiction over the matter and that the case could have been disposed of at a much lower cost to himself; a man from a rural area purchases furniture from a city store on standard, pre-prepared hire-purchase terms, later to find out that he has waived all his rights relating to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so on.

The question was asked in the Discussion Paper whether the courts should be able to give relief in these circumstances by either setting aside the contract or modifying its terms.

The Commission makes the following recommendations in its Report:

1. Reform is called for in this area of the law. Legislation addressing contractual unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced, is the most viable and expedient method to effect such legal reform.

2. There is a need to confer wide powers to the courts to effect justice to contracting parties. These powers should be balanced by confining the proposed criteria to unreasonableness, unconscionability and oppressiveness. The following provision setting out the powers of courts is proposed:

If a court is of the opinion that

(a) the way in which a contract between the parties or a term thereof came into being; or

(b) the form or the content of a contract; or

(c) the execution of a contract; or

(d) the enforcement of a contract,

is unreasonable, unconscionable or oppressive, the court may declare that the alleged contract-

(aa) did not come into existence; or

(bb) came into existence, existed for a period, and then, before action was brought, came to an end; or

(cc) is in existence at the time action is brought, and it may then-

(i) limit the sphere of operation and/or the period of operation of the contract; and/or

(ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or

(iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.

3. There is a practical need to provide some definition to the concept of unreasonableness, unconscionability or oppressiveness by setting out guidelines in the proposed legislation, so as to enhance legal certainty.

4. The proposed legislation should not apply to the following contracts-

• contracts which fall within the scope of the Labour Relations Act, Act 66 of 1995, or which arise out of the application of that Act;
• contracts falling within the scope of the Bills of Exchange Act, Act 34 of 1964;
• contracts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts; and
• contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of the proposed Control of Unreasonableness, Unconscionability or Oppressiveness in Contracts or Terms Bill.

5. The application of the proposed legislation should not be excluded in respect of family law agreements in accordance with the Divorce Act, the Matrimonial Affairs Act, or the Matrimonial Property Act. It does not seem to the Commission that settlements reached under these Acts are in any way satisfactorily regulated and the possibility of judicial review under the proposed legislation seems to be called for.

6. The proposed legislation should provide that the relevant circumstances to be taken into account are those that existed at the time of the conclusion of the contract. Furthermore, where there is a reasonably unforeseeable change of circumstances which makes performance under the contract excessively onerous, the parties to the contract should be bound to enter into negotiations with a view to adapting the contract or terminating it.

7. There is also a need for a specific provision conferring on the High Court the jurisdiction where it is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable, unconscionable or oppressive, that it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

8. The Office of an Ombudsperson should be established to ensure that standard contract terms comply with the requirements of contractual fairness, thus providing a remedy to ordinary consumers who would not be able to seek redress in the courts. It is proposed that the Ombudsperson should have the following powers and duties-
• to negotiate with a person using or recommending the use of pre-formulated standard contracts in order to obtain an undertaking from him or her that he or she will act in accordance with the proposed Act, and if such a party fails to fulfil such an undertaking, the Ombudsperson may issue such orders as may be deemed necessary for ensuring the fulfilment of such an undertaking;
• if having considered a complaint about any contract term that the Ombudsperson considers to be unreasonable, unconscionable or oppressive, that he or she may bring proceedings in the High Court for an interdict against any person appearing to him or her to be using or recommending use of such a term; provided that if he or she decides not to apply for an interdict, reasons shall be furnished to the complainant for such a decision;
• to prepare draft codes of conduct applying to particular persons or associated persons in a field of trade or commerce, in consultation with such persons, organisations, consumer organisations and other interested parties for the consideration and approval of the Minister;

• if it appears to the Ombudsperson that a person has acted in contravention of a prescribed code of practice applicable to that person, to request the person to execute within a specified time a deed in terms approved by it under which the person gives undertakings as to-

(i) discontinuance of the conduct;

(ii) future compliance with the code of practice; and

(iii) the action the person will take to rectify the consequences of the contravention,

or any of them;
• to retain all deeds and to register the deeds in a Register of Undertakings kept by it and containing the prescribed particulars;
• if a person fails to comply with the request by the Ombudsperson for the giving of an undertaking it may on application to the High Court, request that the person be ordered-

(i) to act in a manner that would have been required; or

(ii) to refrain from acting in a manner that would have been prohibited.

9. The question whether the parol evidence rule should be retained or abolished leads to divergent answers not only in South Africa but also in other jurisdictions. The Law Commission takes the view that evidence of what passed between the parties, or the background or surrounding circumstances, is the best evidence of what the parties had in mind, and if the words the parties used are capable of some other meaning, as is almost invariably the case, justice requires that such evidence should be admissible to prove the contract. The following provision is proposed in this regard:

Whether or not the words of the contract appear to be ambiguous evidence of what passed during negotiations between the parties during and after the execution of the contract and surrounding circumstances is admissible to assist in the interpretation of any contract.

ISSUED BY THE SECRETARY, SA LAW COMMISSION, PRETORIA
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