

SPECIFIC PERFORMANCE AS A PRIMARY REMEDY IN THE SOUTH AFRICAN LAW OF CONTRACT

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Abstract

Specific performance is a primary remedy for breach of contract available for the aggrieved party. This order emphasises the performance of contractual obligations. Although the plaintiff can elect to claim specific performance from the defendant, the court has a discretion to grant or decline the order of specific performance. The discretion must be exercised judicially and does not confine on rigid rules. Courts decide each case according to its own facts and circumstances. Plaintiff has a right of election whether to claim specific performance from the defendant or damages for breach of contract. The defendant does not enjoy any choice in this matter. As a general rule, specific performance is not often awarded in the contract of services. However, recent developments have demonstrated that specific performance will usually be granted in employment contracts if there is equality of bargaining power among contracting parties and such order will not produce undue hardship to the defaulting party. Public policy generally favours the utmost freedom of contract and requires that parties should respect or honour their contractual obligations in commercial transactions. Public policy is rooted in the constitution and can sparingly be used to strike down contracts. Specific performance should not continue to be a primary remedy for breach of contract. Contracting parties should be allowed to resile from the contract and use damages as a remedy for breach of contract.

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1 Introduction

Specific performance is the primary and natural remedy for breach of contract and is in principle available to the aggrieved contractant.¹ For the purpose of the law of contract generally, an order of specific performance must be understood as including any order to perform a contractual obligation, whether it is to perform an act or acts, render services, make delivery or pay money.² The law of contract is clear that a plaintiff is always entitled to claim specific performance and, assuming he or she makes out a case, his or her claim will be granted, subject only to the court's discretion.³ In *Farmers' Co-operative Society (Reg) v Berry*,⁴ Innes J stated that "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 another party, so far as it is possible, a performance of his undertaking in terms of the contract."⁵

The right to specific performance of a contract where the defendant is in a position to do so is beyond all doubt.⁶ In *Haynes v Kingwilliamstown Municipality*,⁷ De Villiers AJA held that in South African law "a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by

¹ S Van der Merwe, et al. *Contract general principles* 3rd ed Landsdowne: Juta & Co Ltd (2007) 380; D Hutchison et al *The law of contract in South Africa* 2nd ed. Cape Town: Oxford University Press Southern Africa (Pty) Ltd (2012) 321; K Mould "A critical study of the recurring problem of repudiation in the context of professional rugby in South Africa with particular emphasis on transformative constitutionalism" (2010) 35(1) *Journal for Juridical Sciences* 49, 60; M Wethmar-Lemmer "Specific performance as a remedy in international sales contracts" (2012) 4 *TSAR* 700, 702-703; S Cornelius "Sanctity of contract and players' restraints in South African sports" (2003) 4 *TSAR* 727, 727-728; H Fazilatfar "The impact of supervening illegality on international contracts in a comparative context" (2012) XLV *CILSA* 158.

² R H Christie. *The law of contract in South Africa* 5th ed. Durban: LexisNexis Butterworths (2006) 522.

³ *Ibid* 523. *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A), *Benson v SA Mutual Life Assurance Society* 1986 1 SA 1 (A).

⁴ *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343.

⁵ *Ibid* 350.

⁶ *Thompson v Pullinger* (1894) 1 OR 298 at 301.

⁷ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A).

him of precisely what he has bound himself to do, or to claim damages for the breach”.⁸ He argues that a defendant does not enjoy the right of choice. He or she cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him or her.⁹ Although the plaintiff enjoys a freedom of choice, the court still has a discretion not to order specific performance. The discretion that the court enjoys must be exercised judicially and it is not confined to specific types of cases nor rigid rules. Each case must be judged in the light of its own circumstances.¹⁰ Specific performance is a primary remedy¹¹ for breach of contract in South African law. However, the award of damages can also compensate the aggrieved party when there is a breach of contract. This article will look at the judicial discretion to grant an order of specific performance, impossibility of performance, undue hardship, contract for personal services, imprecise obligations, reluctant of the courts to strike down a contract and make some recommendations.

2 Judicial discretion to grant an order of specific performance

The notion of judicial discretion to grant or refuse an order of specific performance is regulated by common law. In *Haynes* case, De Villiers AJA held that:

It is, however, equally settled law with us that although the court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod* interest. The discretion which a court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.¹²

The Appellate Division listed factors or grounds where the courts have exercised their discretion in refusing an order of specific performance even though performance was not impossible. They include: “(a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the court to enforce its decree; (c) where the things claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature.”¹³ The other examples are “(e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice or would be inequitable under all the circumstances.”¹⁴ For instance an order of specific performance against an employee may produce injustice in certain circumstances and should not be awarded. Furthermore, it is not difficult for the court to enforce its decree. If the court order is not respected, the aggrieved party can approach the court and the defaulting party may be guilty of contempt of court and be dealt accordingly.

In *Benson v SA Mutual Life Assurance Society*,¹⁵ Hefer JA explained the way the discretion had to be exercised and stated that there were no rules except the rule that the court's discretion should be exercised judicially upon a consideration of all relevant factors.¹⁶ However, the appeal court will interfere only when “the court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.”¹⁷

There are circumstances where specific performance should not be ordered. Hefer JA identified three principles that should direct the court: (a) specific performance should not produce an unjust result; (b) the remedy for specific performance should always be granted or withheld in accordance with legal and public policy; and (c) specific performance should not be ordered where performance has become impossible.¹⁸ Circumstances where specific performance should not be granted are examined below. They

⁸ Ibid 378D-E; *Cohen v Shines, Mc Haltie and King* 1882 Kotze's Reports 41.

⁹ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378D-E. See also *Woods v Walters* 1921 AD 303 at 309, *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 392 (A) at 433.

¹⁰ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378G-H.

¹¹ *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 782.

¹² *Haynes v Kingwilliamstown* 1951 2 SA 371 (A) at 378 F-G. See also MA Lambiris. *Orders of specific performance & restitution in integrum in South African law*. Durban: Butterworths 1989 at 126, 128; S Eiselen “A comparison of the remedies for breach of contract under the CISG and South African law” available at <http://www.cisg.law.pace.edu/cisg/biblio/eiselen2.html> (retrieved on 26 May 2015).

¹³ *Haynes v Kingwilliamstown* 1951 2 SA 371 (A) at 378H.

¹⁴ Ibid 378 – 379; K Mould (note 1 above) 61-62.

¹⁵ *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A).

¹⁶ Ibid 782F – 783C.

¹⁷ Per Greenberg JA in *Ex Parte Neethling* 1951 4 SA 331 (A) at 335.

¹⁸ *Benson v SA Mutual Life Assurance Society* op cit (n. 1) 783D-F; see also R Le Roux “How divine is my contract? Reflecting on the enforceability of proper or athlete contracts in sport” (2003) 15 *Merc LJ* 116 at 121.

are impossibility of performance, undue hardship, contract for personal services and imprecise obligations.

2.1 Impossibility of performance

As a general rule, “specific performance will never be ordered if compliance with the order would be impossible.”¹⁹ A distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound.²⁰ When the impossibility extinguishes the obligation, there is nothing to perform and the creditor has no remedy. However the creditor has a remedy if the obligation still exists but it is impossible to fulfil it due to some circumstances. Certain reported cases demonstrate where specific performance of the obligation is impossible.

In *Pretoria East Builders CC v Basson*,²¹ the third party had sold the property of the applicant company to the respondent without having its authority to do so. The applicant did not have any intention to sell its property to the respondent. The court held that, in these circumstances, an order of specific performance against the applicant was futile.²² It follows that, in a contract of sale, specific performance against the owner or third party will be impossible if there is no intention to sell.

However the impossibility does not refer to cases of supervening the impossibility of performance. “If circumstances are such that the impossibility prevents legally enforceable obligations from existing there is no need for the courts to exercise any discretion against an order of specific performance, since no enforceable obligation exists to be enforced.”²³ In fact, the impossibility refers to circumstances where the party is still bound by contract to perform the obligation but he or she cannot do so. If the circumstances are such that, despite the impossibility of performance, enforceable obligations are considered to exist, the law requires that the debtor discharges his or her liability by paying damages in lieu of performance.²⁴ The court will not order specific performance if the debtor cannot honour his or her obligation. “No court can sensibly order the performance of something that is impossible.”²⁵ However, circumstances may exist that require or impose undue hardship for the contracting party to perform his or her obligation.

2.2 Undue hardship

The courts do not order specific performance if it will have the effect of producing undue hardship to the respondent or third parties. In *Haynes v Kingwilliamstown Municipality*, the court gave examples of sufficient grounds for refusing specific performance: “where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances.”²⁶

In this case, the respondent Municipality had an agreement with the appellant to release 250 000 gallons of water a day from their storage dam. Due to unprecedented drought, the respondent reduced the released water to a daily flow of only 1 500 to 2 000 gallons.²⁷ The respondent also had a duty to provide water to its 13 000 inhabitants. The court found that the order of specific performance would result not only in great hardship but in positive danger to the health of the community to whom the respondent owed a public duty to render an adequate supply of water. In this case, the undue hardship did not only exist for the respondent but it also extended to third parties to the contract. On the facts, appellant did not suffer any damages as a result of the breach of contract. The appellant had other means of supply of water. The court refused to award an order of specific performance.

It is therefore “clear that although the court has no general power to relieve parties from the consequences of an unreasonable contract or one that, due perhaps to unforeseen circumstances, has turned out more

¹⁹ R H Christie op cit (n. 2) 525; MA Lambiris op cit (n.12) 140; A Duff “Breach of contract: how contracts rule our lives” November 2010 *Pharmaceutical & Cosmetic Review* 12, 13; IJ Kroeze “Individual performance contracts in higher education: a critical appraisal” (2013) 25 *SA Merc LJ* 13, 17.

²⁰ *Benson v SA Mutual Life Assurance Society* 1986 2 SA 776 (A) 783F.

²¹ *Pretoria East Builders v Basson* 2004 6 SA 15 (SCA).

²² *Ibid* 21D, para 10.

²³ MA Lambiris op cit (n. 12) 140.

²⁴ *Ibid* 140 – 141.

²⁵ *Ibid* 141.

²⁶ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378H – 379A, *R v Milne and Erleigh* (7) 1951 1 SA 791 (A) 873 – 874; *Hutchison et al* (note 1 above) 323.

²⁷ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 376.

onerous than expected, it will take such matter into account in deciding whether to order specific performance.²⁸ The court does not make contract for people and it is not obliged to relieve them from their duties.²⁹ As a result, parties must be careful when they make contract to create binding obligations among themselves. This is because contract freely and voluntarily entered into by the parties must be honoured. However the court considers the unreasonableness of the contract or the changed circumstances when it exercises its discretion to order specific performance. If the court declines to order specific performance, the innocent party will have to prove his or her damages, which may be far less burdensome on the debtor.³⁰ The discretion must be exercised at the time specific performance is sought.³¹ In fact, circumstances may have been changed between the creation of the contract and its execution. The court considers them in order to avoid undue hardship between contracting parties when granting or declining an order of specific performance.

In *Barclays National Bank Ltd v Natal Fire Extinguishing Co (Pty) Ltd*,³² a notarial bondholder sought specific performance under a clause entitling it to demand possession of the bonded property. The court, per Didcott J, considered the hardship not only to the giver of the bond but also to its other creditors.³³ The benefit to third parties persuaded the court to exercise its discretion in favour of ordering specific performance.

The undue hardship principle may, in practice, have the effect of restricting the innocent party's choice of remedies for breach of contract.³⁴ In *SA Harnes Works v SA Publishers Ltd*,³⁵ specific performance was refused because the applicant failed to mitigate its damages. The advertiser repudiated an advertising contract and the publishers were held not entitled to continue publishing the advertisement and to claim the contract price.

In *Visser v Neethling*,³⁶ specific performance of a contract of sale of immovable property was refused when the market price has fallen after the sale. It was refused because the only value which an order for specific performance would be to him would be to enable him to exact a greater amount of damages from the defendant than the court considers him entitled to.³⁷ The undue hardship to the buyer was avoided.

Finally, "the undue hardship principle is equally applicable after an order for specific performance has been made but circumstances have then changed, so that the enforcement of the order would cause an injustice."³⁸ In this situation, simple justice is done between the parties. The following issue examines the order of specific performance in the employment contract.

2.3 Contract for personal services

As a general rule, the court, when exercising its discretion, will not normally grant or award the order of specific performance of a very personal nature, such as contracts of employment.³⁹ In *Selodi and Others v Sun International (Bophuthatswana) Ltd*,⁴⁰ the court declined to order a hotel company to re-employ workers with strong grievances and enmity towards it whom it had summarily dismissed. In this situation, the relationship has been deteriorated and parties could not restore their working relationships. An order for specific performance would have amounted to an undue hardship between the parties.

²⁸ R H Christie op cit (n. 2) 526. See also *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 4 SA 615 (T) 621I – 628K; *SAPDC (Trading) Ltd v Immelman* 1989 3 SA 506 (W) 512 C-D.

²⁹ See *Jajbhay v Cassim* 1939 AD 537; Aquilius "Immorality and illegality in contract" 1941 SALJ 337 - 353.

³⁰ R H Christie op cit (n. 2) 526.

³¹ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 381.

³² *Barclays National Bank Ltd v National Fire Extinguishing Co (Pty) Ltd* 1982 4 SA 650 (T).

³³ Ibid 655 E-H.

³⁴ R H Christie op cit (n. 2) 526.

³⁵ *SA Harnes Works v SA Publishers Ltd* 1915 CPD 43.

³⁶ *Viser v Neethling* 1921 CPD 176.

³⁷ Ibid 177.

³⁸ R H Christie op cit (n. 2) 528. See also *York Timbers Ltd v Minister of Water Affairs and Forestry* [2003] 2 All SA 710 (T) 728 – 729.

³⁹ R H Christie op cit (n. 2) 525; Hutchison *et al* op cit (n.1) 323. See also *Troskie en'n Ander v Van der Walt* 1994 3 SA 545 (O) where the court refused or declined to order specific performance to compel a rugby player to play for a rugby team; MSM Brassey. "Specific performance a new stage for labour's lost love" 1981 ILJ 57 – 79; K Mould "The suitability of the remedy of specific performance to breach of a player's contract with specific reference to the Mapoe and Santos cases" (2011) 14(1) PELJ 189, 198; GA Uberstine & RJ Grad "The enforceability of sports contracts: a practitioner's playbook" (1987) 7 *Loyola Entertainment Law Journal* 1, 10; B Whitehill "Enforceability of professional sports contracts – what's the harm in it?" (1981-1982) 35 *SW LJ* 803, 805.

⁴⁰ *Selodi v Sun International Baphuthatswana Ltd* 1993 2 SA 174 (B) at 186I – 190F.

In *National Union Textile Workers v Stag Packings (Pty) Ltd*,⁴¹ the court held that as a general rule a party to a contract which had been wrongfully rescinded by the other party could hold him or her to the contract if he or she so elected. There was no reason why this general rule should not also be applicable to contracts of employments. This allows the court to exercise its discretion to grant an order of specific performance in contracts of service when it is appropriate. Van Dijkhorst outlined or summarised the nature and scope of the court's discretion to grant an order of specific performance as follows:⁴²

The discretion must be exercised judicially. It is not arbitrary or capricious but sound and reasonable.

1. It is not confined to specific types of cases.
2. It is not circumscribed by rigid rules.
3. Though it governs itself as far as it may by general rules and principles, it at the same time withholds or grants relief according to the circumstances of each particular case when these rules and principles will not furnish any exact measure of justice between the parties.
4. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are absolutely binding in all cases.
5. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future enquiries.

There are certain circumstances where the court can order specific performance for a contract of employment. In *Santos Professional Football Club (Pty) Ltd v Igesund*,⁴³ the court ordered specific performance of a head coach to continue to comply with his contract of employment. In this case, the employee attempted to prematurely terminate his contract simply because he had received a better offer. The contract expressly reserved to appellant (applicant in a court *a quo*) the right to claim specific performance if first respondent committed any breach of the contract. The court made a distinction between a wrongfully dismissed servant and an employee who contracted with his employer on equal terms and unlawfully resiled from the contract in order to earn more money from a rival.

The court recognised as from *Brisley v Drotsky* 2002 4 SA 1 (SCA) at para 94 that courts should be slow in striking down contracts or declining to enforce them, and should, in specific performance situations refuse performance only where a recognised hardship to the defaulting party had been proved.⁴⁴ On the facts, the court found that the respondent employee was independent in the performance of his coaching job and there was no undue hardship for him to comply with the contract. Furthermore, the respondent employee enjoyed the same bargaining power as his employer. The court ordered specific performance against the employee to honour his contract.

Contract to render personal services, other than contracts of service, must be examined on their merits in order to see whether the considerations applicable to contract of service are present in sufficient strength to displace the general principle that a plaintiff is entitled to an order of specific performance, and it will seldom if ever be possible to make a decision until all the evidences had been heard.⁴⁵ Orders of specific performance may be declined or granted depending on the circumstances of each case. The contract of employment is generally governed by the provisions of Labour Relations Act 66 of 1995 and it emphasises reinstatement as a primary remedy in employment disputes. Currently, the order of specific performance will usually be granted in the employment contracts if there is equality of bargaining power and such order will not produce undue hardship to the defaulting party.

3.4 Imprecise obligations

Without necessarily being void for vagueness, a contractual obligation may be of such a nature that defendant who has been ordered specifically to perform it might genuinely claim to have done so but the plaintiff might equally claim that he or she has not.⁴⁶ In some instances, orders for specific performance

⁴¹ *National Union Textile Workers v Stag Packings (Pty) Ltd and Another* 1982 4 SA 151 (T) at 156H. The unwilling employer was ordered to reinstate back dismissed employees into employment. See also *MSM Brassey* op cit (n. 39) at 57.

⁴² *National Union Textile Workers v Stage Packings (Pty) Ltd and Another* 1982 4 SA 151 (T) 156; *Mould* op cit (n.1) 63.

⁴³ *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C); *K Mould* (note 1 above) 67, 50. See also *K Mould* op cit (n.1) 50; *K Mould* op cit (n. 42) 200-205; *Cornelius* op cit (n.1) 729-730.

⁴⁴ *Ibid* 86 F-I. See also *T Naude* "Specific performance against an employee *Santos Professional Club (Pty) Ltd v Igesund* "(2003) *SALJ* 269 at 270.

⁴⁵ *R H Christie* op cit (n. 3) 529; *Robertson Municipality v Jansens* 1944 CPD 526 at 531; *Troskei v Van der Walts* (supra) 552 G-H.

⁴⁶ *R H Christie* op cit (n. 2) 529.

for the contracts to repair or insure buildings have been refused on the grounds of imprecision.⁴⁷ In *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,⁴⁸ the court considered the nature of the claim for plaintiff who has been prevented by the defendant's lack of necessary cooperation from fulfilling his contractual duties, and preferred to treat it as a claim for performance less deduction for saved cost of counter-performance rather than a claim for damages for non-performance. If there are imprecise obligations in the contract, they may be avoided. Every contract requires that parties voluntarily agree to perform their duties and courts are reluctant to invalidate contracts validly formed between the parties.

4 Reluctance of the courts to strike down a contract

The courts are reluctant to make orders striking down the contracts that are unreasonable or oppressive, unconscionable or contrary to good faith. This is because parties are free to enter into binding agreements and structure their activities. Contracts contain the constitutional principles of freedom, equality⁴⁹ and dignity.⁵⁰ "The principle of freedom does, to an extent, support the view that contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectation of contractual parties to be frustrated."⁵¹ However an agreement between the parties can only be invalidated if it is contrary to public policy. "Public policy in any event nullifies agreements offensive in themselves, a doctrine of very considerable antiquity."⁵² It should be respected for the interest of the community and contracting parties.

In *Brisley v Drotzky*, the Supreme Court of Appeals held that "in its modern guise, public policy is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism."⁵³ A contract against public policy is one stipulating a performance which is not *per se* illegal or immoral, but which the courts, on ground of expedience, will not enforce, because performance will detrimentally affect the interest of the community.⁵⁴ 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.⁵⁵

No court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demands.⁵⁶ The power to declare contract contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contract 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. In the words of Lord Atkin in *Fender v St John – Mildmay* [1938] AC 1 (HL) at 12: "... the doctrine should only be invoked in a clear case in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds." In grappling with this often difficult problem it must be born in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom.⁵⁷

The principle in *Shifren's* case has consistently been reaffirmed, albeit with the rider in a recent case that non-variation clauses are to be restrictedly interpreted since they curtail freedom of contract.⁵⁸ Applying these principles, the court in *Brisley v Drotzky* upheld the validity of a non-variation clause and granted an eviction order against the lessee despite having made an oral agreement with the lessor. However, the position was different in *Sasfin (Pty) Ltd v Beukes*. The court held that the respondent was relegated to the

⁴⁷ Marais v Cloete 1945 EDL 238 at 242 – 243.

⁴⁸ BK Tooling (Edms) Bpk v Scope Precism Engineering (Edms) Bpk 1979 1 SA 391 (A) 412 – 414.

⁴⁹ Constitution of the Republic of South Africa, 1996, section 9.

⁵⁰ Constitution of the Republic of South Africa, 1996, section 10.

⁵¹ *Brisley v Drotzky* 2002 4 SA 1 (SCA) 28 B-C.

⁵² *Ibid* 34G; *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 172, 204 - 205.

⁵³ *Brisley v Drotzky* 2002 4 SA 1 (SCA) 34 – 35, para 91.

⁵⁴ *Ibid* 17 H, para 29.

⁵⁵ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 8 D-E; see also H Fazilatfar "The impact of supervening illegality on international contracts in a comparative context" (2012) XLV *CILSA* 158, 177-178.

⁵⁶ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9B.

⁵⁷ *Brisley v Drotzky* 2002 4 SA 1 (SCA) 18D-G. See also *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9B-C; Barkhuizen v Napier 2007 5 SA 323 (CC) paragraph 29; B Whitehill "Enforceability of professional sports contracts – what's the harm in it?" (1981-1982) 35 *SW LJ* 803, 806; JC Kanamugire "The future of standard form contracts in South Africa with particular reference to recent developments in the law" (2013) 4(13) *MJSS* 335, 338-339.

⁵⁸ *Brisley v Drotzky* 2002 4 SA 1 (SCA) 35, par 92.

position of a slave since he could not recover his debts from his debtors or clients according to the agreement of cession of his book debts to the appellant. Such agreement was not severable and was declared to be against public policy and invalid.

5 Conclusion and recommendation

Specific performance is a primary remedy in South African law of contract. When a breach of contract arises, the aggrieved party has the election to request specific performance of the contract or sue for damages against the defaulting party. Despite the election of the aggrieved party, the court has a discretion to order or decline specific performance. However, the discretion has to be exercised judicially. There are no rigid rules or circumstances where a court must order specific performance. Each case depends on its own facts and circumstances.

In certain circumstances such as impossibility of performance, undue hardship to the defaulting party or third parties, contract of service and imprecise obligations, the courts have refused to order specific performance against the defaulting party. However, currently in the contract of service, if the contracting parties enjoy the same bargaining power, the court may order specific performance provided that there will be no undue hardship in the execution or performance of the contract. This is a recent development as the courts usually decline to grant the order of specific performance whenever there is a contract of service.

The court will declare contracts invalid if they are against public policy. Public policy is now rooted in the Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism.⁵⁹ However, the power to declare agreements against public policy must be exercised sparingly and only in the clearest of case. These limits of contractual sanctity lie at the borders of the public policy and they receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights. Contracts will only “be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so.”⁶⁰ In this circumstance, the aggrieved party will not be able to request and enforce specific performance.

It is submitted that specific performance should not continue to be considered as a primary remedy for breach of contract in South African law of contract. Although contracts must be honoured, the circumstances may change after the contract has been made. If necessary, contracting parties should be allowed to resile from the contract and use damages as a remedy for breach of their contract.

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⁵⁹ Ibid para 91.

⁶⁰ Ibid 35B, para 92.

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