

# QUESTIONING THE COURTS What are your options?

Brian Martin | Executive Director

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The court process is often regarded by persons as being too drawn out, costly, inefficient and time consuming to be a practical tool for the resolution of disputes. The parties to contractual and voluntary relationships may consequently seek to provide for alternative methods for the determination of disputes and complaints. May the parties to contractual and commercial relationships oust the jurisdiction of the courts to entertain disputes, having particular regard to the provisions of Section 34 of the Constitution of the Republic of South Africa Act No 108 of 1996? The act states that everyone has a right to a "fair public hearing before a Court, or where appropriate, another independent and impartial tribunal or forum".

It is obviously trite to think that the jurisdiction of a court to entertain a dispute will not lightly be regarded as being ousted. This can arise only where it is expressly provided for, or arises by clear implication from the terms of a statute or contract. An agreement to be bound by certain rules, including rules dealing with decisions that can be competently made against members of a voluntary association, will have legal consequences. Under South African law, a person is bound by the terms of an agreement under which he submitted to the decision of a tribunal. It is also not contrary to public policy to oust the jurisdiction of a court to consider the merits of a dispute — see *Jockey Club of South Africa & Others v Feldman* 1942 AD 340 at 350 (referred to with approval in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A)) where the Court stated:

"The exclusion of the jurisdiction of the courts of law on the merits is not contrary to public policy, and our courts have recognized that the decisions of such tribunals on the merits are final, but if the tribunal has disregarded its own rules or fundamental principles of fairness, the courts can interfere."

Consequently, while the ouster of a court's jurisdiction to consider the merits of a matter is not contrary to public policy, the exclusion of the court's powers to determine whether the *other* tribunal has disregarded its own rules or the fundamental principles of fairness would be contrary to public policy - see *Theron en Anderere v Ring Von Wellington von die NG Sending Kerk in Suid Afrika en Anderere* 1976 (2) SA 1 (AD). The Constitutional Court has also, since its establishment, indicated that it will interpret common law principles based upon public policy in accordance with the Constitution. Thus the first enquiry is to determine whether a right has been infringed, either by contract or statute, and then to determine whether the infraction is reasonable and justifiable in a democratic society as contemplated under Section 36 of the Constitution. If an agreement between the parties is silent on the issue of the ousting of the court's jurisdiction to determine the merits of the matter or in respect of more limited interference on the grounds of irregularity or a failure to apply fundamental principles of fairness, the matter is likely to be resolved by testing the terms of the agreement against the constitutional norm and not by discerning whether the agreement *per se* allows for an appeal or review.

Our common law has also recognized that any tribunal performing a decision-making function, whether constituted by statute, regulation or by contract, is obliged to meet certain minimum requirements which includes procedural regularity and complying with principles of justice. In the *Theron* case, Botha expressed the *view* that a tribunal constituted consensually by members of a