CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 109/19

In the matter between:

BEADICA 231 CC	First Applicant
BEADICA 232 CC	Second Applicant
BEADICA 234 CC	Third Applicant
BEADICA 235 CC	Fourth Applicant

and

TRUSTEES FOR THE TIME BEING OF THE OREGON TRUST	First Respondent
SALE'S HIRE CC	Second Respondent
NATIONAL EMPOWERMENT FUND	Third Respondent

Neutral citation:	*Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13
Coram:	Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Theron J (majority): [1] to [104] Froneman J (dissent): [105] to [203] Victor AJ (dissent): [204] to [232]
Heard on:	5 November 2019
Decided on:	17 June 2020

Summary: Law of contract — public policy grounds upon which a court may refuse to enforce contractual terms — the proper role of fairness, reasonableness and good faith

Section 9(2) of the Constitution — substantive equality — enforcement of contractual terms resulting in failure of a black economic empowerment initiative

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

THERON J (Khampepe ADCJ, Jafta J, Majiedt J, Mathopo AJ, Mhlantla J and Tshiqi J concurring):

Introduction

[1] This application concerns the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms. The extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our

new constitutional era.[1] There is a widely held view that there is a growing divergence in the approaches to this issue adopted by this Court and the Supreme Court of Appeal. This perceived divergence has contributed to a great deal of undesirable uncertainty in our law of contract.

Background

[2] The second respondent, Sale's Hire CC (Sale's Hire), is an operator and franchisor of Sale's Hire businesses – the main focus of which is the rental and sale of tools and equipment. The applicants are four close corporations that entered into franchise agreements with Sale's Hire to operate Sale's Hire franchised businesses for a period of 10 years. The applicants operate their businesses from premises leased from the first respondent, the Trustees for the time being of the Oregon Trust (Trust). Mr Shaun Sale, one of three trustees of the Trust, is also the sole member of Sale's Hire. The members of the applicants are former long-time senior employees of Sale's Hire. They acquired their businesses in terms of a black economic empowerment initiative financed by the third respondent, the National Empowerment Fund (Fund).[2]

[3] During 2011, Sale's Hire entered into a cooperation agreement with the Fund in terms of which the Fund would provide loans to black-owned entities to enable them to own and operate Sale's Hire franchised businesses as part of a black economic empowerment initiative. Sale's Hire was appointed as the coordinator of these funding transactions and was required to facilitate the financing process between the Fund and the black-owned franchisees. In terms of the cooperation agreement, Sale's Hire undertook to train the franchisees to operate their businesses and provide them with ongoing business support and mentorship. The applicants were not party to the cooperation agreement.

[1] Hutchison "From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract" (2019) *Acta Juridica* 99 at 99-100. See also *Beadica 231 CC v Trustees, Oregon Unit Trust* 2018 (1) SA 549 (WCC) (High Court judgment) at para 1.

[2] The Fund was established under the National Empowerment Fund Act 105 of 1998 for "the promotion and facilitation of ownership of income generating assets by historically disadvantaged persons". One of the objects of the Fund, in terms of section 3(c) of the Act, is the facilitation of black economic participation by "promoting and supporting business ventures pioneered and run by historically disadvantaged persons".

[4] The franchise agreements, entered into in October 2011, required that the franchisees operate their franchised businesses from an approved location. The approved locations, in terms of the franchise agreements, were premises leased to the applicants by the Trust.

[5] The applicants had each concluded substantially identical lease agreements with the Trust during May 2011. The lease agreements commenced on 1 August 2011 with an initial period of five years, terminating on 31 July 2016. The lease agreements provided each of the applicants with an option to renew their lease for a further five-year period. Clause 20.1 of the lease agreements provides:

> "The Lessee shall have the right to extend the Lease Period by a further period as set out in section 13 of the Schedule on the same terms and conditions as set out herein, save as to rental, provided that the Lessee gives the Lessor written notice of its exercising of the option of renewal at least six (6) months prior to the termination date."

[6] The aggregate of the five-year initial lease period and the five-year lease renewal period corresponds with the 10-year period of the franchise agreements. The option to renew the lease agreement had to be exercised in writing at least six months prior to the termination of the initial lease period. This meant that written notice had to be given by the applicants to the Trust on or before 31 January 2016.

[7] The applicants did not exercise their respective renewal options by 31 January 2016. They failed to give written notice of their intentions to renew the leases within the notice period, as required in terms of the renewal clause. The second applicant was not able to produce any notice of renewal sent by it to the Trust. The first, third and fourth applicants purported to exercise their options during March 2016, after the notice period had elapsed.

[8] On 3 March 2016, the fourth applicant's accountant sent an email to the Trust enquiring how soon a new lease agreement could be drawn up and sent to the fourth

applicant in draft format "for discussion purposes". On 15 March 2016, the third applicant sent a letter which was principally a request to the Trust to consider an offer to purchase the premises, coupled with a request to forward a "draft of the renewal of premises lease". On 29 March 2016, the first applicant sent a letter to the Trust that was a "request to propose a renewal on our already existing lease agreement with the option to purchase". Some months went by without further communication. During July 2016, the Trust demanded that the applicants vacate the leased premises.

[9] The franchise agreements give Sale's Hire an election to terminate the agreements in the event that the applicants are ejected from the approved locations, or if the lease agreements in respect of the approved locations are terminated. It was not disputed by the respondents that the applicants' businesses will collapse if Sale's Hire exercises its contractual power to terminate the franchise agreements. It would, however, appear to be within Sale's Hire's discretion to allow the applicants to continue operating their franchise businesses at other approved premises – preserving the franchise agreements and the applicants' businesses.

[10] The applicants brought an urgent application in the High Court of South Africa, Western Cape Division, Cape Town (High Court) seeking an order declaring that the renewal options had been validly exercised and prohibiting the Trust from taking steps to evict the applicants. The applicants contended that the strict enforcement of the renewal clause of the lease agreements would be contrary to public policy, or unconscionable in the circumstances of this case. The Trust, in turn, brought a counter-application for the applicants' eviction from the leased premises.

[11] The High Court found in favour of the applicants, dismissed the Trust's counter-application that sought their eviction, and declared that the lease agreements between the applicants and the Trust had been validly renewed.[3] The High Court relied on this

[3] High Court judgment above n 1 at paras 42-5.

Court's decision in *Botha*,[4] which it understood as introducing a "principle of proportionality" into our law of contract.[5] The High Court interpreted the principle emerging from *Botha* as being that the sanction of cancellation for breach must be "proportionate to the consequences of the breach".[6] It found that the termination of the leases would result in the termination of the franchise agreements, the collapse of the applicants' businesses and the failure of the black economic empowerment initiative.[7] This, the High Court held, would constitute a disproportionate sanction for the failure by the applicants to comply with the strict terms of the renewal clauses.[8]

[12] The Supreme Court of Appeal criticised the High Court for failing to have sufficient regard to its jurisprudence, which stresses the importance of the principle of *pacta sunt servanda* (agreements, freely and voluntarily concluded, must be honoured) and the need for certainty in the law of contract.[9] While recognising that courts may decline to enforce contractual terms which are, or the enforcement of which would be, contrary to public policy, the Supreme Court of Appeal cautioned that this power should be exercised "sparingly, and only in the clearest of cases".[10] Based on the principle of proportionality ostensibly derived from this Court's decision in *Botha*,[11] the Supreme Court of Appeal rejected the notion that a disproportionate sanction for breach of contract, or for a failure to comply with the terms of a contract, is unenforceable.[12] It referred to this notion as being "entirely alien" to our law and held that its recognition would undermine the principle of legality.[13] The Supreme Court of Appeal held that there were no considerations of public policy that rendered the renewal clauses

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

[5] High Court judgment above n 1 at paras 34-5.

[6] Id at para 35.

[7] Id at para 39.

[8] Id at para 42.

[9] *Trustees, Oregon Trust v Beadica 231 CC* [2019] ZASCA 29; 2019 (4) SA 517 (SCA) (Supreme Court of Appeal judgment) at para 25.

[10] Id at para 34.

[11] Id at paras 37-8.

[12] Id at para 34.

[13] Id at para 38.

unenforceable and replaced the High Court's order with an order dismissing the application and directing that the applicants be evicted from the leased premises.[14]

In this Court

[13] The applicants contend that the strict enforcement of the contractual terms governing the renewal of their leases would be contrary to public policy. According to the applicants, enforcement would be inimical to the values of the Constitution, in particular, the right to equality contained in section 9(2) of the Constitution.[15] They allege that the termination of the lease agreements will bring an end to their franchise agreements, collapse their businesses and lead to the failure of the black economic empowerment initiative financed by the Fund.

[14] The respondents support the principle that courts should exercise the power not to enforce a contract on the basis of public policy "sparingly and only in the clearest of cases".[16] They contend that this is not a case for judicial interference. The respondents argue that this Court's judgment in *Barkhuizen*[17] imposes an onus on parties that seek to avoid the enforcement of a contractual term on the basis of public policy to adequately explain their failure to comply with that term. The respondents submit that, as the applicants have failed to fulfill this requirement, the enforcement of the renewal clause cannot be found to be contrary to public policy.

[14] Id at paras 46-7.

[15] Section 9(2) of the Constitution provides:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[16] Supreme Court of Appeal judgment above n 9 at para 34 endorsing *AB v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) (*Pridwin*) at para 27. See also *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A) (*Sasfin*) at 9A-C.

[17] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

Leave to appeal

[15] There is, as always, the preliminary issue of whether leave to appeal should be granted in this Court. The applicants are required to demonstrate that two requirements are met. First, the pleaded case must fall within the jurisdiction of this Court[18] and second, the interests of justice must warrant the granting of leave to appeal.[19]

[16] Whether the enforcement of a contractual clause would be contrary to public policy, in that it is inimical to constitutional values, is a constitutional issue. As this Court stated in *Barkhuizen,* public policy is "deeply rooted in our Constitution and the values which underlie it."[20] The adjudication of this matter implicates the crucial question of how public policy, as a basis upon which a court may refuse to enforce the terms of a contract, should be determined. This question requires an enquiry into the social policy and normative content behind the common law rules that inform judicial control of contractual terms on the basis of public policy.[21]

[17] In addition, this application raises an arguable point of law of general public importance. Indeed, there is deep contestation among academics,[22] judges speaking

[18] Section 167(3)(b) of the Constitution provides that:

> "The Constitutional Court—
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> . . .
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

[19] See *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 35.

[20] *Barkhuizen* above n 17 at para 28.

[21] See a similar enquiry into the normative content and social impact behind the principles of vicarious liability in *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 22.

[22] See, by way of a sample, Hutchison above n 1; Du Plessis "Human Dignity in the Common Law of Contract: Making Sense of the Barkhuizen, Bredenkamp and Botha Trilogy" (2019) 9 *Constitutional Court Review* 409; Du Plessis "Giving Practical Effect to Good Faith in the Law of Contract" (2018) 3 *Stellenbosch Law Review* 379; Price and Hutchison "Judicial review of exercises of contractual power: South Africa's divergence from the common law tradition" (2015) 79 *Rabels Zeitschrift* 822; Sharrock "Unfair Enforcement of a Contract: A Step in the Right Direction?" (2015) 1 *Mercantile Law Journal* 174; Bhana and Meerkotter "The Impact of the

extra-curially[23] and our courts about the role that abstract concepts, such as ubuntu,[24] reasonableness and fairness, play in the judicial control of contracts.

[18] The apparent divergence between the approach of this Court and the Supreme Court of Appeal on this issue, and the resultant uncertainty, have been recognised as problematic and undesirable.[25] This case presents an opportunity for this Court to provide much needed clarity on these issues – bringing an end to the uncertainty and confusion which have plagued our law of contract. It also presents an opportunity to resolve the perceived divergence between the approach of this Court and that of the Supreme Court of Appeal, by engaging in a doctrinal analysis that seeks to make the best sense of our jurisprudence on these issues and present a coherent account thereof.[26]

Constitution on the Common Law of Contract: Botha v Rich NO" (2015) 132 *SALJ* 494; and Cockrell "Substance and Form in the South African Law of Contract" (1992) 109 *SALJ* 40.

[23] See Wallis "Commercial Certainty and Constitutionalism: Are They Compatible?" (2016) 133 *SALJ* 545; Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" (2016) 27 *Stellenbosch Law Review* 238; Lewis "The Uneven Journey to Uncertainty in Contract" (2013) 76 *THRHR* 80; Davis "Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" (2011) 22 *Stellenbosch Law Review* 845; and Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" (2009) 126 *SALJ* 71.

[24] Ubuntu is referred to in the postamble of the Interim Constitution in the following terms:

> "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 38; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (*Everfresh*) at para 71, this Court explained the meaning of ubuntu. It said ubuntu—

> "emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'."

[25] Concerns have been raised regarding this apparent divergence. See Hutchison above n 1 at 101, where Hutchison suggests that the need for a clear and definitive ruling on the matter by the Constitutional Court has now become urgent. See Wallis above n 23 at 547 and 563, where it is suggested that the jurisprudence of this Court has introduced a "level of uncertainty" into the law of contract. See also *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 (5) SA 443 (GP) at para 83.

[26] When interpreting jurisprudence, our courts must make the best sense of judicial reasoning across a diverse set of cases. This requires engagement with sustained lines of reasoning within a particular case and across cases, rather than the selective lifting of isolated judicial statements to support a predisposed interpretation. There will always be outlier cases, but doctrinal analysis should offer an account that is coherent and best fits our

[19] The prospects of an appeal succeeding, while of significant importance, are not decisive in determining whether it is in the interests of justice for leave to appeal to be granted.[27] The questions about the judicial enforcement of contracts that arise in this case are of general public importance, as contractual relations are at the bedrock of economic life. In these circumstances, it would be in the interests of justice to grant leave to appeal.

Historical development of the judicial enforcement of contracts

[20] Historically, there has been controversy regarding the role of the concepts of good faith, fairness and reasonableness in the law of contract.[28] In particular, the question of when, and to what extent, these concepts may be invoked at the expense of the "competing goals" of certainty and fairness in contract law has been vexed.[29] Over time, our courts have developed a consensus on certain key principles governing the judicial control over the enforcement of contracts.

Pre-constitutional jurisprudence

[21] The independent concept of good faith has been imported into South African contract law from Roman contract law.[30] In Roman law, the *ius civile's* (civil law) strict liability was radically altered through the introduction by praetorian edict of the *exceptio doli*, which established the defence of bad faith.[31] Contracts were traditionally

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jurisprudence as a whole. Coherence speaks not only to the avoidance of contradiction, but to an inner unity or logic in which legal reasoning corresponds to its broader aims. See Dickson "Interpretation and Coherence in Legal Reasoning" in Zalter (ed) *The Stanford Encyclopedia of Philosophy* (Stanford University, Stanford 2016) at 3.1 to 3.4.

[27] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 6-7 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[28] See Zimmermann "Good Faith and Equity" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co Ltd, Cape Town 1996) at 239-41.

[29] See Hutchinson above n 1 at 100.

[30] Zimmerman n 28 above at 218.

[31] Two species of the *exceptio doli* existed: first, the *exceptio doli specialis*, in terms of which a contract induced by fraud could be met with a claim for restitution. And, second, the *exceptio doli generalis*, which provided an equitable remedy against the enforcement of an unfair contract and against the unfair enforcement of contracts. The *exceptio doli generalis* afforded a much wider defence by which relief could be refused. See Zimmerman,

viewed as either pre-praetorian edict *stricti iuris* (with strict liability, where not even fraud afforded an aggrieved contracting party a defence) or *bonae fidei* (under the influence of the *exceptio doli generalis*). With the development of Roman-Dutch law in Europe, the conventional Roman law distinction between *stricti iuris* and *bonae fidei* contracts gradually receded and the principle that contracts came into existence by consensus and were governed by good faith principles received greater recognition.[32]

[22] As far back as the nineteenth century, our courts cautioned that legal certainty would be undermined if free-standing notions of good faith were to be adopted. Equity, said De Villiers CJ in *Mills*, could be applied in so far as it is consistent with the principles of Roman-Dutch law.[33] Innes CJ explained it thus in *Burger*:

> "[O]ur law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable".[34]

[23] Kotze JA was even more forthright in *Weinerlein* when he opined that "equity cannot and does not override a clear provision of our law" and that, while the common law contains many equitable principles, "equity, as distinct from and opposed to the law, does not prevail with us".[35] Equitable principles are only of force where they have been incorporated into our law.[36] Wessels JA, on the other hand, held that our courts have the inherent equitable jurisdiction to refuse to allow a party to enforce an

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The Law of Obligations: Roman Foundations of the Civilian Tradition (Juta & Co Ltd, Cape Town 1990) at 663-8.

[32] Whittaker and Zimmermann "Good faith in European Contract Law: Surveying the Legal Landscape" in Zimmermann and Whittaker (eds) *Good Faith in European Contract Law* (Cambridge University Press, Cambridge 2000) 7 at 19.

[33] *Mills and Sons v The Trustees of Benjamin Bros* (1876) 6 Buch 115 (*Mills*) at 121.

[34] *Burger v Central South African Railways* 1903 TS 571 at 576.

[35] *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 295.

[36] Id. Kotze JA added:

> "Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law. . . . Where the law in a particular instance is clear, it must be observed, although it may seem to be contrary to considerations of equity."

unconscionable claim.[37] These two different approaches to equity in the law of contract have featured in our jurisprudence ever since.

[24] For a considerable time, there was scepticism whether the *exceptio* was a separate, distinct legal tool in our law, and uncertainty as to the extent of its application.[38] In *Zuurbekom*, the Appellate Division recognised the continued existence of the *exceptio doli generalis.*[39] In *Paddock Motors*, Jansen JA accepted that the *exceptio doli generalis* was still part of our law, but that it could neither override the substantive law, nor amend the terms of an agreement, which had otherwise been validly concluded.[40]

[25] The decision of the Appellate Division in *Bank of Lisbon* finally excised the *exceptio doli generalis* from our law.[41] Joubert JA, writing for the majority, held that the *exceptio* had never been received in Roman-Dutch law and, therefore, did not form part of our law.[42] The majority held that the defence should be "buried" as a "superfluous, defunct anachronism" and roundly rejected the notion that courts had an equitable discretion to adjudicate contract disputes with direct reference to fairness and good faith.[43]

[26] Shortly after the decision in *Bank of Lisbon*, the Appellate Division in *Sasfin* struck down a deed of cession on the basis that it was contrary to public policy and therefore unenforceable.[44] The deed of cession placed the appellant financing company in effective control of the respondent's earnings, depriving him of his income and the

[37] Id at 292-3.

[38] *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) 536 (*Zuurbekom*) at 535.

[39] Id at 537.

[40] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) (*Paddock Motors*) at 28E-G.

[41] *Bank of Lisbon and South Africa Ltd v De Ornelas* [1988] ZASCA 35; 1988 (3) SA 580 (A) (*Bank of Lisbon).*

[42] Id at 605H to 607C.

[43] Id at 607A-C.

[44] *Sasfin* above n 16 at 13F-14A.

means to support himself and his family.[45] In the Appellate Division's view this placed the respondent virtually in "the position of a slave", working for the benefit of the appellant.[46] The Appellate Division held that an "agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy".[47] It further held that the deed of cession was "grossly exploitative" of the respondent and "offend[ed] against the public *mores* to such an extent" that it should be struck down on the grounds of public policy.[48]

[27] While the Appellate Division held that public policy generally favours the "utmost freedom of contract",[49] it also recognised that public policy "should properly take into account the doing of simple justice between [persons]".[50] In reaching this conclusion, the Appellate Division relied on its earlier decision in *Magna Alloys*,[51] in which it reiterated that our common law of contract does not recognise agreements that are contrary to public policy.[52] The Appellate Division cautioned that the power to strike down contracts for being contrary to public policy should be exercised "sparingly and only in the clearest of cases" so as to avoid uncertainty as to the validity of contracts.[53]

[28] Subsequent Appellate Division decisions reaffirmed the approach that agreements that offend public policy may be struck down by our courts, subject to the

[45] Id at 13F-I.

[46] Id.

[47] Id at 13I-14A.

[48] Id at 15E-F.

[49] Id at 9E-F.

[50] Id at 9G-H.

[51] *Magna Alloys & Research (SA) (Pty) Ltd. v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A). Here, the Appellate Division held that a restraint of trade agreement is valid and enforceable, as long as it is not contrary to public policy, and that a party who alleges that an agreement is contrary to public policy bears the burden of proof. The Appellate Division recognised that, although public policy demands that agreements freely and voluntarily entered into should be honoured, it also precludes the enforcement of a contract that imposes an unreasonable restriction on a person's freedom of trade.

[52] *Sasfin* above n 16 at 7H-I.

[53] Id at 9B-C.

caveat that this power be exercised sparingly and only in the clearest of cases.[54] In our law, judicial control of contractual terms has been exercised primarily through the prism of public policy.

Constitutional era jurisprudence

Decisions of the Supreme Court of Appeal pre-Barkhuizen

[29] In *Brisley*, the Supreme Court of Appeal laid the foundation for its approach to the proper roles of good faith, fairness and reasonableness in the law of contract in the new constitutional era.[55] It held that good faith does not form an independent or free-floating basis upon which a court can refuse to enforce a contractual provision and that the acceptance of good faith as a self-standing ground would create an unacceptable state of uncertainty in our law of contract.[56] According to the Supreme Court of Appeal, good faith is a fundamental principle that underlies the law of contract and is reflected in its particular rules and doctrines.[57] In this way, it informs the substantive law of contract, performing a creative, controlling and legitimating function.[58] In a separate concurrence, Cameron JA emphasised that constitutional principles, particularly those encapsulated in the Bill of Rights, permeate all law, including contract.[59] Where contracts infringe on the fundamental values embodied in the Constitution, they will be struck down as being offensive to public policy.[60]

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[54] See, amongst others, *Botha (now Griesel) v Finanscredit (Pty) Ltd* [1989] ZASCA 56*;* 1989 (3) SA 773 (A) at 783A-B and *Eerste Nasionale Bank v Saayman NO* [1997] ZASCA 62; 1997(4) SA 302 (SCA) at 324B-G.

[55] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA).

[56] Id at para 22.

[57] Id.

[58] Id at para 22; quoting, with approval, Hutchison "Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket" (2001) 118 *SALJ* 720 at 744.

[59] *Brisley* id at paras 91-2.

[60] In *Brisley* id at para 93, Cameron JA aligned himself with the caveat expressed in the main judgment to the effect that:

> "[N]either the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."

[30] The views expressed in *Brisley* were affirmed in *Afrox Healthcare*, where the Supreme Court of Appeal explained that courts do not make decisions regarding the enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness, fairness, but only on the basis of established legal rules.[61] Good faith, reasonableness and fairness, although they form the basis for our legal rules, are not themselves legal rules.[62] The Supreme Court of Appeal further held that freedom of contract is a constitutional value that aligns with the principle that contracts freely and seriously entered into should be judicially enforced.[63] For this reason, it cautioned that courts should approach their task of striking down, or refusing to enforce contracts, on the basis of public policy with "perceptive restraint".[64]

[31] In *York Timbers*, the Supreme Court of Appeal confirmed that abstract values, such as fairness and good faith, could not themselves be imposed as contractual terms.[65] It confirmed that, while public policy was a cogent rationale for refusing to enforce contractual terms, good faith, fairness and reasonableness are not self-standing grounds for a refusal to enforce otherwise valid contracts. It summarised its jurisprudence in this area as follows:

> "[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it

[61] *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) (*Afrox Healthcare*) at para 32.

[62] Id.

[63] Id at paras 22-3.

[64] Id. The Supreme Court of Appeal, in this regard, affirmed the view expressed by Cameron JA in his concurring judgment in *Brisley* above n 55 at para 94.

[65] *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72; 2005 (3) SA 323 (SCA) (*York Timbers*) at para 29. The Supreme Court of Appeal stated: "To say that terms can be implied if dictated by fairness and good faith does not mean that these abstract values themselves will be imposed as terms of the contract."

> offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty."[66]

Barkhuizen

[32] The controversy regarding the judicial control over the enforcement of contracts first reached this Court in *Barkhuizen*.[67] That matter concerned the constitutionality of a time limitation clause in a short-term insurance contract, which required the insured party to institute legal proceedings within 90 days of a claim being repudiated.[68] The insured party instituted an action in the High Court against the insurer for loss that resulted from damage to his motor vehicle. Relying on the time limitation clause, the insurer raised a special plea that it had been released from liability, because proceedings had been brought out of time.[69] By way of replication, the applicant contended that the time limitation clause was contrary to public policy, in that it stipulated an unreasonably short time to institute action and violated his right of access to courts enshrined in section 34 of the Constitution.[70]

[33] The parties agreed to a "terse statement of facts", recording no more than the terms of the contract, the occurrence of the accident, the timelines for the claim, the repudiation of the claim and the institution of proceedings.[71] This statement of facts did not address any of the applicant's particular circumstances, or provide an explanation as to why he had not instituted his claim within the contractually agreed 90-day period.

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[66] Id at para 27.

[67] *Barkhuizen* above n 17.

[68] Id at para 1.

[69] Id at para 3.

[70] Id at paras 5 and 8. At the hearing the applicant only relied on the argument that the clause violated section 34 of the Constitution. Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[71] Id at para 7.

[34] On appeal, Ngcobo J, writing for the majority, rejected the High Court's direct application of the Bill of Rights to contractual terms, opting instead for an indirect application through the vehicle of public policy.[72] The majority judgment explained that public policy is now deeply rooted in the Constitution and its underlying values.[73] The majority held:

> "[T]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[74]

[35] The majority judgment further explained that public policy, as informed by the Constitution, imports "notions of fairness, justice and reasonableness", takes account of the need to do "simple justice between individuals" and is informed by the concept of ubuntu.[75] The majority recognised that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken.[76] This is because the principle of *pacta sunt servanda* is a "profoundly moral principle, on which the coherence of any society relies".[77] The majority further stated that this principle—

> "gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."[78]

[36] The majority judgment held that determining fairness in this context involves a two-stage enquiry:

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[72] Id at paras 23-30.

[73] Id at para 28.

[74] Id at para 30.

[75] Id at paras 51 and 73.

[76] Id at para 57.

[77] Id at para 87.

[78] Id at para 57.

> "The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause."[79]

[37] The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause.[80] The onus is on the party seeking to avoid the enforcement of the clause to "demonstrate why its enforcement would be unfair and unreasonable in the given circumstances."[81] The majority emphasised that particular regard must be had to the reason for non-compliance with the clause.[82]

[38] The majority judgment held that the time limitation clause itself was reasonable.[83] It was, however, unable to determine whether the enforcement of the clause was unfair in the circumstances.[84] This was because of the limited nature of the agreed statement of facts, which did not disclose the reason for non-compliance with the clause.[85] The majority found that "without those facts it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy".[86] Importantly, in *Barkhuizen* this Court recognised that, as the law stands, good faith is "not a self-standing rule, but an underlying value that is given

[79] Id at para 56.

[80] Id at paras 56 and 58.

[81] Id at para 69.

[82] Id.

[83] Id at para 67.

[84] Id at paras 84-6.

[85] Id.

[86] Id at para 84.

expression through existing rules of law".[87] This Court accordingly affirmed the position of the Supreme Court of Appeal in *Brisley*.

Decisions of the Supreme Court of Appeal post-Barkhuizen

[39] The ambit of *Barkhuizen* was interpreted by the Supreme Court of Appeal in *Bredenkamp*.[88] Standard Bank had cancelled banking contracts and closed the bank accounts of Mr Bredenkamp and entities related to him. Mr Bredenkamp and the entities contended that the banking contracts could only be terminated on good cause.[89] Relying on *Barkhuizen*, they argued that the Constitution imposes a reasonableness requirement on all contractual provisions and their enforcement.[90]

[40] In dismissing Mr Bredenkamp and the entities' appeal, the Supreme Court of Appeal highlighted that the case revolved around "fairness as an overarching principle" in our law of contract.[91] This was because Mr Bredenkamp and the entities did not suggest that any constitutional value was implicated by the bank's exercise of its right to terminate the banking contracts.[92] The Supreme Court of Appeal rejected the notion that this Court in *Barkhuizen* had established that fairness is a free-standing requirement for the enforcement of contractual provisions.[93] In this regard, the Supreme Court of Appeal stated:

> "I do not believe that the judgment [in *Barkhuizen*] held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated".[94]

[87] Id at para 82.

[88] *Bredenkamp v Standard Bank of SA Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA).

[89] Id at para 25.

[90] Id at para 26.

[91] Id at para 30.

[92] Id.

[93] Id at paras 50-1.

[94] Id at para 50.

[41] The Supreme Court of Appeal viewed *Barkhuizen* as authority for the proposition that, where a constitutional value is limited by the terms of a contract, or by the enforcement of those terms, it must be determined whether the limitation is "fair and reasonable".[95] Applying this principle to the facts in *Bredenkamp*, the Supreme Court of Appeal found that the termination of the banking contract "did not offend any identifiable constitutional value and was not otherwise contrary to any public policy consideration."[96]

[42] Since *Bredenkamp*, the Supreme Court of Appeal has consistently held that fairness, reasonableness and good faith are not self-standing grounds upon which a court may refuse to enforce a contractual term on the basis of public policy.[97] The Supreme Court of Appeal has continued to espouse the "perceptive restraint" principle, derived from *Sasfin*, that a court should exercise its power to refuse to enforce a contract on the basis of public policy "sparingly and only in the clearest of cases".[98] In *Pridwin*, that Court accepted that this principle was clearly established and crucial in governing the judicial control of contracts through the instrument of public policy.[99]

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[95] Id at paras 44 and 46.

[96] Id at para 64.

[97] See, for example, *Roazar CC v The Falls Supermarket CC* [2017] ZASCA 166; 2018 (3) SA 76 (SCA) at para 19 and *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176; 2018 (2) SA 314 (SCA) (*Mohamed's Leisure*) at para 30. In *Potgieter v Potgieter N.O.* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) at para 34, the Supreme Court of Appeal explained:

> "[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. . . . Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, . . . if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge."

[98] See, for example, *Mohammed's Leisure* id at para 24 and *Pridwin* above n 16 at para 27.

[99] In *Pridwin* id, the Supreme Court of Appeal stated:

> "A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds".

Decisions of this Court post-Barkhuizen

[43] In *Everfresh*, the applicant sought to develop the common law, so as to impose an obligation to negotiate in good faith.[100] The majority of this Court declined to do so. That refusal was based on the fact that the claim for the development of the common law was raised for the first time in this Court.[101] In the circumstances, the majority held that it was not in the interests of justice to hear the matter.[102] In *obiter dictum* statements (remarks in passing not setting binding precedent), Moseneke DCJ postulated the possible development of the common law on the grounds advanced, if the case had been pleaded properly:

> "Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact."[103]

[44] In *Botha*,[104] this Court was called upon to determine whether a cancellation clause in a contract could be enforced in circumstances where the contract was governed by the statutory regime created by section 27(1) of the Alienation of Land Act (Act).[105] In light of the controversy resulting from this decision, it is necessary to devote considerable focus to this matter.

[45] The first applicant (Ms Botha) was the sole member of the second applicant, Khululekani Laundry CC. Ms Botha had concluded an instalment sale agreement with the JJW Hendriks Trust (trust) in terms of which she purchased immovable property from the trust. The business of the second applicant was conducted on the immovable property. The agreement contained a cancellation clause, which provided that, in the

[100] *Everfresh* above n 24.

[101] Id at paras 63-4.

[102] Id at paras 65-7 and 74.

[103] Id at para 71.

[104] *Botha* above n 4.

[105] 68 of 1981.

event of a breach by Ms Botha, the trust would be entitled to cancel the agreement and retain all payments made.[106] Ms Botha had paid three-quarters of the purchase price, but had then defaulted on her monthly installment payments.[107] The trust instituted proceedings in the High Court for an order declaring the sale agreement cancelled and evicting the applicants from the property.[108] In turn, Ms Botha counterclaimed for an order that the property be transferred into her name.[109] She relied on section 27(1) of the Act, which entitles a purchaser of immovable property on instalment, who has paid at least half of the purchase price, to claim transfer of the property against registration of a mortgage bond in favour of the seller.[110] In the High Court, the applicants contended that the enforcement of the cancellation clause would be unfair and contrary to public policy, as 80% of the purchase price had been paid.[111] Ms Botha claimed that she was, in terms of section 27(1), entitled to transfer of the property into her name.

[46] The High Court rejected the public policy argument and ordered the eviction of the applicants from the property.[112] The High Court did not deal with Ms Botha's counterclaim. On appeal to the Full Court, Ms Botha persisted in her claim that she was entitled to transfer of the property into her name. The argument advanced on her behalf was that section 27(1) of the Act was applicable to the contract of sale concluded by the parties. Accordingly, by virtue of the fact that Ms Botha had paid more than 50% of the purchase price of the property and had made a demand for the transfer of the

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[106] *Botha* above n 4 at para 4(i).

[107] Id at para 5.

[108] Id at para 11. The trust was represented in all proceedings by its trustees in their capacities as trustees.

[109] Id at para 12.

[110] Section 27(1) of the Act provides:

> "Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 percent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation."

[111] *Rich N.O. v Botha* [2009] ZANCHC 79 at para 23.

[112] Id at para 30 and para 2 of the order.

property, the trust, by reason of the provisions of clause 8.4 of the sale agreement,[113] was contractually obliged to transfer the property into her name.[114]

[47] The Full Court dismissed the appeal, finding that Ms Botha was not entitled to specific performance in the form of the transfer of the property. It held that the only remedies available to a purchaser are those listed in section 27(3) of the Act. The Full Court held that no provision is made in the Act for a claim of specific performance, in terms of which a seller can be directed to transfer the property to the purchaser. It further held that section 27(1) enables the purchaser, when half of the purchase price has been paid, to demand transfer of the property on condition that a bond is registered in favour of the seller to secure the balance of the purchase price. If the seller does not tender transfer of the property after receiving a demand, the purchaser's only remedy is to cancel the sale in terms of section 27(3).[115] The Full Court also found that Ms Botha had failed to prove her second claim, namely that the enforcement of the cancellation clause was contrary to public policy. It reached this conclusion primarily on the bases that Ms Botha had proffered no explanation for her failure to meet her contractual obligations, that she had derived substantial benefit from the contract and that the respondents had behaved eminently reasonably.[116]

[48] The main issue for determination in this Court was whether the trust was obliged, in terms of section 27(1), to register the property in Ms Botha's name against registration of a mortgage bond in its favour.[117] In the alternative, the question was whether enforcement of the cancellation clause would, in these circumstances, be

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[113] Clause 8.4 reads, in relevant part:

> "Die kopers is ten alle tye geregtig . . . [o]m transport van die eiendom ingevolge artikel 27 van die Wet te eis wanneer hy ten minste een helfte van die koopprys betaal het."
>
> "The purchasers are at all times entitled to claim transfer of the property in terms of section 27 of the Act when he has at least paid one half of the purchase price". (Own translation.)

[114] *Botha v Rich NO* 2013 JDR 0586 (NCK) (*Botha Full Court*) at para 4.

[115] Id at paras 7-8. The Full Court relied on *Dongwe v Slater-Kinghorn* 2009 JDR 1341 (KZP) at para 34 as authority for this proposition.

[116] *Botha Full Court* id at paras 14-5.

[117] *Botha* above n 4 at para 21.

unreasonable, unfair and unconstitutional and, if so, whether Ms Botha would be entitled to restitution of the money paid.[118]

[49] It is clear from this delineation of the issues that *Botha* principally concerned the interpretation and application of section 27 in the context of a contract of an instalment sale. In particular, a contract of sale that contained a cancellation clause, which provided for forfeiture. The trust, as seller, sought to enforce its right to cancel the contract, while Ms Botha, as purchaser, resisted cancellation on the basis of the right in section 27(1), which she claimed had accrued to her. The context in which *Botha* was decided is also apparent from the discussion in the judgment regarding whether it was in the interests of justice to grant leave to appeal. Nkabinde J, writing for the Court, said that it was a matter of public importance that this Court determine "whether *cancellation of a contract, governed by the Act*, and the resultant forfeiture of the payments . . . are fair and thus constitutionally compliant."[119]

[50] This Court recognised that it was obliged to interpret section 27 of the Act in a manner that promotes the spirit, purport and objects of the Bill of Rights.[120] After a consideration of the legislative history, the purpose and the plain language of the Act, it concluded that section 27(1) seeks to protect the rights of a purchaser of immovable property who has paid at least half of the purchase price of property in terms of an instalment agreement.[121] This Court cautioned that the section 27(1) should not be read in isolation and concluded that section 27(3) provided additional optional protection to a purchaser.[122]

[51] This Court accepted, as was held by the Full Court and contended by the trust, that the purchaser is entitled to cancel the contract in terms of section 27(3) and recover

[118] Id.

[119] Id at para 24.

[120] Id at para 28.

[121] Id at para 34.

[122] Id at paras 35 and 39.

payments made.[123] However, it rejected the contention that, because the section only mentions cancellation, this was the purchaser's only remedy where the seller refused to honour the demand for transfer.[124] This Court held that section 27(3) adds to the purchaser's remedies without taking anything away.[125] It reasoned:

> "The trustees' argument cannot be sustained. The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right. Section 27(1) creates a contractual right implied by law. The purchaser is therefore entitled to specific performance in respect of that right unless the legislation means to depart from the common-law position. The section indicates no meaning of this kind."[126]

[52] This Court went on to explain that the construction of section 27(1) contended for by the Trust would defeat the purpose of the Act, namely, to protect a purchaser who has partially paid the purchase price of immovable property.[127] It would leave a purchaser, like Ms Botha, who has paid most of the purchase price and whose right to transfer is being ignored by a seller, without the standard remedy of specific performance afforded by our law of contract.[128] This Court rightly concluded that this would be "anomalous" in an Act designed to protect persons in the position of Ms Botha.[129]

[53] In a unanimous judgment, this Court held that Ms Botha's right to claim transfer was preserved, despite her being in arrears. In this regard, it said that depriving Ms Botha of her entitlement to transfer of the property in terms of section 27 "would be

[123] Id at para 36.

[124] Id at paras 36-7.

[125] Id at para 39.

[126] Id at para 37.

[127] Id at para 40.

[128] Id.

[129] Id.

a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair."[130]

[54] This Court also refused to enforce the seller's right to cancel the sale agreement, on the basis that cancellation of the sale agreement would be "a disproportionate penalty for breach" and unfair in the circumstances of the case, particularly where three-quarters of the purchase price had already been paid.[131] This Court therefore crafted an appropriate order, requiring the applicant to pay all outstanding arrears to the trust and to register a mortgage bond in favour of the trust, prior to the property being transferred into her name.[132]

[55] In *Botha*, this Court made two observations concerning disproportionality. These were:

> "In my view, to deprive Ms Botha of the opportunity to have the property transferred to her under section 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair."[133]

and

> "For the same reasons mentioned above, granting cancellation – and therefore, in this case, forfeiture – in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach."[134]

[56] Reading these two *obiter dicta* together, it is evident that this Court was mindful, in the unique statutory context of *Botha*, of the consequences of enforcing the sanction

[130] Id at para 49.

[131] Id at para 51.

[132] Id at paras 49 and 53.

[133] Id at para 49.

[134] Id at para 51.

of cancellation for breach of an instalment sale agreement governed by the Act. Cancellation, in these circumstances, would result in Ms Botha losing her right to claim transfer of the property into her name and in the forfeiture of three-quarters of the purchase price, which she had already paid. This Court was of the view that, as such, the sanction for breach would be disproportionate in relation to the considerable portion of the purchase price already paid.

[57] Although this Court did not expressly refer to the test enunciated in *Barkhuizen*, it also did not elevate notions of good faith or fairness to substantive rules of contract law. On the contrary, it endorsed the view that those notions underlie our law of contract and have given rise to principles like those of reciprocity and the *exceptio non adempleti contractus*.[135] It put the matter thus:

> "To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Corporation* it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. This accords with the requirements of good faith.
>
> The Act seeks to ensure fairness between sellers and purchasers. Its provisions are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that

[135] Id at paras 45-6 and fn 64. See also Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" above n 23 at 247 and Du Plessis above n 22 at 410.

> way. In this case good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus.*"[136]

[58] It must be categorically stated that, in *Botha*, this Court did not revisit or revise the *Barkhuizen* test. *Barkhuizen* remains the leading authority in our law on the role of equity in contract, as part of public policy considerations.

[59] There has been significant criticism of this Court's judgment in *Botha*. Much of the academic commentary on *Botha* assumes that *Botha* is authority for the general proposition in our law of contract that a party who breaches its contractual obligations can avoid the termination of a contract by claiming that termination would be disproportionate or unfair in the circumstances.[137] This assumption, which was implicitly endorsed by the Supreme Court of Appeal in this matter,[138] is based on a misreading of the *ratio decidendi* (rationale for the decision) in *Botha* and rests on a misconception of what that case was about. *Botha* did not rewrite the legal position on equity in our law of contract. This Court did not hold in *Botha* that disproportionality or unfairness are separate, self-standing grounds, upon which a court may generally refuse to enforce contractual provisions. *Botha* must be understood within the context of the relevant statutory scheme in issue.[139] *Botha* was primarily concerned with the question whether the seller's contractual right to cancel for breach could be enforced within the statutory scheme created by section 27(1) of the Act.[140]

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[136] Id at paras 45-6.

[137] See, for example, Hutchison above n 1 at 117-20; Wallis above n 23 at 554-7; and Sharrock above n 22. However, as a counterpoint, see Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" above n 23 at 247 and Boonzaier "Rereading Botha v Rich*"* (2020) 137 *SALJ* 1.

[138] Supreme Court of Appeal judgment above n 9 at paras 37-8.

[139] The importance of the statutory scheme in *Botha* has been recognised by both academics and courts. Boonzaier, above n 137 at 6, states that it was "plainly the statutory scheme that had triggered and shaped the dispute" which led the Court to refuse to enforce the trust's right to cancel. In addition, Du Plessis, above n 22 at fn 144, correctly states that *Botha* "was decided in the context of a statutory regime aimed at protecting purchasers of land on instalments". Similarly, in *Atlantis*, above n 25 at para 30, the High Court recognised the importance of the statutory context in *Botha*. The High Court stated: "[t]he comments [in *Botha*] were made in the context of the legislation under discussion and the application thereof to the particular facts."

[140] See Boonzaier id at 7.

[60] The Supreme Court of Appeal's failure to either apply or distinguish *Botha* in this matter is most unfortunate. The fundamental doctrine of precedent is a core component of the rule of law.[141] This doctrine has been endorsed by both this Court and the Supreme Court of Appeal. To deviate from it is to invite legal chaos and undermine a founding value of our Constitution.[142] The Supreme Court of Appeal failed to properly engage with this Court's reasoning in *Botha*. It went further, chastising the High Court for not following its decisions, whilst at the same time departing from the decisions of this Court.[143]

Comparative jurisprudence on the role of good faith

[61] The role of good faith within a legal system depends, in some measure, on its legal tradition. Good faith has its firm place in the legal frameworks of civil law jurisdictions where it often exists as a free-standing doctrine.[144] Although there is not absolute uniformity across civil law jurisdictions, a duty to act in good faith in contractual relations is generally recognised.[145]

[62] German law has for a long time recognised good faith, in the form of "Treu und Glauben" (fidelity and faith) in its German Bürgerliches Gesetzbuch (German Civil Code).[146] Article 242 of the Code (the good faith clause) provides that "[a]n obligor

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[141] *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 28.

[142] Id and *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at paras 54-5.

[143] See para 25 of the Supreme Court of Appeal judgment above n 9, which reads:

> "In the High Court Davis J did not refer to *Bredenkamp* in his judgment, despite its binding force. (The statement of Kriegler J in *Ex parte Minister of Safety and Security: In re S v Walters* [at] paras 60 to 61, that the decisions of this Court bind the High Court, is still good law.)"

[144] See France and Germany, for instance.

[145] Hesselink "The Concept of Good Faith" in Hartkamp et al *Towards a European Civil Code* 4th ed (Kluwer Law International BV, The Netherlands 2011) 619 at 619.

[146] The most relevant articles are 157 and 242. Article 157 provides that contracts are to be "interpreted as required by good faith". According to Du Plessis, above n 22 at 384, article 157 resembles the rule concerning contractual interpretation recognised in *York Timbers*, above n 65 at para 32, where the following was said:

> "In the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is

has a duty to perform according to the requirements of good faith, taking customary practice into consideration." This provision has generously been interpreted to mean "rights have to be exercised and duties have to be fulfilled according to good faith."[147] Article 242 does not render judicial enforcement of contracts subject to judicial discretion to decide cases having regard to notions of fairness and equity. Du Plessis, an academic, explains:

> "[T]he good faith clause does not provide judges with a general equitable discretion to decide cases according to subjective notions of fairness. Its application rather requires a careful weighing up of relevant interests, which enables specific new legal instruments to be developed. . . . The care which the courts exercise in applying the provision, and the degree of precision required when relying on it, is neatly summarised [as follows:]
>
> > . . .
> >
> > 'Most cases [involving the application of section 242 of the German Civil Code] can be assigned to one of a number of well-defined rules which have all been developed by the courts under the umbrella of section 242 of the German Civil Code, but which now lead a separate and independent existence so that figuratively speaking, the statutory foundation of section 242 of the German Civil Code could be withdrawn without any risk of having the judge-made edifice collapse. It would be a poor advocate who would simply cite section 242 of the German Civil Code to the judge to invite him to dispense justice to his client according to the principles of good faith and fair dealing. What would be expected of him would be references to the more specific doctrines.'
>
> Ultimately, therefore, the devil is in the detail: the good faith clause works because specific rules give effect to it. Those rules were hammered out on the anvil of concrete cases and incremental scholarly analysis."[148]

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applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith."

[147] Du Plessis id at 380.

[148] Id at 383.

Properly understood, the role of good faith in German contract law appears to bear striking similarity to the role of good faith in our law as evidenced by the approach of the Supreme Court of Appeal in *Brisley*, *Afrox Healthcare* and *York Timbers*.

[63] French law recognises, in general, principles of good faith in both the negotiation and performance of contracts. Its genesis is to be found in le Code civil des Français (French Civil Code), albeit in a very restricted form in practice – case law and practical application of the Code's provisions were dominated, instead, by the concepts of contractual autonomy and consensus.[149] Over the previous two centuries, however, there has been a marked development of the principle of good faith in French contract law. It is now generally recognised that good faith is a central principle in the negotiation and performance of contracts.[150]

[64] In common law jurisdictions, courts have historically been reluctant to recognise a free-standing doctrine of good faith. In England and Wales, the courts have declined to find a general duty of good faith, preferring instead to develop specific doctrines that mitigate unfairness in particular cases. There is thus no general duty to negotiate or perform contracts in good faith in English law. In *Interfoto,* Bingham LJ, described the English approach to regulating problems of unfairness in contract law:

> "English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated *problems of fairness*."[151]

[65] English courts have developed a number of specific doctrines in response to "problems of unfairness". For example, the courts may require a contractual discretion

[149] Whittaker and Zimmermann above n 32 at 32-4.

[150] Id at 34-7.

[151] *Interfoto Picture Library Ltd v Stiletto Visual Programmes* Ltd [1989] 1 QB 433 (*Interfoto*) at 439F-G. This statement of principle has been called into question, most famously in *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB) at para 124 per Leggatt J. However, Leggatt J conceded, at para 131, that English law had not reached the stage "where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts".

to be exercised reasonably,[152] and may be prepared to imply a term of good faith where this is consistent with the intentions of the contracting parties.[153] In addition, the United Kingdom introduced a good faith principle in specific areas in accordance with European Union law.[154]

[66] Scotland, another mixed legal system, has largely followed the English tradition of no general duty of good faith in contract.[155] The influence of the English tradition is also felt further afield. In Hong Kong, courts are faithful to the traditional common law approach. In *Aktieselskabet Dansk Skibsfinansiering*, the Hong Kong Court of Appeal declined to find a self-standing doctrine of good faith in the law of contract and approvingly cited Bingham LJ in *Interfoto*.[156]

[67] Canada, also a common law jurisdiction, is more receptive to the principle of good faith. The Supreme Court of Canada, in *Bhasin*,[157] affirmed that good faith is a "general organising principle" of Canadian common law of contract – which underpins and informs the various rules in the common law.[158] The Court held that "a duty of honest performance" flows directly from the common law organising principle of good faith.[159] The Court carefully delimited the scope of this duty, noting: "[i]t is a simple

[152] *British Telecommunications v Telefonica O2* [2014] UKSC 42 at para 37 and *Braganza v BP Shipping* [2015] UKSC 17 at para 30.

[153] See, for example, *Sheikh Tahnoon Bin Saeed Bin v Kent* [2018] EWHC 333 (Comm) at para 174, where it was held that "the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations".

[154] An example of such an area is consumer protection. The Consumer Rights Act 2015, enacted to give effect to EU consumer protection laws, requires judges to consider the fairness of contractual terms in the context of consumer contracts. Section 62(1) provides that "[a]n unfair term of a consumer contract is not binding on the consumer". Section 62(4) defines an unfair term as one which "contrary to the requirement of good faith, causes a significant imbalance in the party's rights and obligations under the contract to the determent of the consumer". These two sections reproduce Article 6 and Article 3(1), respectively, of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[155] Price and Hutchison above n 22 at 824.

[156] *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2000] 3 HKCFAR.

[157] *Bhasin v Hrynew* 2014 SCC 71.

[158] Id at para 33.

[159] Id at para 73.

requirement not to lie or mislead the other party about one's contractual performance."[160]

[68] The decision in *Bhasin* heralded a significant break from the previous approach to judicial control of contractual relations in Canada, in which notions of good faith "applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships."[161] However, the Court in *Bhasin* did not go so far as to recognise good faith as a self-standing rule, the breach of which is enforceable in and of itself. Rather, it is a principle that permeates throughout existing doctrines and stipulates in general terms "a requirement of justice from which more specific legal doctrines may be derived."[162] The Court also left open the door to novel claims, acknowledging that the list of good faith doctrines "is not closed" and that the organising principle "should be developed where the existing law is found to be wanting."[163]

[69] Australia has no general doctrine of good faith.[164] The position varies between states, with some states showing a greater willingness to recognise good faith duties.[165] Duties of good faith have been implied in specific species of contract.[166] Significantly, in *Vodafone*,[167] the New South Wales Court of Appeal held that a duty to perform contractual obligations in good faith may be implied even in ordinary commercial

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[160] Id.

[161] Id at para 42.

[162] Id at para 64. The Court stated: "An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines".

[163] Id at para 66.

[164] Viven-Wilksch "Good Faith in Contracts: Australia at a Crossroads" (2019) 1 *Journal of Commonwealth Law* 273 at 273-4.

[165] Id.

[166] The species of contract in which a duty of good faith has been found to exist include franchise agreements and subcontracting agreements. See *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 and *Alstom Ltd v Yokogawa Australia Pty Ltd* (No 7) [2012] SASC 49.

[167] *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 (*Vodafone*).

contracts unless expressly excluded.[168] The Court described good faith as encompassing a duty to act honestly and reasonably.[169]

[70] This analysis demonstrates that there is a wide range of approaches to the role of good faith in the judicial control of contracts in comparative jurisdictions. While foreign law provides a useful comparison, the approach adopted by this Court must fit our own context, in particular the requirements of our Constitution.

The role of the Constitution, fairness, reasonableness, justice and ubuntu

[71] There is only one system of law in our constitutional democracy. As recognised by this Court in *Pharmaceutical Manufacturers*, this system of law is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[170] The determination of public policy is now rooted in the Constitution and the objective, normative value system it embodies. [171] Constitutional rights apply through a process of indirect horizontality to contracts.[172] The impact of the Constitution on the enforcement of contractual terms through the determination of public policy is profound. A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy. As explained by the Supreme Court of Appeal in *Barkhuizen SCA*,[173] and endorsed by this Court in *Barkhuizen*,[174] the Constitution requires that courts—

[168] Id at paras 125 and 189. However, in that case a duty to act in good faith had been excluded by the express terms of the contract.

[169] Id at paras 192-3.

[170] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 44. See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33.

[171] *Barkhuizen* above n 17 at para 28. See also *Carmichele* id at para 54.

[172] *Barkhuizen* id at paras 23-30.

[173] *Napier v Barkhuizen* [2005] ZASCA 119; 2006 (4) SA 1 (SCA) (*Barkhuizen SCA*).

[174] *Barkhuizen* above n 17 at paras 70-1.

> "employ [the Constitution and] its values to achieve a *balance* that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."[175]

[72] It is clear that public policy imports values of fairness, reasonableness and justice.[176] Ubuntu, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy.[177] These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.

[73] While these values play an important role in the public policy analysis, they also perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract.[178] Many established doctrines of contract law are themselves the embodiment of these values.[179]

[74] In addition, these values play a fundamental role in the application and development of rules of contract law to give effect to the spirit, purport and objects of the Bill of Rights. Courts are bound by section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law. When the common law deviates from the spirit, purport and objects of the Bill of Rights, courts are mandated to develop it in order to remove that deviation.[180] In addition, courts must not lose sight of the transformative mandate of our Constitution. Transformative adjudication requires courts to "search for substantive justice, which is

[175] *Barkhuizen SCA* above n 173 at para 13; referring to *Brisley* above n 55.

[176] *Barkhuizen* above n 17 at para 51.

[177] Id at para 51 and *Everfresh* above n 24 at paras 71-2.

[178] *Brisley* above n 55 at para 22.

[179] For instance, the rules in our contract law concerning fraud, duress, misrepresentation, estoppel, implied terms and rectification are themselves the embodiment of abstract values.

[180] *Carmichele* above n 170 at para 33.

to be inferred from the foundational values of the Constitution . . . that is the injunction of the Constitution – transformation."[181]

[75] These values should be used creatively by courts to draw normative impetus and develop new doctrines that address deficiencies in the law of contract. As held by this Court in *Carmichele*:

> "The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."[182]

[76] Indeed, this Court has recognised the necessity of infusing our law of contract with constitutional values.[183] This requires courts to exercise both resourcefulness and restraint. In line with this Court's repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require.[184] The development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law. While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning is required to ensure certainty of the law.

[77] Our case law demonstrates how abstract values have informed the development of new doctrines. In *Tuckers Land* Jansen JA developed the law of contract, finding that there is an implied duty not to commit anticipatory breach.[185] This development

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[181] Moseneke "The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication" (2002) 18 *SALJHR* 309 at 316.

[182] *Carmichele* above n 170 at para 54.

[183] *Everfresh* above n 24 at para 71.

[184] Courts must be mindful that, in terms of the doctrine of separation of powers, the major engine for law reform is the Legislature and not the Judiciary. See *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 31 and *Carmichele* above n 170 at paras 36 and 55.

[185] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) (*Tuckers Land*) at 652D-F.

was based on the requirement that contracts are to be performed in good faith.[186] Similarly, in *BK Tooling*, the Appellate Division developed the law of contract to permit a relaxation of the principle of reciprocity where a party to a reciprocal contract had used the other party's partial performance.[187] It did so on the grounds of fairness.[188] These cases illustrate the development of clear doctrines that brought our law of contract in line with the values of fairness, reasonableness and justice.

[78] The scope for the development of new common law rules in our law of contract is broad. The common law must be developed so as to promote the spirit, purport and objects of the Bill of Rights. Constitutional values have an essential role to play in the development of constitutionally-infused common law doctrines.

The perceived divergence between this Court and the Supreme Court of Appeal

[79] Much was made by the applicants in this case of a "divergence" between the approach of this Court and that of the Supreme Court of Appeal to the judicial control of contracts. The "divergence" is said to center on the role of abstract values in our law of contract and whether these values can be directly relied upon to invalidate, or refuse to enforce, contractual terms. This controversy has now been put to rest by the clarification of the law as expressed by this Court in *Barkhuizen* and *Botha*. There is agreement between this Court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions.[189]

[80] 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

[186] Id.

[187] *Bk Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) (*BK Tooling*) at 421A-B.

[188] Id.

[189] See [73] to [75].

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.

[81] The rule of law requires that the law be clear and ascertainable. As stated by this Court in *Affordable Medicines*: "The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."[190] The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires.[191] The 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

[190] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 108.

[191] Section 1(c) of the Constitution.

few judicial minds".[192] This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law.

[82] There has, in fact, largely been general uniformity of principles between the two courts. In *Pridwin*, the Supreme Court of Appeal set out what it views as the "most important principles" governing the judicial control of contracts through the instrument of public policy. It said:

> "(i) Public policy demands that contracts freely and consciously entered into must be honoured;
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> (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
>
> (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
>
> (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
>
> (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
>
> (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose."[193]

These principles are derived from a long line of cases and find support in the decisions of this Court. There are, however, two principles listed by the Supreme Court of Appeal in *Pridwin* which require further elucidation.

[192] *Pridwin* above n 16 at para 27.

[193] Id.

[83] The first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured".[194] This Court has emphasised that the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity".[195] It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken.[196] *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.

[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.[197] 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.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.

[86] However, the pre-constitutional privileging of *pacta sunt servanda* is not appropriate under a constitutional approach to judicial control of enforcement of

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[194] Id at para 27(i).

[195] *Barkhuizen* above n 17 at para 57.

[196] Id.

[197] Klass "Three Pictures of Contract: Duty, Power, and Compound Rule" (2008) 83 *New York University Law Review* 1726 at 1766.

contracts. Prior to our constitutional era, in *Wells*,[198] the Appellate Division cited an English authority to the effect that—

> "[i]f there is one thing, which more than another, public policy requires, it is that [individuals] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts".[199]

[87] In our new constitutional era, *pacta sunt servanda* is not 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. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.[200]

[88] The second principle requiring elucidation is that of "perceptive restraint", which has been repeatedly espoused by the Supreme Court of Appeal.[201] According to this principle a court must exercise "perceptive restraint" when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases".[202]

[89] This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured. This Court has recognised as sound the approach

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[198] *Wells v South African Alumenite Company* 1927 AD 69.

[199] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

[200] This is not to say that a constitutional right must be implicated for a contractual term to be contrary to public policy.

[201] *Pridwin* above n 16 at para 27(v). See also *Mohammed's Leisure* above n 97 at para 24; *Afrox Healthcare* above n 61 at para 22-3, *Brisley* above n 55 at para 94; and *Sasfin* above n 16 at 9B-C.

[202] *Pridwin* id at para 27(v).

adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases.[203]

[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the "perceptive restraint" principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable "harm to the public" before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.[204]

Application to the facts

[91] Have the applicants discharged the onus of demonstrating that the enforcement of the renewal clauses would be contrary to public policy in the particular circumstances of this case? A party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term.[205] The rationale for this was explained in *Barkhuizen*:

> "For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequences in

[203] In *Barkhuizen SCA* above n 173 at para 13, the Supreme Court of Appeal put it thus:

> "[I]ntruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."

This approach was affirmed by this Court in *Barkhuizen* above n 17 at paras 70-1.

[204] See second judgment at [158].

[205] *Barkhuizen* id at para 58 and 69.

> these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent."[206]

[92] The public policy imperative to enforce contractual obligations that have been voluntarily undertaken recognises the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity.[207] This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit.[208] While the explanation provided is not the only relevant consideration, it is critical in the overall assessment of whether enforcement would be contrary to public policy in all the particular facts and circumstances of a case. In *Barkhuizen*, the majority held that, in the absence of facts establishing why the applicant did not comply with the clause, it was unable to conclude that its enforcement would be contrary to public policy.[209] The absence of any explanation for the failure to comply will, in most cases, be the end of the enquiry.

[93] The applicants, relying on *Barkhuizen*, approached the High Court on the ground that enforcement of the renewal clauses would be contrary to public policy. The only reasons advanced by the applicants for their failure to comply with the terms of the renewal clauses were that they were not sophisticated business people and not fully apprised of their rights and obligations regarding their options to renew the leases. The Supreme Court of Appeal rejected this argument:

> "[T]he representatives of the lessees had all operated franchises, and had previously been store or regional managers. They were not ignorant individuals. They may not

[206] Id at para 85.

[207] Id at para 57.

[208] In Raz "Promises in Morality and Law" (1982) 95 *Harvard Law Review* 916 at 933, Raz argues that "[t]he purpose of contract law should be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice."

[209] *Barkhuizen* above n 17 at paras 84-6.

> have fully appreciated the niceties of the law, but they knew that they had to give notice – they attempted to do so after the notice period had elapsed."[210]

[94] The terms of each lease governing termination and renewal are clear and easy to understand. Each lease provides that the termination date is 31 July 2016 and the renewal clause provides that the lessee must provide written notice of its exercising of its renewal option "at least six (6) months prior to the termination date". These terms appear in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand.

[95] The inescapable inference is that there were no circumstances that prevented the applicants from complying with the terms of the renewal clauses in the leases. The clauses were favourable to the applicants. The only inference to be drawn is that the applicants simply neglected to comply with the clauses in circumstances where they could have complied with them. It follows that the applicants have failed to discharge the onus resting on them to demonstrate that in the circumstances of this case, the enforcement of the clauses would be contrary to public policy. Their case must suffer the same fate as that of the applicant in *Barkhuizen*.

[96] The applicants submit that the enforcement of the renewal clauses would be contrary to public policy, as it would lead to the failure of a black economic empowerment initiative financed by the Fund with public money. This harsh outcome alone, absent an explanation for their failure to comply with the terms of the renewal clauses, cannot constitute a sufficient basis to hold that the enforcement of the clauses would be contrary to public policy. The applicants were afforded an opportunity to run their own businesses through the financial support of the Fund and the administrative and technical support of Sale's Hire. The possible failure of this commendable black economic empowerment initiative is attributable entirely to their unexplained failure to comply with the renewal clauses.

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[210] Supreme Court of Appeal judgment above n 9 at para 39.

[97] I do not consider the conduct of the Trust as snatching at a bargain or exploiting a mere technical slip on the part of the applicants. The applicants' failure to exercise their right of renewal within the requisite notice period resulted in the termination of the lease agreements by effluxion of time. There was no cancellation of the lease agreements on the part of the Trust. Instead, the termination occurred automatically by operation of the clear terms of the lease agreements regarding the termination date, in the absence of a valid renewal.

[98] In any event, it would seem that the termination of the applicants' franchise agreements does not follow automatically upon the termination of their lease agreements. It appears to be within the discretion of Sale's Hire, as the franchisor, to allow the applicants to operate their businesses from different premises.[211] The collapse of the applicants' businesses will only take place if Sale's Hire elects to exercise its contractual power to terminate the franchise agreements.[212] The exercise of this contractual power possibly may then be challenged by the applicants.

Equality argument

[99] The applicants have failed to adequately explain how the enforcement of the strict terms of the renewal clauses would be contrary to public policy. They contended that enforcement would be inimical to the constitutional value of equality as enunciated in section 9(2) of the Constitution. Section 9(2) provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms". This provision recognises that the constitutional promise of equality cannot be sustained merely by the achievement of formal equality: it authorises the taking of "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". The Constitution enjoins courts to actively advance substantive

[211] This would require an amendment, in writing and signed by the parties, to the definition of the approved location in clause 2.5 of the franchise agreements. However, we make no finding in this regard.

[212] See [9].

equality by dismantling the various patterns of disadvantage that still plague our society.[213] As this Court held in *Van Heerden*:

> "[W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systemic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."[214]

[100] Section 1 of the Constitution provides that South Africa is founded on values including human dignity, the achievement of equality and the advancement of human rights and freedoms. This provision underscores that equality is a foundational democratic value and that the Constitution envisages the taking of active steps towards substantive equality.[215] This stems from the fact that the Constitution is a transformative document and the lodestar of an ongoing constitutional project to achieve a democratic and egalitarian society.[216] This Court has held that "section 9(2), as an instrument for transformation and the creation of an equal society, is powerful and unapologetic".[217]

[101] The National Empowerment Fund Act established the Fund to facilitate the redress of economic inequality that resulted from unfair discrimination against historically disadvantaged persons.[218] This falls within the scope of the "measures" envisioned by section 9(2) of the Constitution (as would initiatives funded by the Fund). The applicants have not shown that the failure of their businesses, in these circumstances, would unjustifiably undermine substantive equality. To hold that the

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[213] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 27.

[214] Id at para 31.

[215] In *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC), this Court stated, unequivocally, at para 20: "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."

[216] Sections 1 and 7(1) of the Constitution.

[217] *Van Heerden* above n 213 at para 87.

[218] Sections 2 and 3 of the National Empowerment Fund Act above n 2.

failure of a black economic empowerment initiative financed by the Fund renders the enforcement of the renewal clauses deleterious to the constitutional value of equality would have the undesirable result of defeating the Funds own objects. This is because the effect of this finding would increase the risk of contracting with historically disadvantaged persons who benefit from the Fund. If the applicants were to succeed, it would establish the legal principle that enforcement of a contractual term would be inimical to the constitutional value of equality, and therefore contrary to public policy, where enforcement would result in the failure of a black economic empowerment initiative. This could, in turn, deter other parties from electing to contract with beneficiaries of the Fund, or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations. These outcomes would, in effect, undermine the very objects that the Fund and section 9(2) seek to achieve.

Conclusion

[102] The applicants have failed to discharge the onus of demonstrating that the enforcement of the impugned contractual terms would be contrary to public policy. It is fatal to the applicants' case that they did not adequately explain why they did not comply with the terms that they seek to avoid. In any event, the public policy considerations advanced by the applicants are insufficient to demonstrate that it would be contrary to public policy to enforce the terms they seek to avoid.

[103] For these reasons, the application must fail on the merits. There is no reason why costs should not follow the result.

Order

[104] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

FRONEMAN J (Madlanga J concurring)

Introduction

[105] I have had the benefit of reading the path-breaking judgment of my sister Theron J (first judgment). The first judgment sets the regulation of fairness in our contract law squarely and unambiguously within the ambit of our constitutional value system. Why write separately then? Three reasons, mainly.

[106] The first is that it might lead to greater clarity and understanding of the divergence in approach between the Supreme Court of Appeal and this Court to explain that the regulation of unfairness in contract law is never simply a "legal" one that can be deduced from supposedly neutral legal principles in a self-executing way. This kind of regulation inevitably involves making an underlying moral or value choice. The first judgment makes clear that these choices must be made within the objective value system of the Constitution. It does not, however, consider it necessary to develop or give further guidance as to how these objective values are to be translated into practical application. That is the second reason.

[107] Although it is commendable to seek similarities in this Court's and the Supreme Court of Appeal's approaches, I am less sanguine that the remaining dissimilarities can be overcome without emphasising what I consider to be unambiguous and authoritative statements about the role of constitutional values and rights in our law of contract by this Court in *Barkhuizen*.[219] Although I do not consider the Supreme Court of Appeal's own solution to the problem as any better than the criticism of this Court's perceived misguided approach, I accept that our purpose must be to delineate reasonably certain, practical and objective legal principles and rules to guide prospective contracting parties. In so doing the caricature of rogue judges imposing their own subjective and

[219] *Barkhuizen* above n 17.

arbitrary opinions of what is fair and reasonable upon unsuspecting litigants must be dispelled.

[108] The approach suggested in this judgment is that this outcome is best achieved by recognising that the individualism of our law of contract is one that has always taken account of the reasonable expectations of the parties to the contract as well as those of the wider community. This can be done in a manner that ensures objectivity, reasonable practicality and certainty.

[109] The last reason is that the facts call for a different outcome from that proposed in the first judgment. While acknowledging that it is a hard call, I conclude that the first judgment errs in not intervening in the order of the Supreme Court of Appeal. The appeal must succeed.

The morality of contract law

[110] A country's choice of how it conceives its contract law is influenced by its social, political and economic history, how it views that history and how it chooses to forge its fundamental values into its conception of contract law.[220] This should not be a controversial statement. There are discernible differences in perspective and emphasis in what was, before the Constitution, the two sources of our mixed legal system, the civilian tradition and the English common law tradition. To that mixed legal heritage the Constitution now adds its own overarching objective value system. This must inform not only our views on our mixed common law and civilian heritage, but must embrace also the neglected "third grace"[221] of our legal heritage, namely African customary law and tradition.[222]

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[220] Brownsword *Contract Law: Themes for the Twenty-First Century* 2 ed (OUP, Oxford 2006) at 165.

[221] Zimmermann and Visser above n 28 at 15, explain the neglect of the third grace thus:

> "The three Graces of the South African legal system are civil law, common law and customary law. The free spirit of the third Grace makes it difficult for her to join in the circle. *To enable her to do so may be one of the great challenges of the new South African legal order. Someone may then, perhaps, be able to tell the story of the Africanisation of Roman-Dutch law in twenty-first century South Africa.*".

[222] *Barkhuizen* above n 17 at para 51 and *Everfresh* above n 24 at para 71.

[111] Despite differences in approach between civil law and common law systems, it is now recognised that both grapple with the same problem, namely regulating fairness in contract law. In *Interfoto*, Bingham LJ said:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean simply that they should not deceive each other. . . . [I]ts effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's own cards face upwards on the table'. It is in essence a principle of fair and open dealing. . . . English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of fairness."[223]

[112] Fairness is thus universally recognised as integral to any system of contract law. How should it be dealt with – general principles or piecemeal solutions? This remains contentious, as does the particular conception of fairness that should prevail.[224] To give content to fairness entails a moral choice or value judgment.

[113] Over time in civilian and common law tradition the conception of fairness in contract law has changed. It is instructive to understand this evolving process in how fairness in contract was and is perceived. First, because these traditions form part of our mixed legal heritage; second, because we might unwittingly and uncritically cling to a particular conception of fairness that may have outlived its usefulness; and, third, because it is now our duty to ensure that our own conception of fairness in contract accords with the Constitution's value system. This point has been articulated in the first

[223] *Interfoto* above n 151 at 439.

[224] See Rawls *A Theory of Justice* (Harvard University Press, Cambridge 2003) at 3. Perhaps the most famous use of the concept / conception distinction is that of the political philosopher John Rawls. Rawls appeals to the distinction between the concept of justice and particular conceptions of justice. His theory, of justice as fairness, is defended as the best conception of justice. See also, more generally, Dworkin *Law's Empire* (Harvard University Press, Cambridge 1988), where the author generally argues for the formulation of guidelines for finding that elusive right answer that should try to incorporate the virtues of justice, morality, fairness and integrity.

judgment. We can only do this if we know and understand where our current ideas come from.

Three conceptions of fairness in contract

Equality in exchange

[114] This idea of fairness is explained by Gordley,[225] as—

> "the ancient idea that in an exchange the value of what each party gives should be equal to the value of what he receives. Once, when university study of law meant primarily the study of an idealized Roman Law, academic jurists regarded this idea as a basic principle of the law of contracts. They did not expect the law to remedy every unequal exchange, for to do so might be unsettling for commerce. But they regarded an unequal exchange as unjust in principle and thought that the law should provide a remedy where practical."

[115] Gordley traces the history of this idea from its origin in Roman law texts to the development by medieval jurists of the civilian doctrine of *laesio enormis* (extraordinary injury), not merely as a remedy to recover land sold at less than half its price, but as a generalised remedy for one-sided contracts; and finally to the explicit link between this remedy and the Aristotelian principle of commutative justice, the justice owing between two individuals.[226] In contract that principle requires that parties exchange performances of more or less equal value, also expressed as the idea that the exchange should impose the same burden on each of the parties.[227]

The rise of unfettered freedom of contract

[116] But the rich moral content of the intellectual tradition that located the purpose of the law of contract in ensuring equality in exchange was abandoned by what is known

[225] Gordley "Equality in Exchange" (1981) 69 *California Law Review* 1587.

[226] Id at 1588 and 1638; and fn 205, 206 and 207.

[227] Id at 1638.

as the "classical law of contract", forged mainly in the nineteenth century.[228] In its place came a framework of "a thin collection of organizing principles",[229] focused on supposedly "voluntary choices by individuals".[230] This analytical framework, preserving as cardinal the principle of respecting and enforcing voluntary choices, established a closed system of thought that excluded inconsistent rules and doctrines.[231]

[117] In his authoritative study, Atiyah[232] describes the individualism underlying this approach:

> "[T]he contents of the contract, the terms and the price and the subject-matter are entirely for the parties to settle. It is assumed that the parties know their own minds . . . that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain. It follows that the unfairness of the bargain – gross inadequacy or excess of price – is irrelevant, and once made the contract is binding."[233]

[118] This created a closed and self-executing system in terms of its internal logic:

> "Contract, in other words, was the vehicle through which autonomy and rational planning could be simultaneously promoted, the former by respecting the parties' free choices, and the latter by channelling the parties towards performance by holding those in breach responsible for letting down their fellow contractors. Or, to put this in terms that marry the classical law with the foundational ideas of freedom of contract and sanctity of contract, contract serves autonomy by adopting the principle of freedom of contract, and contract underpins rational planning by adopting the principle of sanctity of contract."[234]

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[228] Id.

[229] Collins *The Law of Contract* 4 ed (LexisNexis, London 2003) at 4.

[230] Id at 6.

[231] Id at 6-7.

[232] Atiyah *The Rise and Fall of Freedom of Contract* (OUP, Oxford 1979).

[233] Id at 403.

[234] Brownsword above n 220 at 49. The current justification for freedom of contract is more instrumental than regarding freedom of contract as a value in itself. In this economic efficiency form, freedom of contract is essential in order to ensure that transactions maximise wealth. See also Collins above n 229 at 25-6.

[119] It should not be overlooked that the classical 19th century interpretation of freedom of contract and the market order also laid claim to fairness.[235] The normative justification for this notion of freedom of contract lies in its claim to promote and sustain liberty, equality and fairness in exchange. Its protection of individual liberty and freedom lies in the extensive freedom it gives to individuals to decide who to contract with, on what terms to contract and in the protection of the sanctity of contract. Its protection of equality lies at a formal level of equality of opportunity: every person has the same set of rights to enter contracts and own property – no distinctions of rank and privilege apply. Lastly, fairness finds expression in the reciprocity of exchange: both parties to a contract give up something of value in return for something that was desired. Interference to ensure equivalence in value thus becomes unnecessary. Collins says it best:

> "No one enters a transaction voluntarily unless he or she expects to benefit from it, so that every voluntary bargain must be fair, because it should leave each party better off than before."[236]

The decline and transformation of freedom of contract

[120] Atiyah documented the decline of the rigid conception of the freedom of contact as a process by which "[f]reedom of choice was whittled down in many directions, government regulation replaced freedom [of] contract . . . and paternalism once again was the order of the day".[237] This process still continues in different forms.

[121] In descriptive terms the market system and content of its legal regulation has altered dramatically. It cannot be described as a system based on individual freedom of contract.[238] In Europe the two most important developments are said to be the legislative protective regime in the mass consumer market and "the growing recognition

[235] Collins id at 23.

[236] Id at 24.

[237] Atiyah *Essays on Contract* (OUP, Oxford 1986) at 356, cited in Kimel, "Neutrality, Autonomy, and Freedom of Contract" (2001) 21 *Oxford Journal of Legal Studies* 473 at fn 2.

[238] Atiyah id at 357.

that relational commercial dealing needs its own regulatory framework".[239] A normative concern is the inequality in power relations created and maintained by a narrow and rigid conception of freedom of contact.[240]

[122] The notion that freedom of contract speaks for itself in only one voice has also been debunked. Contract law cannot protect freedom in the abstract, because unless one asks what goals each of the contracting parties pursues, one will not be able to determine the kind of freedom that needs to be protected. Kennedy explains:

> "[W]ithout doing violence to the notion of voluntariness as it has been worked out in the law, [we] could adopt a hard-nosed, self-reliant, individualist posture that shrinks the defences of fraud and duress to almost nothing. At the other extreme, [we] could require the slightly stronger or slightly better-informed party to give away all his advantage. . . . If we cut back the rules far enough, we would arrive at something like the state of nature – legalized theft. If we extended them far enough, we would jeopardize the enforceability of the whole range of bargains that define a mixed capitalist economy. . . . In either extreme case we would have departed from freedom of contract – the concept has some meaning and imposes some loose limits."[241]

[123] Freedom of contract can thus never be absolute. It is constrained, inevitably. Modern remedies for regulating unfairness are found primarily in doctrines of unconscionability and good faith.[242] Common law systems appear to prefer the former and civil law systems the latter, but there is much cross-pollination in between.[243] Both approaches appear to eschew reliance on the idea of equality or equivalence in

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[239] Brownsword above n 220 at 69. See also Atiyah above n 237 at 148, where it was stated:

> "[To argue that] to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill."

[240] Kimel above n 237 at 486.

[241] Kennedy "Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 *Maryland Law Review* 563 at 582.

[242] Brownsword above n 220.

[243] Id.

exchange. But, without that, it is unclear what objective reference point provides the normative justification for regulating unfairness in contracts.

[124] There appears to be two possibilities: (i) the standards of fair dealing recognised by the community of which the contractors are part; and (ii) the standards of fair dealing and cooperation in terms of the best moral theory. Contract law prefers practicality to theory, so the best standard appears to be one that reflects the expectations associated with good commercial practice.[244]

[125] What could those be? Gordley suggests that it always comes back to the ancient idea of equality in exchange:

> "It seems hard to maintain that a 'disproportion' in the values exchanged is of itself neither unfair nor an evil to be remedied, but one that exploits another's precarious situation and exploits another's precarious situation and causes such a disproportion is acting against good morals. A situation can only be described as 'precarious' by reference to some harmful consequences that might occur. Conduct can only be described as 'exploitive 'if some unfair advantage is taken. Yet here, the only harm that attends the 'precarious situation' of the one party, and the only advantage taken of him by the other, seems to be the disproportionality in the values exchanged. If the disproportion were not viewed as an evil in itself, it is hard to see why one would care about either the situation or the conduct."[245]

[126] And he discounts the argument that it is impossible to determine the disproportion objectively and in a practically ascertainable way:

> "The greater and more certain the harm and the less the ability to protect against it, the more willing the court should be to give a remedy.
>
> . . .
>
> The disproportion in the [exchange] is itself reason for giving relief. That does not mean that relief should be given whenever an exchange is disproportionate. If the

[244] Id at 135.

[245] Gordley above n 225 at 1632.

> courts are not to cause more inequalities than they cure, they should confine relief to cases where the [exchange] is clearly disproportionate and the disadvantaged party is badly hurt and less able to protect himself."[246]

[127] Has our law of contract seen similar developments? The answer is, Yes.

Closer to home – before the Constitution

[128] The doctrine of *laesio enormis* did not survive European codifications of the civil law,[247] but it survived longer in our non-codified Roman Dutch law. It was eventually abolished by Section 25 of the General Law Amendment Act[248] after the decision of the Appellate Division in *Tjollo*, only in the middle of the last century.[249]

[129] There was also the *exceptio doli*. This was not explicitly linked to equality in exchange, but remained as a general legal device that could prevent a party from exercising a right in a manner that did not measure up to the standard of good faith. That equitable instrument was abolished in our law of contract by the Appellate Division in *Bank of Lisbon*.[250] The wisdom of that decision remains doubtful. As noted by Jacques Du Plessis:

> "Zimmermann prophesied three decades ago that the *exceptio doli* may 'haunt the courts and legal writers from its grave'. . . . [T]his prophecy has been fulfilled: determining when a party may be prevented from exercising a contractual right is now one of the most pressing problems in modern contract law."[251]

[130] Of particular interest to South African law is that the rise of freedom of contract as a closed and self-executing system accorded with the Pandectist notion of law as a

[246] Id 1621 and7.

[247] Id at 1592-3.

[248] 32 of 1952.

[249] *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A).

[250] *Bank of Lisbon* above n 41.

[251] Jacques Du Plessis above n 22 at 397.

formalistic science, the rules and methods of which were derived from the system itself.[252] This limited role of normative principles within law influenced many jurists, mainly those of Afrikaans descent, who studied in Germany.[253] These included J.C. de Wet, whose work on contract law exerted an enormous influence.

[131] As explained by Lubbe,[254] De Wet was certainly influenced by the Pandectists, but not slavishly so. What he derived from them was a methodology that seeks to give the whole of private law a coherent conceptual structure that at the same time provides the general principles from which the application of rules to individual cases follow and from which new related concepts could be constructed to cover new situations. The conceptual framework has an ethic and logic of its own and, provided this is used properly, no further normative work needs to be done in adjudication. The underlying normative premise is that the personal autonomy and individual responsibility contract law provides is sufficient guarantee for ethically acceptable results. Judicial interference is thus unnecessary.

[132] This closed and self-executing nature of the system in terms of its internal logic probably explains why it was and is often seen as an axiomatic truth that needs no further explaining. In his seminal article, titled "Substance and Form in the Law of Contract", Cockrell describes its effect on our law of contract:

> "It should be obvious to anyone familiar with the South African law of contract that the privileged position here is occupied by a substantive individualism couched in a rules-based form. Freedom of contract, the sanctity of individual promises, the minimal role for the courts in matters of contractual agreement, the need for certainty in the law – these are the ideas which permeate the surface of the law. But it is important to note that this privileging invariably proceeds on the basis that the

[252] Paul Du Plessis "Good Faith and Equity in the Law of Contract in the Civilian Tradition" (2002) 65 *THRHR* 397 at 407.

[253] Id at 406.

[254] See generally Lubbe "The Last Pandectist ? – J C de Wet in Methodological Perspective" in Du Plessis and Lubbe (eds) *A Man of Principle. The Life and Legacy of J.C. de Wet* (Juta & Co Ltd, Cape Town 2013).

> preference for individualism and the rules-form is an axiomatic truth rather than a controversial premiss in an ongoing argument."[255]

[133] Cockrell and others[256] have shown that, both on a purely descriptive and also on a normative level, a rigid conception of freedom of contract fails to fully explain our own law of contract, even in the pre-constitutional era.[257]

[134] This starts with the ascription of responsibility – or, more familiarly perhaps, with the question under what circumstances mistake may nullify consent. Our law, like other systems, increasingly accepts that the demand that personal autonomy in the sense of individual consent should prevail in contractual liability must be qualified in some form by the reasonable expectation of the other party. Here "the principle of autonomy shades into the principle of reliance".[258]

[135] This process of locating contractual liability outside the subjective consent of the contracting parties is continued when the content of contractual obligations is determined. The prime examples are terms implied by law.[259] But even so-called "tacit terms" (unspoken terms that the parties would presumably have agreed to, if asked) are

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[255] Cockrell above n 22 at 45-6.

[256] Id. See also Zimmermann and Visser above n 28 at 240-1 and Andrew Hutchison "Good Faith in Contract: A Uniquely South African Perspective" (2019) 1 *The Journal of Commonwealth Law* 1 at 2.

[257] See generally Brownsword above n 220 at 68, where he states – although not speaking on our law – that "the *maxim pacta sunt servanda* (at any rate, if applied in a literal and mechanical fashion), like the ideal of freedom of contract, is out of place where the parties' relationship is ongoing, evolving and dynamic".

[258] Cockrell above n 22 at 48.

[259] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) (*McAlpine*) at 532G-533A, where Corbett JA explained the distinction between implied terms and tacit terms:

> "The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. . . . The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances that an implication necessarily arises that the parties intended to contract on the basis of the suggested term."

not actual; they, too, may be "imputed".[260] This kind of hypothetical consent is justified by a finding by a judge that the parties would have agreed to that term if they had been made aware of its possible inclusion at the time of concluding the contract. But they did not. The practical upshot is that the judge makes that part of their contract for the parties.

[136] Our highest courts have repeatedly recognised that good faith underlies our law of contract.[261] It has been used as an informing value for the development of our law in relation to anticipatory breach of contract,[262] cession,[263] auction bids,[264] the modification of notice terms by conduct,[265] and for allowing for a relaxation of the principle of reciprocity and the award of a reduced contract price.[266]

[137] The defences of misrepresentation, duress and undue influence are often explained on the basis that they instance defects in the promisor's volition.[267] But the more obvious explanation for these defences may be that either they spring from improper conduct by the promisee, instancing bad faith conduct from which the law will not allow the promisee to benefit,[268] or are legal rules to undo an unfair bargain.[269]

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[260] Cockrell above n 22 at 53. See also the proffered distinction between tacit and implied terms in *McAlpine* id.

[261] Id at 55. See also Dale Hutchison "From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract" above n 1 at 108 and Andrew Hutchison "Good Faith in Contract: A Uniquely South African Perspective" above n 256 at 6.

[262] Cockrell id, citing *Tuckers Land* above n185 at 652.

[263] Cockrell id, citing *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 770-1.

[264] Cockrell id, citing *Neugebauer & Co Ltd v Hermann* 1923 AD 564 at 573-4.

[265] *Garlick v Phillips* 1949(1) SA 121 (A).

[266] *BK Tooling* above n 187 at 434-5.

[267] Cockrell above n 22 at 56.

[268] Cockrell id states:

> "It is an illegitimate bargaining tactic to induce a contract by making a false statement of fact (misrepresentation), or by coercing the promissor (duress), or by abusing a position of trust (undue influence)".

[269] Collins above n 229 at 33.

[138] Another patent overruling of freedom of contract occurs when a contract is not enforced because of reasons of public policy. In *Sasfin,*[270] the Appellate Division examined the substantive fairness of a deed of cession and concluded that it was clearly unconscionable and incompatible with the public interest. In our law it is now established that covenants in restraint of trade will not be enforced where enforcement would be contrary to public policy, especially in cases where there is no legitimate business interest in the restraint. Cockrell states that—

> "for else there is no benefit which will outweigh the prima facie harm that results from the restrictions on the liberty of a citizen to pursue his or her trade. The influence of considerations of public harm is clear, for the individual assessment of personal interest is overreached by the broader interests of the community in maintaining the institutional practices of free trade".[271]

[139] One can mention more instances of judicial interference in supposed "freedom of contract" in our law, but the point is already clear. In the formation of contracts, in the formulation of their terms, and in their enforcement, our courts second-guess, or "make" and "unmake" contracts for parties, independently of the individual consent of the contracting parties.

[140] No wonder Cockrell despaired at our courts' denial of this obvious state of affairs and pleaded for a more realistic assessment:

> "While the strains of commitment pull relentlessly in both directions all that we can ask of contract law is that it mediate between self-interest and sociality in a self-conscious manner that does not blindly value legal doctrine as an end unto itself".[272]

[270] *Sasfin* above n 16.

[271] Cockrell above n 22 at 62.

[272] Id.

[141] As in other jurisdictions the legislature has also stepped in to supplant or supplement freedom of contract for reasons of equity. A luminous instance is the pre-democracy Conventional Penalties Act,[273] which affords courts the radical power to reduce excessive penalties "to such extent as [they] may consider equitable in the circumstances".[274]

[142] Lastly, it needs to be noted that in pre-Constitutional South Africa the moral justification for freedom of contract was virtually non-existent in relation to the vast majority of people. The reason was simple and brutal: there was no freedom to contract with anyone they chose on the terms they wished, because this was forbidden by law. There was no equality of opportunity, because rank and privilege applied. There was no proper reciprocity in exchange because the disadvantaged lacked the means to decide freely what they valued in that exchange.

[143] The law of contract regulates both productive and distributive relations. It thus functions as a key mechanism in the distribution of wealth.[275] The undeniable inequality in the distribution of wealth over centuries in our country presents a significant impediment to the argument that the playing field is now level and hence that the moral justification for a supposed "freedom of contract" can simply be applied.

At home – under the Constitution

[144] The Supreme Court of Appeal jurisprudence before this Court's judgment in *Barkhuizen*,[276] is dealt with in the first judgment.[277] Its analysis then also finds a convergence between the Supreme Court of Appeal's and this Court's approaches. The apparent differences in approach are said to be more apparent than real. The first judgment finds:

[273] 15 of 1962.

[274] Id at section 3.

[275] Collins above n 229 at 12.

[276] *Barkhuizen* above 17.

[277] First judgment at [79] to [80].

> "There is agreement between this Court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions.
>
> 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."[278]

[145] My concern with the repetitive statement that the so-called "abstract" values of fairness, justice and equity, and reasonableness have no autonomous, self-standing status is that it may be read to underplay what *Barkhuizen* actually decided. The statement that their application is mediated by the common law rule that a court may not enforce contractual terms contrary to public policy innovatively attempts to bridge the divide between the criticism of the application of "abstract values" as distinct from legal rules. But as we will see, that only pushes the criticism of so-called "abstract values" back a step further, without offering anything better than the same abstractedness, now in the form of a "rule".[279]

[278] Id.

[279] See the discussion at [159] to [161] below.

[146] *Barkhuizen* is authoritative and binding precedent that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, *where constitutional values or rights are implicated*, be done directly in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy.

[147] Let *Barkhuizen* speak for itself. Before turning to the specific challenge raised on the papers before it, the general approach of constitutional challenges to contractual terms where both parties are private parties[280] was spelled out:

> "Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all the people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.
>
> What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.
>
> In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time

[280] *Barkhuizen* above n 17 at para 27.

> allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."[281]

[148] In dealing with the validity of time-limitation clauses it stated:

> "In general the enforcement of an unreasonable or unfair time-limitation clause will be contrary to public policy. Broadly speaking the test announced in *Mohlomi* is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of *ubuntu*. It would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.
>
> In my judgment the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy. There is no reason in principle why this test should not be applicable in determining whether a time-limitation clause in a contract is contrary to public policy."[282]

[149] It then proceeded explicitly to "*the determination of fairness*" which considered, first, the unreasonableness of the time-limitation clause in the contract at stake and, second, if the clause is reasonable, whether it should be enforced in light of the circumstances which prevented compliance with the time-limitation clause.[283] With regard to the former Ngcobo J felt "unable to conclude that the 90-day period allowed to the applicant to sue [*was*] *so unreasonable that its unfairness is manifest and that therefore its enforcement would be contrary to public policy*".[284]

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[281] Id at paras 28-30.

[282] Id at paras 51-2.

[283] Id at para 56.

[284] Id at para 67. The direct, unmediated application of notions of fairness, unreasonableness and simple justice between contracting parties is explicitly made throughout the judgment. See also paras 69-73, where the so-called inflexibility argument raised in the High Court was dealt with.

[150] In relation to the second question, enforcement of the clause, the Court held that the applicant had not furnished the reason for its non-compliance with the time clause,[285] which was required in the circumstances.[286] This prevented the Court from making a finding based on fairness or justice:

> "In the result, without facts establishing why the applicant did not comply with the clause, I am unable to say that the enforcement of the clause would be unfair or unjust to the applicant. For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequence in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent."[287]

[151] This is direct authoritative precedent that in cases where constitutional values or rights are alleged to be implicated in the application of public policy in the invalidation or enforcement of contractual clauses, so-called abstract notions of fairness, reasonableness and simple justice between persons are the unmediated standards against which the validity of the clauses or their enforcement is judged. It is only in relation to good faith that the Court referred to the then existing state of affairs that it is not a "self-standing rule". It did not anoint this with its approval, but rather noted:

> "Whether, under the Constitution, this limited role for good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need to be answered on the facts of this case and I refrain from doing so".[288]

[152] The unmediated and direct application of the standards of reasonableness and fairness does not translate into a pejoratively depicted dependence "on the idiosyncratic inferences of a few judicial minds".[289] As with other open-ended standards in our law

[285] Id at para 84.

[286] Id at para 58.

[287] Id at para 85.

[288] Id at para 82.

[289] *Pridwin* above n 16 at para 27.

– reasonableness in delict and fair labour practices in employment law – individual application may in time develop into generally applicable rules. The cautioning question – does initial application allow future general application in similar situations? – restricts the danger of subjective idiosyncrasy. If like cases could not be treated alike in the future, invalidation or non-enforcement should not follow because it would infringe equality of treatment.

[153] *Barkhuizen* was then considered by the Supreme Court of Appeal in *Bredenkamp*.[290] That case has been interpreted as giving *Barkhuizen* an inhibiting gloss, namely that in *Barkhuizen* the claimant had claimed that the constitutional right of access to court was infringed; and it was only to determine that infringement that the Constitutional Court had invoked the fairness standard – crucially this did not, therefore, operate as a "free-standing ground upon which a court may refuse to enforce a contractual term on the basis of public policy".[291]

[154] That interpretation of *Bredenkamp* is not correct. There is little to quibble with the statement in *Bredenkamp* that *Barkhuizen* is no authority for the proposition that valid contractual terms or their enforcement may be invalidated on the ground of unfairness even where no public policy considerations found in the Constitution or elsewhere are implicated. Nor that, in *Bredenkamp,* no infringement of a constitutional value, right or any other public policy consideration was relied upon.

[155] That is the *ratio* of the decision in *Bredenkamp*.[292] Harms JA did not purport to contradict *Barkhuizen*'s general import that in a case where constitutional rights and

[290] *Bredenkamp* above n 88.

[291] See first judgment at [42] and the cases cited in fn 98.

[292] See Dale Hutchison above n 1 at 115, where the author questions whether this Court accepted or would accept this reading down of the majority judgment in *Barkhuizen,* when discussing that this Court refused to grant leave to appeal in *Bredenkamp*. See also Sharrock above n 22 at 185, where the author shared the view that—

> "[i]t is a great pity that the Constitutional Court did not engage critically with the appeal court's view regarding unfair enforcement because the view appears to rest upon weak foundations. The appeal court was evidently persuaded to adopt its inflexible stance by two considerations: concepts like reasonableness, fairness and good faith are merely abstract values not independent substantive rules, and allowing judges to refuse to implement contractual provisions on the basis of unfairness will give rise to intolerable legal and commercial uncertainty. Neither

values underlying public policy are invoked and implicated, the contractual clause or its enforcement may be invalidated as being in conflict with fairness, justice and equity, reasonableness, the necessity to do simple justice between individuals, or ubuntu. It is in that context that the statement that "fairness is not a free-standing requirement for the exercise of a contractual right" in *Bredenkamp* must be understood.[293] It should not be read as saying that fairness is not a free-standing requirement for the exercise of a contractual right when the validity of the right is attacked as being in conflict with constitutional values or other public policy considerations.

[156] Unfortunately, Supreme Court of Appeal decisions following *Bredenkamp*, uncritically adopted the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy. In *Pridwin*, this was set out as "now clearly established".[294] Included as part of these "clearly established" principles are the following:

> "(v) A court will use the power to invalidate a contract or not enforce it, sparingly, and only in the clearest of cases in which the harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds; [and]
>
> (vi) A court will decline to use the power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose."[295]

consideration is sustainable or convincing. Even if reasonableness and unfairness are merely abstract values, it does not follow that they cannot be determinative of public policy on a particular issue. The approach followed by the appeal court in relation to substantive unfairness of contractual terms demonstrates this very point."

[293] *Bredenkamp* above n 88 at para 53.

[294] *Pridwin* above n 16 at para 27.

[295] Id.

[157] The Supreme Court of Appeal's judgment in this matter unfortunately follows this trend. After quoting the principles enunciated in *Pridwin*, Lewis ADP adds a further rider:

> "Thus although fairness and reasonableness inform policy they are not self-standing principles. And there are competing policy considerations, in particular, the need for certainty in commerce."[296]

[158] The precedential and logical shortcomings in this approach do not appear to have been considered. First, the principles set out are not in accordance with those authoritatively stated in *Barkhuizen*, nor for that matter, with *Bredenkamp* itself. Nor is the criterion of harm only to the public, with no apparent consideration of the harm to the individual contracting party, consistent with *Sasfin*,[297] or the Appellate Division's jurisprudence regarding public policy in restraint of trade matters.[298]

[159] Second, the insistence on only "substantive rules" for the determination of public policy in contract law does not bear examination. The only countervailing requirements to fairness and reasonableness are apparently: (a) the power to invalidate a contract must be used "sparingly''; (b) only "in the clearest of cases"; (c) when the harm to the public is "incontestable"; and (d) when it does not depend on the "idiosyncratic inferences of a few judicial minds".[299]

[160] It appears to be suggested that these are now the "substantive rules" that determine public policy issues in contract in accordance with the dictates of commercial certainty as an essential part of the rule of law. Yet the alternatives the Supreme Court of Appeal suggests do not address that Court's own concerns about legal certainty. This is because no "objective standard" is provided to determine when a power is used

[296] Supreme Court of Appeal judgment above n 9 at para 35.

[297] *Sasfin* above n 16.

[298] See *Magna Alloys* above n 51.

[299] See *Pridwin* above n 16 at para 27.

"sparingly", or only in "the clearest of cases", or when the harm to the public is "incontestable", or when judicial minds make "idiosyncratic inferences". These are themselves not "rules" of law, but at best also abstract standards. They suffer the same vice of uncertainty as "notions of fairness and reasonableness". And so does the first judgment's use of the mediating "rule'' of public policy.[300]

[161] The result is that the Supreme Court of Appeal's reasons for rejecting direct application of standards of good faith, including fairness and reasonableness, apply as much, if not more, to its own alternative, which is the sparing use of public policy in only the clearest case of incontestable violation of the public interest. By that Court's own logic, these vague standards must necessarily result in uncertainty and the "idiosyncratic inferences of judicial minds".[301]

[162] In *Barkhuizen*, this Court declined to express a final view on the role of good faith in public policy invalidation or non-enforcement cases because it did not arise properly on the facts.[302] In *Everfresh*,[303] the majority of the Court declined to grant leave to appeal. The applicant in that matter had asked the Court to develop the law of contract, in accordance with notions of good faith, where the parties have agreed to negotiate a further agreement, but without an independent deadlock-breaking mechanism. The Court nevertheless reiterated the need to infuse our contract law with constitutional values, including the value of ubuntu, which "carries in it the idea of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".[304]

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[300] Id.

[301] Id.

[302] *Barkhuizen* above n 17 at para 82.

[303] *Everfresh* above n 24.

[304] Id at para 71. In what seems to have become a new extra-curial tradition for serving Supreme Court of Appeal Judges who are dissatisfied with this Court's judgments, Carole Lewis criticised this judgment in Lewis "The Uneven Journey to Certainty in Contract" (2013) 76 *THRHR* 80. In turn her extra-curial criticism was used as supporting authority in *Roazar* above n 97 at paras 20-1. If only for purposes of a balanced assessment, reference should be made to the contrary views expressed on *Everfresh* above n 24 by other commentators, see Price and Hutchison above n 22. In the present case Lewis AJP cited an article by a colleague, Wallis above n 23 to justify

[163] *Botha*[305] came next. The first judgment clearly sets out that *Botha* was principally concerned with the interpretation of a statutory scheme aimed at protecting purchasers of land on instalments and applied principles of reciprocity and the *exceptio non adimpletis contractus* in doing so.[306] In that context it may also be seen as the application of the principle of good faith in developing existing common law rules in the interpretation and application of the statutory scheme.[307]

[164] This Court formulated the main issue as whether, under section 27(1) of the Alienation of Land Act,[308] the Trust was obliged to register the property in Ms Botha's name against registration of a mortgage bond in its favour.[309]

[165] The Court gave a qualified finding in Ms Botha's favour on the main issue. It dealt with two defences to her claim: (a) that the statutory provision provided only for cancellation as a remedy if demand for transfer is refused, and not specific performance; and (b) that Ms Botha was not entitled to specific performance since she was in arrears.

[166] The Court held in Ms Botha's favour on the availability of specific performance.[310] In relation to her exercise of that remedy, it held that the statutory provision recognised the reciprocal obligations of the parties and that "[i]t follows inexorably that the provision does not allow the purchaser to obtain rights in the

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ignoring this Court's judgment in *Botha* above n 4. See Supreme Court of Appeal judgment above n 9 at paras 20-4.

[305] *Botha* id.

[306] First judgment at [48] to [58].

[307] *Botha* above n 4 at paras 45-6.

[308] 68 of 1981.

[309] *Botha* above n 4 at para 21 and again at para 23, where the Court stated the following:

> "At the heart of the case is whether Mrs Botha was entitled to transfer of the property in terms of section 27(1). The determination of the issue depends on a proper interpretation of the section. The issue at stake entails the constitutionality of the enforcement of a cancellation clause in a contract of sale of immovable property in circumstances where more than half of the purchase price was paid, and demand for transfer of the property in terms of section 27(1) was refused by the seller."

[310] Id at para 41.

property unless she first purges her arrears".[311] How then to get past the fact that she was in arrears?

[167] The first step was to extend the common law relaxation of the principle of reciprocity, based on good faith, to the situation where Ms Botha had an accrued statutory right designed for her protection, which the Trust's purported cancellation would have destroyed.[312]

[168] So good faith allows the Court to relax the reciprocity that the *exceptio non adimpleti contractus* usually demands (the *exceptio* permits a party sued for non-performance of a contract to resist judgment by showing that the other party did not perform their side of the bargain).

[169] But how is this done fairly? It could not be done by a simple order compelling the Trust to transfer the property to Ms Botha against registration of a mortgage bond in its favour, because that would not remedy Ms Botha's immediate breach.[313] So this was the Court's equitable solution – an order, relying on both the constitutional competence to make just and equitable orders,[314] and the common law discretion to avoid undue hardship in making orders of specific performance:[315]

> "[T]o deprive Ms Botha of the opportunity to have the property transferred to her under section 27(1) and in the process cure her breach in regard of the arrears, *would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees.* Accordingly, an appropriate

[311] Id at para 44.

[312] Id at paras 45-7.

[313] Id at paras 47-8.

[314] Id at para 49 and fn 69.

[315] Id at para 49 and fn 70.

> order in this regard will be made. The condition that Ms Botha must pay the arrears and all municipal balances, set out in our order, on top of the statutory requirement that a bond be registered, constitutes an equitable exercise of the discretion a court has to avoid hardship to the trustees."[316]

[170] The further question, whether the cancellation clause in itself was unreasonable, unfair and unconstitutional and if it was, whether Ms Botha was entitled to restitution of the instalments she had paid,[317] was also decided in her favour on similar grounds relating to reciprocity.[318]

[171] More recently, in *Dunlop*,[319] this Court has expressly tied good faith to the furtherance of equality.[320] Dunlop had fired striking employees, represented by their union, on the basis that, although they had not themselves participated in the violence that had broken out during a strike action, they had refused to disclose the identities of co-workers who had participated. This, the employees argued, was unlawful. In argument before this Court, Dunlop supported its actions by invoking the Court's own decisions, in bilateral contract cases, that it may import an implied duty of good faith into the parties' dealings in relation to the contract. This, Dunlop said, entailed a duty to disclose relevant information about the unlawful conduct of their fellow workers. The Court unanimously dismissed the appeal and in particular rejected this argument. The basis was that duties of good faith are intended to infuse "more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party".[321] Dunlop's argument was to exactly the opposite effect. In an employment relationship, it is the employee who is subordinated to the power of the employer.[322] It is that power of the employer that duties of good faith

[316] Id at para 49.

[317] Id at paras 21.

[318] Id at paras 50-51.

[319] *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* [2019] ZACC 25; 2019 (5) SA 354 (CC); 2019 (8) BCLR 966 (CC).

[320] Id at para 66.

[321] Id.

[322] Id.

ought to restrain, to the benefit of the employee. Good faith accordingly affords no basis for strengthening the employer's position by giving it a right to dismiss its employees for mere silence.

[172] The Court has also commented favourably on legislation that incorporated enforcement of statutory equitable provisions into contracts dealing with employment, urban leasing and the petroleum industry. In *Maphango*,[323] the majority left open the question whether the landlord terminated the lease under the common law, but nevertheless indicated that the statutory tribunal, to whom this task fell to be decided on equitable principles, would have to consider the parties' respective interests.[324]

[173] This was taken further in *Business Zone*.[325] Mhlantla J, writing for a unanimous Court, held that section 12B of the Petroleum Products Act,[326] which introduced an equitable standard that overrides the terms of a petroleum contract, "prevails in all petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation".[327]

[174] She also noted that—

> "the establishment of separate adjudicative institutions under the LRA and RHA does not mean that the equitable standard under those Acts does not also apply to contractual employment and residential lease disputes. It is difficult to imagine any employment dispute under the common law still being determined as if the fairness standard developed under the LRA is irrelevant.
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> . . .

[323] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC).

[324] Id at para 52-3.

[325] *The Business Zone 1010 v Engen Petroleum Limited* [2017] ZACC 2; 2017 JDR 0259 (CC); 2017(6) BCLR 773 (CC).

[326] 120 of 1977.

[327] *Business Zone* above n 325 at para 52.

> There is no reason why the specifics of the general standard of fairness and good faith in the common law of contract should not be given shape in the context of petroleum contracts, as is done in the context of labour or rental housing contracts."[328]

[175] In summary: this Court has authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with fairness, justice and equity, and reasonableness, which cannot be separated from public policy.[329] Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu.[330] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to these values. This approach leaves space for *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even where the parties consented to them.

[176] Although declining to express a final view on whether good faith can operate as a self-standing rule, this Court has accepted that the common law notion of good faith underlies our contract law and that it embodies concepts of justice, reasonableness and fairness. It has used that notion of contractual good faith to further relax the common law principle of reciprocity underlying the *exceptio non adimpleti contractus*. It has done so in statutorily protected land rights and in infusing equality into the content of employment obligations. It has had little difficulty in accepting the courts' role in enforcing open ended statutory equitable provisions overriding express contractual terms. And it has acknowledged that the common law could in that process benefit from statutory development.

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[328] Id at paras 54-5.

[329] *Barkhuizen* above n 17 at paras 28-9.

[330] Id at para 51.

[177] These developments are in accord with the general decline and transformation of the rigid classical notion of freedom of contract into a more socially situated or communally understood conception of personal autonomy. Freedom of contract is not the only principle of our law of contract. Nor is good faith. They complement each other. This means that the individualism of our law of contract is one that takes account of the reasonable expectation of the parties to the contract as well as that of the wider community.

[178] The real complaint against notions of reasonableness and fairness is that they do not on their face articulate objective standards against which the conduct of contracting parties may readily be measured. That is a legitimate concern. To address it, this Court must seek ways to formulate cognisable standards rooted in reasonableness, fairness and good faith that may be applied in particular cases. The German courts have succeeded in doing this. There is no reason why our courts cannot, too. It is in this quest that there may be room for a synthesis between this Court's approach and that espoused in the Supreme Court of Appeal.

A synthesis?

[179] A former member of this Court, Edwin Cameron, has commented recently on this divergence of approach:

> "What is needed is an integration of the two perspectives, to which the debate thus far has not been helpful. It has tended to proceed in unhelpful generalities. 'Commercial certainty or constitutionalism?' 'Good faith: Are you for or against?' . . .
>
> Some important voices have urged a more fine-grained approach. Gerhard Lubbe, writing shortly after *Afrox* in 2004, said South Africa could learn much from the German approach, whose *Fallgruppen* methodology has served to translate the good faith clause into a set of perceptible legal rules. More careful work of this nature is now beginning to be done by legal academics. It offers the possibility of a détente: a bold conception of good faith need not be the 'monster' the Supreme Court of Appeal once perceived, but it must be 'domesticated' through processes more careful and lawyerly than those the Constitutional Court has applied. But that has not yet been

> realised in practice. In the Constitutional Court's approach the Supreme Court of Appeal perceives no legal rules or doctrines, only a loose discretion whose exercise threatens to be adventitious. The disconnect is neither doctrinally nor functionally satisfactory, and academics have rightly expressed dissatisfaction with the polarization, which has become more severe."[331]

[180] Privileging freedom of contract and certainty in an absolutist manner is no fit redress for the valid complaint that this Court's approach lacks discernible objective criteria to give content to good faith and its close relatives, fairness and reasonableness. Rigidity negates any possibility for these notions to play a role in contract law, even indirectly. So the quest must be for reasonably practical, objective and clear requirements informed by these concepts. That is not an impossible task.

[181] It may help to seek some assistance, not wholesale transplant, from other jurisdictions. This Court has often looked at German law in this regard and yet again it is a fruitful exercise in the present context.[332]

[182] German law, like ours, makes a distinction between invalidation on public policy grounds and the general operation of good faith. The former is governed by Articles 134 and 138 of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB), the latter primarily by Article 242.

[183] Article 134 provides that a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion. Article 138(1) provides that a legal transaction that is contrary to public policy is void. Article 138(2) adds:

> "In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be

[331] Cameron and Boonzaier, "Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence" (2020) 92 *Rabel Journal of Comparative and International Private Law* [Forthcoming].

[332] See for example *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 104.

> promised or granted pecuniary advantages which are clearly disproportionate to the performance."

[184] Article 134 needs no special discussion. Our law already recognises that in appropriate circumstances an agreement contrary to a statute may be declared void.[333]

[185] Article 138(1) suffers from the same abstractness and lack of certainty that our law for declaring contracts contrary to public policy appears to be suffering from. It is here, however, that the articulation of individual fundamental rights in the Constitution can be of great help. The infringement of a fundamental individual right in the context of a contract may then be used as a concrete example of being in conflict with public policy. This has already been recognised in *Barkhuizen*.

[186] It is where an infringement of a fundamental right does not appear clearly in the first stage of the *Barkhuizen* analysis, that some aspects of Article 138(2) of the BGB provides some further insight into how more objective, specific and ascertainable rules may be of assistance in the second stage of determining the validity in the enforcement of a contractual clause. It is interesting to note the similarities between the article and the reconsideration, advocated by Gordley, that some equivalence in the value of the respective performance by the parties in bilateral contracts may still be the underlying purpose of most, if not all, contracts.[334]

[187] *Barkhuizen*, I suggest, may be read as having already started the process of determining more objectively certain rules in the second stage of its analysis, by

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[333] See *Schierhout v Minister of Justice* 1926 AD 99 at 109-10, where it was held:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. . . . So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act. The maxim, '*Quod contra legem fit pro infecto habetur*', is also recognised in English law. And the disregard of peremptory provisions of a statute is fatal to the validity of the proceeding affected."

See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 77.

[334] Gordley above n 225 at 1587.

requiring that parties who seek to avoid the consequences of their own breach of contract on the basis of public policy need to adequately explain the reason for their non-compliance. This requirement may fit in with first of the three requirements that underlie Article 138(2) of the BGB and the suggestion by Gordley, that more is required. What a party then needs to prove would be that: (a) the exchange is clearly disproportionate (which would include providing a reason for non-compliance); (b) the disadvantaged party is badly prejudiced; and (c) that the disadvantaged party is less able to protect itself than the other contracting party. The greater and more certain the harm and the less the ability to protect against it, the more willing the court should then be to give a remedy.

[188] Proof of disproportionate exchange will only be possible where there is evidence available of what a proportionate or normal exchange will be in commercial practice. That might be a difficult evidentiary burden but the lack of proof will then serve as the first filter for ensuring that invalidation is done "sparingly" and in only the "clearest" of cases.[335] The next filter will be proof of the prejudice that the complaining party will have to endure because of the disproportionality. This again goes to a cautionary approach to exclude undeserving cases. And lastly that party will have to show that it was less able to protect the contracting party than the other contracting party, which would incorporate current notions of inequality in bargaining power.

[189] What about good faith? In determining unreasonableness and fairness under the public policy test for invalidity there is, of course, an overlap with good faith, which includes notions of reasonableness and unfairness. But as we have seen this Court has not confined good faith to public policy invalidation and has recognised its application in other fields as well.

[190] Earlier, I indicated that *Botha* may be an instance where good faith considerations justified the development of the common law rule that the rigorous

[335] See *Pridwin* above n 16 at para 27.

application of reciprocity in bilateral contracts, in the form of the use of the *exceptio non adimpleti contractus*, may be relaxed where fairness and justice dictates it. That rule was developed and applied by the Appellate Division in *BK Tooling*,[336] by allowing for a relaxation of the principle of reciprocity and the award of a reduced contract price in circumstances where equity demands it.

[191] The difference in the application of good faith in the context of developing the common law, in contrast to public policy application, lies in its purpose. Its purpose is that of development and modification of a legal rule, while public policy aims at something different, namely the invalidation of a contractual term or its enforcement. The effect of the order in *Botha* was not to invalidate the cancellation clause in the contract, but to postpone it in order for Ms Botha to have a further opportunity to cure her default and other arrears.[337]

[192] That still leaves the problem of giving objectively ascertainable content in a particular case to the dictates of good faith. As explained by Jacques du Plessis, when applying Article 242 of the BGB—

> "'good faith' does not simply mean fairness or reasonableness. It bears a more specific meaning, which sometimes is explained by a closer examination of the German term, *Treu und Glauben*, of which 'good faith' is a rather vague translation. The term essentially requires that a party takes into account the protectable interests of another party (that is, display *Treu*) and the other party in turn must rely on this (that is, must display *Glauben)*. The protection of this reliance lies at the heart of the whole construct of good faith. When used in this sense, the concept is defined 'objectively' as a standard of behaviour, as opposed to the 'subjective' sense of having the state of mind of being 'in good faith', typically through not knowing something. German law then uses a different term, *gutter Glaube*, to describe 'subjective' good faith."[338]

[336] *BK Tooling* above n 187.

[337] Boonzaier above n 137 at 6-7.

[338] Jacques Du Plessis above n 22 at 381.

[193] This is not too far off from the statement in the much-maligned *Botha* that:

> "Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each other to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way."[339]

[194] Testing the respective trust and reliance of the parties, in and towards each other, is by disproportionality working both ways, as illustrated by the quotation from *Botha* earlier.[340] Teasing out a "substantive rule" from *Botha* that can be applied in future cases, might then amount to either of the following. The narrower formulation would be that: (a) the facts of the matter must disclose a relationship of reciprocal trust and reliance, inherent in the application of good faith, between the parties; in (b) a situation where the defence of the *exceptio non adimpleti contractus* is raised in litigation; and (c) it is possible to provide relief in the form of a proportionate adjustment to the respective exchanges agreed to by the parties in the contract. The wider formulation would extend the second requirement to the relaxation of the strictness of the contractual principle of reciprocity in general, and not only to situations where the *exceptio* is raised as a defence.

[195] It will be seen from this that there may be an overlap between the application of the rules in the second stage of the analysis under public policy unconscionableness, and those of good faith application in the operation of contracts. That overlap lies in the proportionality requirement for both. But the purpose of the inquiry into proportionality is different. The purpose of good faith in the operation of contracts is to ascertain whether a proportionate adjustment to the agreed exchanges is possible. If not, that particularised rule deriving from good faith will not avail a claimant, because the aim of developing the common law to cater for some adjustment to the agreed

[339] *Botha* above n 4 at para 46.

[340] See [194].

reciprocal obligations cannot be achieved. But the purpose of public policy invalidation is plainly invalidation, not adjustment of exchange. It is a more drastic remedy because invalidating the enforcement of an obligation is permanent, and not a mere temporary adjustment to an obligation that can remain, or be revived, for further enforcement. It is for this reason that, although disproportionality is a necessary requirement for public policy invalidation, it is not sufficient. More is required, in the form of individual collateral prejudice and lastly, a less powerful ability to protect himself than his adversary.

Application

[196] The first judgment disposes of the matter by endorsing the finding that the applicants did not explain why they did not comply with the notice clause.[341] I disagree. The applicants explained that they were unsophisticated and not versed in the niceties of the law. This explanation was not contradicted by any direct evidence. Besides, there is enough circumstantial evidence to back up their contention.

[197] It is common cause that they were not businessmen in their own right: they are former Sale's Hire employees. They acquired their businesses in terms of a black economic empowerment initiative that sought to facilitate "business ventures pioneered and run by historically disadvantaged persons".[342] This was in the form of a franchise agreement for ten years that was dependent on a renewal of the five-year lease agreement. It is closing one's eyes to reality to deny the obviously unequal relationship between a franchisor and franchisees, and this one was no different. Mr Sale had the power of life and death over their franchises.

[198] Their lack of sophistication is, ironically, illustrated by the content of the renewal notices. None were written by lawyers. The first was "a formal request to propose a renewal on our already existing lease agreement with the option to purchase",

[341] See first judgment at [93] to [96].

[342] Id at [2]. See also section 3(c) of the National Empowerment Fund Act 105 of 1998.

expressing the hope that the proposal would receive favourable consideration and indicating that the franchisee should be contacted if further discussion was necessary. The second was also for consideration of an offer to purchase and, in the interim, for "the draft of the renewal of [the] premises lease". The third was from an accountant, in informal terms:

> "My name is Gerald and I am Gavin's accountant the reason for emailing you is that we check thru the lease agreement and saw that the termination date is 31 July 2016.
>
> How soon can you draw up a new lease agreement for Gavin and can you also send me a draft copy for discussion purposes.
>
> Your assistance in this matter will be highly appreciated."

[199] What followed was a reply, dated 15 March 2016, from an employee of the first respondent, indicating that Mr Sale was out of town and that she would only be able to revert "once your offer has been discussed with him". This express acquiescence in the consideration of the offer was then followed by four months of further acquiescence by silence, until the first and third applicants were told to vacate the premises by 31 July 2016 by an attorneys' letter. The second and fourth applicants were advised on 29 July 2016 that the first respondent was amenable to concluding new agreements with them and was willing to let the premises to them on a monthly basis until new agreements could be concluded. They were warned that if they did not respond by 31 July 2016, they would be required to vacate the premises on that day.

[200] What probable inferences can be drawn from these undisputed facts? The answer seems clear to me. The applicants were novices in how to play a hard business game. They sent notices of renewal and offers to purchase that clearly show their ignorance of the "niceties of law"; they are lulled into a sense of security, first expressly and then by silence, that their offers and expectation of renewal of the leases will be considered; and then, four months later, just as 31 July approaches, they are hit by attorney' letters that give effect to their franchisor's power of death over the future of their franchises

[201] This is not a *Bredenkamp* kind of case. The applicants approached the Court on the basis that fundamental constitutional values of dignity and equality are implicated in determining whether enforcement of the notice clause is against public policy. *Barkhuizen* requires that in a case of that kind the application of public policy in determining the unconscionableness of contractual terms and their enforcement must be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu.

[202] On that approach, the applicants' assertion of relative lack of sophistication is clearly apparent when contrasted with the conduct of the third respondent. Their explanation of why they did not comply with the strict notice requirement rings true. The disproportionate unfairness between their conduct and that of the first respondent is equally clear. Their prejudice in losing their businesses is obvious against that the first respondent, who loses nothing. And the inequality in bargaining power between the applicants as franchisees and their franchisor is there for all to see.

[203] For these reasons, I would uphold the appeal with costs, including the costs of two counsel, and reinstate the order of the High Court.

VICTOR AJ:

[204] I have had the pleasure of reading the judgment of my sister, Theron J (first judgment). Her judgment finally brings harmony in the contest between contractual autonomy and constitutional fairness in the law contract. I have also had the privilege of considering the dissent of my brother, Froneman J. I agree with the reasoning and conclusion in his dissent and with some pause, set out additional reasons for doing so.

[205] Moseneke DCJ in *Everfresh*, when infusing the law of contract with *ubuntu* refers to it as a constitutional value:

> "Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of *ubuntu*."[343]

[206] In advancing the role of *ubuntu* in the law of contract, I do not deal with customary law contracts, but bring to the fore the constitutional value of *ubuntu* as one of the values in determining commercial contracts. In my view, *ubuntu* is an important value that stands alongside values such as good faith, fairness, justice, equity, and reasonableness. Whilst these latter constitutional values go a long way in addressing fairness in the law of contract, the constitutional value of *ubuntu* adds a value of substance. Ubuntu together with the other values, form a transformative basis in the adjudicative process when deciding whether to set aside an unfair contractual term or its unfair enforcement. Characterising *ubuntu* as a substantive constitutional value in the law of contract leads to a more context-sensitive basis in its adjudication and facilitates a constitutionally transformative result.[344]

[207] As the analyses conclude in the first and second judgments, the law of contract has moved away from formalism towards substantive fairness.[345] I emphasise the value of *ubuntu* in adjudicating contractual fairness as it has a greater and context-sensitive reach, especially where there is inequality in the bargaining power between the parties. In my view, there is a danger in conflating or characterising fairness and *ubuntu* as being

[343] *Everfresh* above n 24 at para 71.

[344] The Constitution is a document committed to social transformation in both public and public spheres. O Regan J stated in *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 81 "[a]s this Court has emphasised on many occasions, our Constitution is a document committed to social transformation."

[345] First judgment at [75]-[77] and second judgment at [111]-[113].

a single concept.[346] The full scope and ambit of *ubuntu* is considerably wider than fairness. As stated in *Everfresh*—

> "[*ubuntu*] emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'."[347]

[208] In true fidelity to our transformative constitutional project, *ubuntu* is an appropriate adjudicative value in reaching substantive fairness between contracting parties. *Ubuntu* provides a particularistic context in the law of contract when, for example, addressing the economic positions or bargaining powers of the contracting parties.

[209] Here, at the outset, the very purpose of the two contracting parties took place within the context of a black economic empowerment initiative and thereby, the purpose was to redress economic disempowerment of historically disadvantaged persons. This context requires a nuanced approach in balancing contractual autonomy and transformative constitutionalism. Mahomed DP in *Du Plessis* noted that "[t]he common law is not to be trapped within the limitations of the past . . . . It needs to be revisited and revitalised with the spirit of constitutional values . . . and with full regard to the purport and objects of [the Bill of rights]."[348]

[210] In *Makwanyane*,[349] Madala J referred to *ubuntu* permeating the Constitution generally and more particularly the Bill of Rights, which embodies the entrenched

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[346] Du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract* (LLM thesis, University of South Africa, 2017) at 377, opined that "the harmonisation of good faith and ubuntu in the common law of contract is essential not only to establish a plural legal culture but also to develop the common law of contract in line with the Constitution."

[347] *Everfresh* above n 24 at para 71.

[348] *Du Plessis v de Klerk* above n 332 at para 86. See also Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *South African Journal of Human Rights* 403 at 412

[349] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

fundamental human rights.[350] He stated that the concept of *ubuntu* "carries in it the ideas of humaneness, social justice and fairness".[351] *Ubuntu* is not a constitutional value that must hover on the marginal boundaries of our jurisprudence, with its place debated. In my view, it is an important part of our constitutional jurisprudence which is already embedded as a substantive value in the core values of our Constitution. *Ubuntu* together with the other underlying values such as fairness and justice, is one of the central values of our jurisprudence generally when adjudicating fairness in contract.

[211] Western "pace-setters" conceptualised and defined philosophy in the image of the dominant European and American thought systems which they used as "benchmarks for measuring the propriety of all philosophical thought".[352] They, by and large, overlooked the very rich African philosophy and jurisprudence, and its overarching feature – *ubuntu*.[353] As a result of this history, its operation under the constitutional dispensation, must be given prominence to be fully recognised and integrated.[354]

[212] The time has come to vindicate African jurisprudence.[355] Its central concept of *ubuntu* must be reconceived into the transformative space which the Constitution provides.[356] It is appropriate that the important value of *ubuntu* be acknowledged on an equal footing for its operation under the Constitution.[357]

[213] Whilst *ubuntu* is difficult to define, it is a value that was clearly included even by implication in many of the rights in the Bill of Rights such as the right to dignity and

[350] Id at para 237.

[351] Id.

[352] Ndima "Reconceiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication" (2015) 48 *The Comparative and International Law Journal of Southern Africa* at 359.

[353] Id at 360-3.

[354] Id at 367 and 373.

[355] Id at 363.

[356] Id at 373.

[357] Id at 366.

equality which go to the core of *ubuntu*.[358] When the final Constitution was adopted there was a recognition that the principle of *ubuntu* was to be harmonised into all jurisprudential thought going forward and in constitutional reasoning.[359] The philosophical foundations of *ubuntu* are not new but originate from time immemorial and should be acknowledged as forming a part of our entire jurisprudential heritage including our commercial heritage. The recognition and infusion of *ubuntu* into the law of contract is long overdue.

[214] In expanding the underlying value of *ubuntu*, its characterisation in the analysis underpinning the debate on certainty, contractual autonomy and constitutionalism is necessary. I agree with the second judgment that adjudicating fairness in contract fairness cannot be done within a set of neutral legal principles.[360] It will ultimately be based on an "*underlying moral or value choice*."[361] The second judgment pays attention to the individuals who conclude the contract and the wider community.[362] It finds that contractual autonomy and constitutional fairness can be done "*in a manner that ensures objective, reasonable practicality and certainty*"[363]. A synthesis of these values has led to the crafting of a unique system of the law of contract to suit the legal climate and transform the common law of contract.[364]

[215] It is within this context that more needs to be said about the value of *ubuntu* and its recognition in this adjudicative process. Davis J, in the High Court dealt with the importance of the value of *ubuntu*.[365] His judgment deals with the merits of weighing up the role of *ubuntu* against certainty in contract.

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[358] Id at 373-4.

[359] Id at 373-6.

[360] Second judgment at [106].

[361] Id.

[362] Id at [108].

[363] Id.

[364] Hutchison "Decolonizing South African Contract Law: An Argument for Synthesis" in Siliquini-Cinelli (ed) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (Springer International Publishing, 2017) 151 at 165.

[365] High Court judgment above n 1 at paras 9 and 30-1.

[216] Whilst contractual autonomy and freedom of contract requires certainty, the concept of absolute certainty in contract is illusory and this is evident from the historical overview of the undulating journey of fairness in our jurisprudence. The High Court refers to certainty not only in contract but in law generally as being a shibboleth.[366] I would agree. Absolute preordained certainty in the outcome of legal disputes can hardly be attained. The quest for certainty is nebulous and to paraphrase the High Court's shibboleth characterisation, it is really "a catch all" or "tagline".[367] There is no reason for a commercial contract to become diverted from its intended goal when considered through the prism of transformative constitutionalism which includes the value of *ubuntu*, and the other values referred to in both judgments. The additional scrutiny through the prism of *ubuntu*, is but a more focused legal methodology to achieve justice as between two parties. It does not exclude or undermine certainty in contract. It remains a central consideration in harmony with the other values.

[217] The first and second judgments provide a detailed historical overview and acknowledge that Roman, Roman-Dutch and other European systems of law, all embrace some concept of fairness in contract.[368] Even after the *exceptio doli generalis* was relegated to "RIP"[369] our jurisprudence continued to ameliorate the harsh effects of contract. Of course, even more so when the benchmark was set by constitutional values of "good faith, reasonableness and fairness" which has come to the fore in the enforcement of contracts in South African law. Academic writers caution against the "disconnect between South Africa's modernistic Constitution and its vintage canons of

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[366] Id at para 44.

[367] Davis J id states:

> "Legal certainty is a shibboleth if it is meant to imply that inevitably there is one right answer that stares litigants in the face, so much so that there is never a risk that an opposite conclusion may be reached by a court. I venture to suggest that in the vast majority of cases the approach adopted in this dispute on its specific facts will not necessarily be followed, where the consequence of a breach is so reasonably foreseen and the remedy is appropriate."

[368] First judgment at [20]-[69] and second judgment at [111]-[143].

[369] See Hutchinson above n 364 at 158, where he states that the *exceptio doli generalis* was a clause which could be relied on by a party to challenge bad faith conduct the other contracting party. This principle was considered unnecessary as all consensual contracts rested on good faith (thus being relegated to RIP status).

legal analysis steeped in common law and Roman–Dutch tradition, adulterated by the decades of apartheid".[370]

[218] The emphasis in this dissent illustrates that when adjudicating the law of contract, the underlying values must be consonant with the transformative constitutional values which include the value of *ubuntu,* whilst simultaneously attaining appropriate levels of certainty.

[219] In ameliorating harshness in contract, Parliament has gone even further on the issue of fairness in contracts. It has enacted various statutes to achieve this goal. This has led to a remodelling of the law of contract to be more just and equitable.[371] It enacted the Consumer Protection Act (CPA)[372] which provides for the non-enforcement of contracts that are unfair, unjust or unreasonable. There is also the National Credit Act (NCA).[373] These statutory enactments belie the concept of absolute certainty in the law of contract as can be seen when Parliament intervened to ensure equality in bargaining power. The CPA obliges a court to consider a number of factors such as the fair value of the goods, the nature of the parties to the transaction, their relative capacity, education, and many other factors that lie at the heart of unequal bargaining power.[374] Consequently, our jurisprudence recognises that certainty, in the law of contract, must be balanced against a number of important factors. Even section 7 of the CPA provides that the Minister may determine the contents of provisions in franchise agreements.[375] Davis, in an extra-curial article, refers to the work of an academic who postulates that

[370] Davis and Klare above n 348 at 406.

[371] Hutchison "Good Faith in Contract: A Uniquely South African Perspective" above n 256 at 263-4. See also *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC); *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC); *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC); *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC); *Botha* above n 4; *Cool Ideas* above n 333; *Malan v City of Cape Town* [2014] ZACC 25; 2014 (6) SA 315 (CC); 2014 (11) BCLR 1265 (CC); *Maphango* above n 323; *Everfresh* above n 24*;* and *Barkhuizen* above n 17.

[372] 68 of 2008.

[373] 34 of 2005.

[374] Section 52(2) of the CPA.

[375] Section 7 of the CPA.

the "law of contract cannot simply be viewed as an arena of private autonomy which is devoid of profound public implications."[376] There are also other areas where, notwithstanding that there may be contracts in place, Parliament has legislated to protect vulnerable groups; such as workers, tenants, consumers and those evicted from urban dwellings and people who live in rural areas, on farms and on undeveloped land.[377]

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[376] Davis above n 23 at 849 referring to the work of Robert Hale.

[377] The preamble of the CPA provides:

> "The people of South Africa recognise—
>
> That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality
>
> That it is necessary to develop and employ innovative means to
>
> (a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
>
> (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress or consumers who are subjected to abuse or exploitation in the marketplace; and
>
> (c) to give effect to internationally recognised customer rights". . . .

Section 3 stipulates the purposes of the NCA which are aimed at, *inter alia* providing access to previously disadvantaged individuals in the following terms:

> "The purpose of this Act to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions.
>
> (b) . . . "

The preamble of the Extension of Security of Tenure Act 62 of 1997 provides:

> "[I]t is desirable that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced".

The preamble of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 provides:

> "[N]o one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances".

It further provides:

> "[I]t is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances".

In addition, the Act recognises the rights of vulnerable groups of society by providing that-

[220] It is the appropriate time in our evolving jurisprudence that, when adjudicating the law of contract, we not only recognise good faith, reasonableness and fairness but also recognise that the constitutional value of *ubuntu* should stand alongside these values as one of the integral considerations of public policy.[378] The recognition of *ubuntu*, in interpreting contracts will not undermine the traditionally highly prized jurisprudential concept of certainty and contractual autonomy.[379] When adjudicating the law of contract, certainty and the principle of *pactum sunt servanda* will continue to be consonant with what the second judgment refers to as a consideration in the "*underlying moral or value choice*". Based on this tonal palette, the recognition of the value of *ubuntu* in the interpretive process will not detract from the principles of certainty in contract, instead it will contribute to the achievement of the transformative goals required by the Constitution. Certainty is not erased when adjudicating contracts "*in a manner that ensures objective, reasonable practicality and certainty*". This approach is objectively verifiable and does not spiral into a subjective vortex of uncertainty where it collides with commercialism.

Ubuntu and the Broad Based Black Economic Empowerment Act

[221] The balancing of constitutionalism and contractual autonomy are best viewed through the prism of a transformative constitutional framework. It informs the adjudication of this case which is essentially a dispute that originates from a franchise and lease agreement set within a black economic empowerment context. The Broad

> "[S]pecial consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered".

The preamble of the Rental Housing Act 50 of 1999 provides:

> "[T]here is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation".

[378] Hutchison and Siliquini-Cinelli "Beyond Common Law: Contractual Privity in Australia and South Africa" (2017) 12 *Journal of Comparative Law* 49 at 75.

[379] Davis and Klare above n 348 at 412 note that it is not every common law problem which requires a "solution deducible from the Constitution's animating values". The transformative methodology is context oriented and this methodology is attentive to the values of stability and predictability and is always open to reconsideration and contestation.

Based Black Economic Empowerment Act (BBBEE Act)[380] is a statute which attempts to level the playing fields skewed by the apartheid system. The value of *ubuntu* certainly resonates in interpreting the context of BBBEE.

[222] The second judgment refers to the work of Cameron who advances the idea that the two perspectives of commercial certainty and constitutionalism can be synthesised and integrated to bring about some unity in the divergent debate. This raises very directly, an issue we must face head on. In this case, should commercial certainty trump constitutionalism? Can the doctrine of *pacta sunt servanda* be "synthesised" with the normative framework of the Constitution without dissonance? The facts in this case support unity of purpose more so because the facts are to be found squarely within the context of the BBBEE Act. The BBBEE Act seeks to address the legacy of apartheid and promote the economic participation of previously disadvantaged people in the South African economy. The preamble to the BBBEE Act expressly recognises the right of all South Africans to participate in the economy.[381]

[223] The franchise and lease agreements were concluded within the context of the overarching principle of commercial empowerment of previously disadvantaged persons. This BBBEE context and its principles are a stark reality in this matter. The franchise agreement depended on the leased premises from which the applicants are sought to be evicted. The High Court referred to this contract as a "vitally important initiative designed to encourage ownership of business by historically disadvantaged people [which] will be dealt a fatal blow insofar as these applicants are concerned. The sanction of eviction was described as being in the form of '*capital punishment'*, in that, they lose their businesses if their application fails."[382]

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[380] 53 of 2003.

[381] Section 9(2) of the Constitution states that "[e]quality includes the full and equal enjoyment of all rights and freedoms." The BBBEE Act and the amended Codes of Good Practice seek to give effect to this right. The preamble of the BBBEE Act provides that—

> "unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans irrespective of race."

[382] High Court judgment above n 1 at para 39.

[224] The second judgment refers to the values in Article 138(1) of the German Civil Code which recognises and bluntly acknowledges the predicament and inexperience of one of the contracting parties.[383] I find that the facts in this case are indicative of that inexperience on the part of the applicants. The second judgment explains the import of Article 138(2) of the German Civil Code and how specific ascertainable rules may be of assistance in the second phase of implementing the contract.[384]

[225] The contracting parties in this case are not equal in levels of experience. The post constitutional-era requires that all law, including private law, be interrogated and scrutinised using transformative legal tools to ensure equality and human dignity. Mr Sales of Sale's Hire had concluded a cooperation agreement with the National Empowerment Fund (NEF). This Fund provided loans to black-owned entities. This enabled the applicants to borrow money so that they could own and operate Sale's Hire franchise businesses. In concluding this contract with the NEF, Mr Sales as the sole member of Sales Hire CC, enjoyed a substantial financial benefit. In return Sale's Hire had an obligation to provide ongoing training, business support and mentorship to the applicants. Sale's Hire's contractual obligations to the Fund in this regard, were clear. Mr Sales as the sole member, was the face of Sale's Hire and among his responsibilities, was the responsibility to negotiate the best rental deal possible for the businesses. The renewal of the rental agreements would also fall within his obligations of ongoing training, business support and mentorship. He was also a trustee of the Oregon Trust, the landlord in this case.

[226] He took no steps to advise the applicants to renew the lease agreement timeously. Instead, in conflict with his obligations, he was instrumental in launching the eviction of the applicants on behalf of the Oregon Trust. The facts in this case show that the applicants did not have the kind of business experience in renewing contracts for leased

[383] Second judgment at [182]-[184].

[384] Id at [186]-[188].

premises. As part of Sales Hire's obligations, it was incumbent on Mr Sales to attend to training, business support and mentorship and this would have included assisting the applicants in timeously renewing the leases. It is not a situation where they were negligent or forgot to give notice to renew. They were not versed in the sphere of the law of contract. As described in the first judgment[385] the applicants, including the fourth applicant's auditor, belatedly attended to the renewal without success. These facts are relevant to the determination of this appeal. In light of Mr Sales' conflict of interest and his participation in evicting the applicants, he cannot be said to have been acting in a bona fide manner towards the applicants. Whilst the agreement may be fair on its face, it is the implementation phase of the two-phase approach as posited in *Barkhuizen* which would render the eviction of the applicants unfair and contrary to the spirit of *ubuntu* and the other values referred to.[386] The eviction of the applicants in these circumstances would fail to take into consideration the interests of both parties and the original purpose of the contract, being the empowerment of historically disadvantaged persons in commerce.

[227] The applicants were contractually bound to rent the respondent's premises. It was a term in the agreement. The High Court judgment explained the effect of implementing the eviction of the applicants from the premises. It held that "[i]t would be a devastating blow to these objectives if these businesses were to collapse and be taken away from the applicants when they had diligently paid off their loans to the NEF and were finally in a position to enjoy the 'full economic benefit of their businesses unencumbered by these loan obligations'".[387]

[228] The *raison d'etre* (the core reason) for this franchise deal is context-driven. Its primary purpose is to ensure that persons who were historically disadvantaged are empowered to participate in the economy at a meaningful and equal level. The facts in this case aptly demonstrate that there is a strong jurisprudential foundation for the

[385] First judgment at [111].

[386] *Barkhuizen* above n 17 at paras 56-8.

[387] High Court judgment above n 1 at para 29.

parties to enjoy contractual freedom, achieve certainty and at the same time achieve what is fair and just. The normative framework of the BBBEE Act and its requirements must be interpreted to incline towards transformative constitutionalism. This will extend the legal-methodological approach in the law of contract. A paradigm shift is needed to move the current legal culture to craft new precepts and decisional techniques consonant with the Constitution.[388] The application of the principle of *ubuntu* in an appropriate contractual context leads to fair treatment and fair dealing for all parties.

Conclusion

[229] This approach is important for the task of adjudicating our law of contract based on a framework of transformative constitutionalism, and as set out in the second judgment, the recognition of an "*underlying moral or value choice*". The traditional individualistic approach to the law of contract is one that "promotes self-interest and self-reliance". This results in the iconic rules of certainty and contractual autonomy to the exclusion of the underlying moral or value choice, which fails to address constitutional transformation.[389]

[230] It is the second phase in *Barkhuizen* that needs to be critically analysed in this case.[390] The implementation of the eviction order for the failure to notify the renewal of the lease agreement timeously must be weighed up against the context already described. Its implementation must be weighed up against the principles of fairness and *ubuntu* which provides for a more expansive analysis which would include the inequality in bargaining power.[391] The wording of the renewal clause, on the face of it, is fair, but the moment the enquiry continues into the second phase, as to whether its implementation is fair, the application of the value of *ubuntu* will play a more significant role in that assessment. An enforcement of the cancellation of the lease would not be

[388] Davis and Klare above n 348 at 415.

[389] Davis above n 23 at 848.

[390] *Barkhuizen* above n 17 at para 58.

[391] Id at paras 64-5.

in accordance with the transformative approach referred to in this judgment. It is also not consonant with the underlying value of *ubuntu*.

[231] This approach leaves space for courts to scrutinise contractual autonomy whilst at the same time allowing courts to refuse enforcement of contractual terms that conflict with constitutional values, even though the parties may have consented to them. Public policy must take all these considerations into account and not implement contractual autonomy at the expense of transformative constitutionalism. The appropriate balance can readily be achieved upon a recognition of an "*underlying moral or value choice*" in which the constitutional values of *ubuntu* feature in this constitutionally transformative space.

[232] For these reasons, I agree with the second judgment.

For the Applicants	BJ Manca SC and GGM Quixley instructed by ME Mohamed Attorney-at-Law
For the First and Second Respondents	J Muller SC and HL Du Toit instructed by De Klerk & Van Gend Incorporated