

CHAPTER 4:
TRANSFORMATION, THE CONSTITUTION AND
CONTRACT LAW

CHAPTER 4:
TRANSFORMATION, THE CONSTITUTION
AND CONTRACT LAW

‘I believe a significant part of the failure of the judicial development of the law to address the ills of modern societies can be traced to conservative political attitudes bent on the preservation of an existing status quo ... Such political attitudes are bound to turn open-ended legal principles such as reasonableness, good faith and the boni mores of society into rule-like maxims that entrench rather than challenge existing power relations’¹

I INTRODUCTION: THE BREAK WITH THINGS PAST, A TRANSFORMING SOCIETY AND THE CONSTITUTIONAL RULE OF LAW

(a) Background

On 27 April 1994 the Interim Constitution introduced a new dispensation of constitutional sovereignty for South Africa.² This new dispensation is founded in the constitutional (formative) values of freedom, equality and human dignity and envisages the eradication of the injustices and discriminations which forms a central theme of South Africa’s divided past. The Interim Constitution provided for the first democratic election in South Africa and for an interim

¹ J van der Walt ‘Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence’ (2001) 17 *SAJHR* 341, 361.

² Constitution of the Republic of South Africa 200 of 1995 (the ‘Interim Constitution’).

parliament who, in its capacity as a constitutional assembly, was responsible for drafting the final Constitution which had to be concluded within two years.³

The Constitution⁴ represents one of the most egalitarian constitutions of the modern world.⁵ Hanekom points out that it is a product of ‘significant political negotiation and compromise’⁶ which ‘serves as tangible evidence of our break with the past’.⁷ The values contained in the Constitution stand in high contrast to those that were favoured under the Apartheid order. It is a text which envisages a dynamic system of competing values within the framework of the three core values of freedom, equality and human dignity. The spirit, purport and objects of the Bill of Rights are contained in section 7(1) of the Constitution:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

The Bill of Rights embodied in the Constitution ensures the protection and enforcement of human rights by the rule of law. The Bill not only protects the individual against arbitrary exercise of public power, but also places positive obligations on the State and other individuals to respect and contribute to the realisation of, these rights.⁸

³ Chaskalson *et al Constitutional Law of South Africa* (5 ed) (1999) 2-15.

⁴ Constitution of the Republic of South Africa Act 108 of 1996 (the ‘Constitution’).

⁵ D Tladi ‘Breathing constitutional values into the law of contract: Freedom of contract and the Constitution’ 2002 35(2) *De Jure* 306.

⁶ D Hanekom ‘Beware the silence: a cautionary approach to civic republicanism’ (2003) 18 *SAPR/PL* 139

⁷ *Ibid.*

⁸ B Bekink *Basic Principles of the South African Constitutional Law (A Student Handbook)* (2001) 115.

The enactment of the Constitution has brought with it much debate as to the preferred approach to its interpretation, the most evident dispute existing between those arguing for a classical liberal interpretation and those arguing for a transformative approach. Henk Botha's thought is located in the school that argues for a transformative approach. He notes three reasons why the Constitution requires more than a classical liberal interpretation.⁹ Firstly, he points out that the Constitution contains a commitment to an open, value-orientated, participatory democracy.¹⁰ This is a commitment that cannot be reconciled with the reduced concept of democracy which pervades liberal theory. Secondly, Botha opines that the Constitution does not support a liberal conception of rights as boundaries between the individual and the collective; the rights in the Bill of Rights have a contingent and non-absolute meaning and to that extent they do not operate as a shield against government intervention or as trumps over collective interests.¹¹ Thirdly, the Constitution is structured in a way which requires far more of an activist stance by the judiciary than what would be acceptable under a liberal interpretation.¹² In accordance with the transformative approach, Van Marle and Brand argues that the new constitutional dispensation requires judges to shape law in accordance with the constitutional values and to make openly political choices in adjudication processes.¹³

Botha's call for a transformative reading of the Constitution resonates with Du Plessis's earlier arguments that academics belong to the 'open community of interpreters.'¹⁴ This open community is characterised by openness as inclusivity, publicness and the open community as a

⁹ H Botha 'Democracy and rights: Constitutional interpretation in a postrealist world' 2000 (63) *THRHR* 561.

¹⁰ *Ibid* 574.

¹¹ *Ibid* 575.

¹² *Ibid* 575-576.

¹³ K van Marle & D Brand 'Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*' (2001) 12(3) *Stell LR* 408, 415.

¹⁴ LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12(2) *SAJHR* 214, 215.

catalyst for the constitutional reality to take effect in civil society.¹⁵ Openness connotes ‘a free and rational society receptive to pluralist interplay of forces and ideas shaping its destiny.’¹⁶ The open community of interpreters presupposes that language allows for more than one (equally) valid reading of the Constitution.¹⁷ Du Plessis warns that to make sense of the project of constitutional interpretation, we will have to free ourselves from the restrictive illusion of ‘an “only one meaning” syndrome’¹⁸ which is characteristic of liberalist readings.

The process of transformation operationalised by the Interim Constitution is a long and ongoing process which is still in its early phases. This is equally true about the transformative approach to (constitutional) interpretation. The role of the courts in this process is critical. The Constitution tasks the judiciary with the responsibility to interpret and protect the values of the Constitution.¹⁹ Primarily, it is also the task of the courts to strike down law inconsistent with the Constitution, to develop the common law in accordance with the spirit, purport and object of the Bill of Rights and to declare conduct inconsistent with the Constitution invalid.²⁰ I believe that it is only once the courts become committed to a transformative interpretation of the Constitution and to a transformative approach to the common law in general that we will be able to begin to realise its full impact on the legal system and indeed our lives.

Although the Constitution regulates the public relationship (namely that between state and private person) to a vast extent, the effect of the Constitution on the private relationships between individuals, is for obvious reasons of primary importance in this study. Seeing that (a)

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 220.

¹⁸ Ibid 218.

¹⁹ See section 39(1) and (2) of the Constitution.

²⁰ Tladi (note 5 above) 306.

truly democratic community/(ies) can only exist where individuals are actively involved in and represented by the different communities they find themselves in, it is important that the constitutional value system also finds application horizontally (that is between private persons or groups of private persons amongst themselves). Accordingly, it is important to investigate the horizontal application of the Constitution, specifically in the law of contract in order to see whether it provides us with the means to escape the many straitjackets of the common law of contract.

(b) Horizontal application of the Constitution and the Bill of Rights to contract law

(i) *Direct and indirect horizontal application provisions*

The Constitution and specifically the Bill of Rights, can be applied to the law of contract in a variety of ways and through an application of a variety of its provisions. The general view in this regard is that horizontal application of the Constitution to contract can and should occur either directly or indirectly.²¹

Van der Walt summarises the horizontal application of the Constitution in pointing out that it rests on four provisions, namely section 8(1), section 8(2), section 8(3) and section 39(2).²² In

²¹ G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law' (2004) 121(2) *SALJ* 395.

²² Van der Walt (note 1 above) 341,342, 346. I do not wish to take issue here with the position on horizontal application of the Bill of Rights as set out in *Du Plessis v De Klerk* 1996(3) SA 850 (CC) because I think that to a large extent that exposition has become rudimentary. (For a lucid exposition of *Du Plessis* see V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis, UP 96-99.) What I do wish to point out is Van der Walt's contention that the difference between that interpretation and the current stance has contributed to a rivalry between the Constitutional Court and the Supreme Court of Appeal on the issue of horizontal application.

addition, section 39(1)(a) provides that a court, tribunal or forum, when interpreting the Bill of Rights itself, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In terms of this provision a court is bound to the values of freedom, equality and human dignity when it comes to interpreting the Bill of Rights itself.

Furthermore, section 173 provides that the Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. Two other jurisdiction provisions, namely section 168 and 169 provide that the Supreme Court of Appeal and the High Courts may decide constitutional matters not in the sole jurisdiction of the Constitutional Court in terms of section 167(4).

In addition, section 9(4) enjoins horizontal application in the sense that it provides that *no person* (whether a natural or juristic person) may unfairly discriminate directly or indirectly against *anyone* on one or more grounds in terms of subsection (3). Tladi suggests that section 9(1), (the equality clause) is also relevant in the horizontal application of the Constitution insofar as it (read with section 9(4)) prohibits unfair discrimination in an *unqualified* manner.²³ This is a very important consideration for the law of contract as the inequality of bargaining power problem may be addressed by this reading, especially in the light of Hawthorne's view that 'equality seldom exists [in contract] and most contracts are concluded out of necessity'.²⁴

Lubbe argues that although section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, not all fundamental rights have horizontal application. This, according to Lubbe is because section 8(2) provides for a

²³ Tladi (note 5 above) 307.

²⁴ L Hawthorne 'The Principles of Equality in the Law of Contract' (1995) *THRHR* 157, 163.

‘restricted’²⁵ direct horizontal application of the Bill of Rights by providing that a provision of the Bill of Rights binds a natural or juristic person ‘if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’²⁶ Although it can be said that this provision creates the possibility or opens up the space for invoking (one of) the rights in the Bill of Rights as a cause of action or ground of defence in disputes between private legal subjects, Christie has warned that section 8(2) suggests that the court should proceed with caution and investigate the nature of the right and the nature of the duty imposed by the right, to determine whether the Constitution finds direct horizontal application on the private relationships between natural and juristic persons.²⁷ Similarly, Lubbe and Cockrell seem to be of the opinion that ‘the direct horizontal application of constitutional rights against private agencies must be mediated by the operation of the common law.’²⁸

Indirect horizontal application is understood to imply that the values and principles of the Bill of Rights have a radiating effect on the common law reflected in open-ended principles of law such as the *boni mores*.²⁹ Most importantly in this respect, section 39(2) of the Bill of Rights provides that every court, tribunal or forum, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights.³⁰

The issue of direct, as opposed to indirect horizontal application of the Constitution has attracted a lively, ongoing debate, generating sharp-criticisms and profound apologies. I do not wish to take issue with the question whether the Constitution really provides for direct horizontal

²⁵ Lubbe (note 21 above) 395.

²⁶ See section 8(2) of the Constitution.

²⁷ RH Christie *The Law of Contract in South Africa* (4ed) (2001) 403.

²⁸ A Cockrell ‘Private Law and the Bill of Rights: A threshold issue of “horizontality”’ *Bill of Rights Compendium* (looseleaf 1998-) paras 3A8 and 3A7 as quoted in Lubbe (note 21 above) 395.

²⁹ J van der Walt (note 1 above) 352.

³⁰ My emphasis.

application or whether it only provides for indirect horizontal application. Suffice it to say that I side myself with Van der Walt who is of the opinion that ‘the future impact of the Bill of Rights on private law in general...will predominantly take place through what has come to be understood as the indirect horizontal application of the Bill of Rights.’³¹

However, from the above it appears that the Constitution provides ample space for its horizontal application to private law and specifically the law of contract. Because the Bill of Rights does not make provision for any specific hierarchy of human rights, the courts are tasked with weighing the competing rights and values in specific instances to determine which right outweighs another in a given set of circumstances. In the area of private law, this process has to take place within the context of the clash of rights and/or values and with reference to the good faith, boni mores and public interest criteria as developed by the values in the Bill of Rights itself.

(ii) The role of section 36

In the light of what has been said above, the role of section 36 in this balancing process should then be considered. Section 36 of the Constitution is the general limitation provision which provides the conditions under which a right in the Bill of Rights may be limited. As Van der Walt points out, section 36 does not have a bearing on the application of the Bill of Rights to private relationships between legal subjects as such, but can be understood to govern the resolution of the conflict between fundamental rights when horizontal application takes place.³²

Lubbe argues that limitations on the direct application of fundamental rights may, in accordance with section 36(1), be fashioned ‘by means of the development of common-law rules.’³³ Here,

³¹ J van der Walt (note 1 above) 351.

³² Ibid.

³³ Lubbe (note 21 above) 395.

Van der Walt suggests that the proportionality principle is not the only principle in terms of which we can understand the limitation of rights and that it could be equally workable to employ a principle, as is the case in German law, that the right that can be said to best serve the public interest under the circumstances should enjoy precedence, as public interest is in any event the criterion that underlies the various balancing procedures of which the proportionality principle is only one.³⁴

In the context of contract law the principle of ‘balancing’ is particularly important where freedom of contract and good faith are allegedly at odds. In its enquiry into the public interest in contract courts will in the future have to be more seriously concerned, within the broad constitutional context, with a real balancing exercise between freedom of contract and good faith rather than to blindly depart from the freedom of contract starting point position.

II A TRANSFORMATIVE APPROACH TO THE CONSTITUTION AND ITS INFLUENCE ON THE LAW OF CONTRACT

In light of the fact that the Constitution creates the possibility of horizontal application, coupled with what has been said above, a call for an acknowledgement that it is the constitutional responsibility of the courts to weigh competing rights and interests also in contractual disputes and to decide on the basis of such an exercise which of the parties’ position outweighs the other’s, does not seem to me to be an unjustified one. This of course implies that a mere blind reliance on freedom of contract as the basis of contractual relationships will not do, neither will an interpretation of contract which attempts to (re)legitimise liberal ideology. The other side of this is that a consideration for the values of freedom, equality and human dignity will have to be properly considered in contractual cases and a real value judgment exercised in each case.

³⁴ J van der Walt (note 1 above) 351.

What is in my opinion of cardinal importance to emphasise is that it is not only constitutional rights which are to facilitate common law development but also and more importantly perhaps, the values underlying the Bill of Rights and the Constitution as a whole.³⁵ In the law of contract this means that a review, adaptation, reinterpretation and expansion of the traditional *boni mores*, public interest and good faith criteria is inevitable in order to align these open-ended contractual norms from the realms of the common law with the new *boni mores* of the constitutional community through the radiating effect of indirect horizontal application.

Van der Merwe points out that judges in the former constitutional dispensation, where ideas concerning parliamentary sovereignty were paramount, were compelled to guarantee a consistent and coherent application of the law.³⁶ Currently, they are compelled to guarantee the law as such – even against and in relation to Parliament – against any intrusion on the democratic values of freedom, equality and human dignity.³⁷

In my opinion this statement illustrates what has been going on in the law of contract before and how it is expected to change in the future. In the past, judges in contract felt themselves compelled to guarantee a consistent and coherent application of the freedom of contract doctrine without regard to the injustices that might have ensued from its application. Currently, they are enjoined by the Constitution to ask in each case whether the application of freedom of contract will be in furtherance of the values of freedom, equality and human dignity. The values of the

³⁵ J Goldblatt 'The Effect of the Constitutional Norm of Accountability on the Development of the Delictual Liability of the State' Paper presented at the Young Researchers Programme, Faculty of Law, University of Cape Town on 30 April 2004, 1.

³⁶ D Van der Merwe 'The Roman-Dutch law: from virtual reality to constitutional resource' (1998) 1 *JSAL* 1 13.

³⁷ *Ibid.*

Constitution and the moral ethos of the Constitution itself, has to be guaranteed not only in the law of contract but indeed in all other law subordinate to the Constitution.³⁸

It is true that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law and I would not want to be read as denying that freedom of contract is indeed such a value.³⁹ But the Constitution also explicitly holds that these freedoms are only recognised ‘to the extent that they are consistent with the Bill’ of Rights.⁴⁰ I am thus not suggesting that the vested common law right to freedom of contract, should not be protected. Following Van der Walt, I am merely suggesting that the right to freedom of contract should not be seen to be legally unassailable.⁴¹ It should in all cases be balanced against the other contractual party’s right to good faith in the conclusion, operation and termination of the contract. ‘Horizontal application requires that vested rights always be subjected to a balancing process when the fundamental rights of others are also at stake.’⁴² Lubbe also notes that it is important to recognise ‘that the injunction to develop the common law might very well require the reconceptualisation of traditional rules, concepts and doctrines in order to give optimal effect to constitutional rights in the domain of private law.’⁴³

The continued protection of traditional values of contract (ie freedom, certainty, sameness, coherence, consistency, predictability) is an outdated remnant of the consequences of

³⁸ Section 2 of the Constitution provides specifically that the Constitution is the supreme law of the country and that all other law and conduct in conflict with the Constitution is invalid.

³⁹ Section 39(3) of the Constitution.

⁴⁰ Ibid.

⁴¹ Van der Walt (note 1 above) 361, note 63.

⁴² Ibid.

⁴³ Lubbe (note 21 above) 407.

parliamentary sovereignty and its influence on private law adjudication.⁴⁴ In the context of the new dispensation this approach cannot be endorsed where it does not reflect a commitment to the values of the Constitution. Van der Merwe has offered the helpful insight that it is only once judges become prepared and willing to employ the sources of the Roman-Dutch law to protect and defend freedom, equality and dignity, that it can fulfil a constructive role in the adjudication practices of South African courts.⁴⁵ In the context of contract this implies a renewed focus on and reinterpretation of those values of the Roman-Dutch law which have become underprivileged in contract law as a result of the overemphasis on freedom of contract (ie bona fides, fairness, reasonableness).

My vision of this transformative approach to contract law is perhaps best described in the words of Langa, DJP in what may be referred to for ease of reference as the *Hyundai*-case:

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and include all in the process of governance ... This spirit of transition and transformation characterises the constitutional enterprise as a whole.⁴⁶

⁴⁴ See A van Aswegen 'The Implications of a Bill of Rights for the law of Contract and Delict' (1995) 11 *SAJHR* 50, 67 who indicates that the system of apartheid contributed greatly to social and economic equalities experienced specifically in the context of contract law.

⁴⁵ D van der Merwe (note 36 above) 13.

⁴⁶ *Investigative Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) par 21.

Section 39 compels (as opposed to authorise) a court to develop the common law when it does not reflect the values of the Constitution precisely. In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*⁴⁷ the Constitutional Court held that the common law has to be developed within the matrix of the constitutional value system. Even though this case deals with horizontal application of the Constitution to the law of delict, it is the *common law* (which necessarily includes the law of contract) which has to be developed in accordance with the value system enshrined in the Constitution.

Van der Walt has argued elsewhere for an understanding of horizontal application of fundamental rights as resistance against the privatisation of the political or the public.⁴⁸ He argues that all abuses of fundamental rights ‘constitute feudal or colonial privatisation of the political, be they perpetrated by a private or public legal subject’.⁴⁹ Van der Walt asserts that the political exists in non-hierarchical or horizontal relations and speaks of a ‘verticalisation’⁵⁰ of the political which I understand to mean attempts to create hierarchy. He argues that horizontal application is not so much concerned with the category of legal subjectivity to which it applies than it is with the question whether a legal subject (be it private or public) is involved in a privatisation of the political or the public.⁵¹ Constitutional review then entails the (re)horizontalising of the political, the removal of the hierarchy, to which both private and public legal subjects can be dedicated to or responsible for.⁵² Van der Walt’s ultimate argument is that it is no longer feasible to maintain a stable distinction between the private and the public and points out that ‘[d]emocracy requires

⁴⁷ 2001(4) SA 938 (CC).

⁴⁸ J van der Walt “Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism” (2003) 1 *Law, Social Justice & Global Development Journal* <<http://elj.warwick.ac.uk/global/03-1/vanderwalt.html>> 4.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 3.

⁵¹ *Ibid* 4.

⁵² *Ibid* 4.

government by some and by none’ and argues that *one* can never ‘safeguard absolutely, the some from becoming one, or a few, a privitising and depriving few’.⁵³

Van der Walt argues that ‘it is the acceptance that the law never simply is what it is, that it is constantly subject to adaptation and supplementation, that renders the distinction between direct and indirect horizontal application devoid of substantive significance.’⁵⁴ It is in this interpretation of the Constitution that I believe lies its transformative value.

I believe that a continued debate about transformation through the direct or indirect horizontal application of the Constitution poses the danger that it may become a politic which again threatens actual transformation. Essentially the debate is a debate about the private (in this case contract law) and the public (the Constitution). But the reality is that these spheres are no longer so rigidly separated – the Constitution subordinates all law to it. To that extent the traditional private law of contract should now be transformed or infused by the Constitution (‘the public’) for it to become a body of law that is constitutional.

It makes no difference then whether we allow for an approach which directly invokes constitutional principles within the context of the common law or whether we elect an approach which prefers to let the common-law principles themselves perform ‘the required mediation between the existing law and constitutional challenges to such law.’⁵⁵ As long as we can invoke the Constitution, whether by direct or indirect horizontal application, to resist the limiting, reductive and often oppressive tendencies of the common law of contract, it does not really make

⁵³ Ibid 4-5.

⁵⁴ J van der Walt (note 1 above) 355.

⁵⁵ Ibid.

much of a difference how that resistance occurs.⁵⁶ What is critical is that we remain committed to transformation *and* that the courts allow us the opportunity to resist ‘the privatisation of the political’ with the tools of horizontal application.

The remainder of this chapter will consider whether the Courts regard the Constitution to be capable of such a transformative reading or whether it is still up to its old tricks of protecting liberal ideology behind claims of neutrality. I will attempt to show that unfortunately the latter is true. It will be seen that ample opportunities presented themselves to the Supreme Court of Appeal to invoke a transformative reading, but the court declined the opportunity in *Brisley v Drotzky*,⁵⁷ *Afrox Healthcare v Strydom*,⁵⁸ and *South African Forestry Co Ltd v York Timbers*.⁵⁹

At the end of this chapter I arrive at the conclusion that, but for a few exceptions, contract law adjudication in a post-constitutional, value orientated social context is still primarily concerned with an approach subscribing to indirect and marginalised application of fairness to contracts and furthermore, that there is a practice manifest on the pages of the law reports which threatens transformation, namely a (selective/exclusionary) reading of the Constitution which favours the traditional liberal notions of the common law. This practice seems to enjoin the Constitution itself in the legitimation of an unjust status quo in the law of contract.

⁵⁶ NJ Grové ‘Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet’ (2003) *De Jure* 134 140: ‘Dit word egter aan die hand gedoen dat die bron van die remedie nie die kritieke punt is nie, maar dat daar inderdaad 'n remedie is.’

⁵⁷ 2002 (4) SA 1 (SCA).

⁵⁸ 2002 (6) SA 21 (SCA).

⁵⁹ 2005(3) SA 323 (SCA).

III DECISIONS IN THE LAW OF CONTRACT AFTER 1994

(a) *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*⁶⁰

The above case provides an example of the utter unfairness in maintaining the *pacta servanda sunt* rule. The respondent, in her capacity as *curatrix bonis* of her mother, Mrs Malherbe, obtained an order in a provincial division which ordered the appellant ('FNB') to hand over to her certain share certificates which Mrs Malherbe had ceded to FNB in 1989 to secure certain debts her son was owing to FNB.⁶¹

The court dismissed FNB's claim in reconvention, based on a suretyship as causa of the above mentioned cession, on the grounds that Mrs Malherbe was of unsound mind and accordingly lacked capacity to contract when she concluded the agreements in question.⁶² FNB appealed against this decision and the Supreme Court of Appeal, per Streicher, AJA held that in the light of the expert and factual evidence, Mrs Malherbe was decidedly without capacity to understand what she was doing or what the possible outcomes of her acts could be.⁶³ Accordingly, the appeal was denied.⁶⁴

In this case Mrs Malherbe was 85 years old, almost deaf and nearly blind when she was asked by her loving son to sign the agreements in question.⁶⁵ Most of the time Mrs Malherbe was also confused and delusional.⁶⁶ Her loving son had her apparently wrapped around his little finger and

⁶⁰ 1997 (4) SA 302 (SCA).

⁶¹ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 307A-C.

⁶² *Ibid* 307A.

⁶³ *Ibid* 315A-C.

⁶⁴ *Ibid* 318F.

⁶⁵ *Ibid* 330I.

⁶⁶ *Ibid* 330J.

had her sign one after the other utterly detrimental document.⁶⁷ Mrs Malherbe was under the impression that she was merely making the shares available to her son without prejudice of her rights. She was also under the impression that she merely had to ask for the shares back in order to get them back.⁶⁸ She signed these agreements without having their consequences explained to her and without reading them.⁶⁹

Olivier, JA declines to base his decision (like the majority) on a negation of the will theory and based his decision that the appeal had to be denied in a concurring minority judgment on an application of the bona fides principle to our law of contract:

[e]k hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelijke skepper en gebruiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoortlikheid.⁷⁰

([i] believe that the principles of good faith, based on public policy, still play and should continue to play an important role in our law of contract as it does in any legal system which is sensitive to the convictions of the community - who is the ultimate creator and user of the law - relating to the moral and ethical values of justice, fairness and propriety.)

⁶⁷ Ibid 330J-331A.

⁶⁸ Ibid 331A.

⁶⁹ Ibid 331B.

⁷⁰ Ibid 326 F-H.

In his judgment Olivier, JA affirms that the principle of individual autonomy as embodied by the freedom of contract doctrine should be subject to the standards of the bona fides and external circumstances:

In gemelde omstandighede meen ek dat die openbare belang nie vereis dat die algemene beginsel, dat 'n handelingsbevoegde kontraktant aan die ooreenkoms gebonde gehou moet word, strak deurgevoer moet word nie....Waar die borg, soos in hierdie geval, opsigtelik liggaamlik swak is en uit 'n gesprek met die skuldeiser laat blyk dat hy of sy verward is of moontlik nie die implikasies van die borgkontrak goed verstaan nie, of waar die borg tot die kennis van die skuldeiser 'n eggenote is wat vir die eggenoot borg staan of 'n bejaarde ouer is wat vir 'n kind borgstaan, verg die openbare belang myns insiens dat die skuldeiser seker maak dat die borg die volle en werklike betekenis en implikasies van die borgkontrak en enige gevolglike sessies goed begryp.⁷¹

(In the present circumstances, I am of the opinion that public policy does not require that the general principle, namely that a contractual party of sound mind should be kept to her contracts, should be enforced...Where the surety, as in this case, appears to be clearly physically weak, and, in a conversation with the creditor appears confused or not to comprehend the implications of the suretyship, or where the surety is, to the knowledge of the creditor, a spouse who stands surety for another or an elderly parent who stands surety for a child, public policy requires in my opinion that the creditor makes sure that the surety clearly understands the full and true meaning and implications of the suretyship as well as any subsequent sessions.)

This passage reveals in my opinion a clear sensitivity for the broad legal context of constitutional transformation, because it points out that social values which are separate from the freedom of contract doctrine have a primary role to play in the correction of the tyranny often brought about

⁷¹ Ibid 331 D-G.

by the strict application of this doctrine. In a legal system where morality and social responsibility have been declared paramount by the operation of the Constitution, this approach should, in my opinion be considered the more favourable one, especially because it allows for an escape from the shackles of the traditional law of contract by making use of the concepts already contained within the common law to bring it in line with the Constitution. Unfortunately, the judgment is only that of a minority and therefore has only persuasive authority.

Although no direct constitutional argument was submitted in the *Eerste Nasionale Bank* case, the decision nevertheless reveals aspects of an approach that would be generally in line with a sensitivity for the values embodied in the Constitution. Here the Court had clearly made its moral judgment (ie that the law was not going to deprive an elderly, ailing woman from her only means of income) and proceeded to apply the law in accordance with that judgment, without attempting to be neutral or insensitive to the outcome of its application of the law. Although the majority elected to base their decision on a negation of will, they could in the light of the evidence easily have decided to hold that the will was not negated, *caveat subscriptor*.

The decision of Olivier, JA specifically, confirms that the Court is at least willing to follow a new approach and does not consider itself bound to pronounce the law only.⁷² The impropriety of this is explicitly stated in Olivier, JA's judgment.⁷³ The decision comes down to the fact that public interest requires from contracting parties good faith in respect of the origination, content, execution, enforcement and termination of contracts – the so-called broad lawfulness criterion.⁷⁴

⁷² Also see NJ Grové 'Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid' (1998) 61 *THRHR* 687, 688, 695.

⁷³ *ENB v Saayman* (note 60 above) 320A.

⁷⁴ CFC Van der Walt 'Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?' (2000) 1 *JSAL* 33 35. Here Van der Walt also shows that where the broad lawfulness criterion is not satisfied, the Court will visit the agreement with invalidity or unenforceability.

In his discussion of unfair contracts, Christie remarks: “There is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA’s reasoning, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract.”⁷⁵ In accordance with Christie’s advice the above dicta was quoted with approval (although obiter) in the judgment of Davis J, in *Mort NO v Henry Shields-Chiat*⁷⁶ in which the judge added that, for the bona fides in our law of contract to be taken seriously, the primary importance placed on the concept of individual autonomy of contracting parties, should be reconsidered.⁷⁷ The court held that the hegemony of the will theory, which still survives, notwithstanding dicta indicating a move in the opposite direction towards a system of social responsibility should also be re-examined.⁷⁸

⁷⁵ Christie (note 27 above) 19.

⁷⁶ 2001 (1) SA 464 (C).

⁷⁷ Ibid 474.

⁷⁸ Ibid. See also the decisions in *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) and *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2002 (6) SA 202 (C) for examples of a transformative approach. This chapter’s focus is on decisions in the Supreme Court of Appeal (SCA) because these decisions provide the authority or guidance to the High Courts. In addition, a decision of a High Court can always be overridden by the SCA and it is thus important to rather focus on SCA decisions in order to interpret the approach a court will follow when faced with re-examining the decision of a High Court. In this regard Matlala remarks: ‘It would seem as if far from playing a constructive role, the SCA has unfortunately stalled a number of initiatives emanating from various divisions of the High Court.’ See DM Matlala ‘The Law of Contract: When the Supreme Court of Appeal Fails to Act’

(available at <http://wwwserver.law.wits.ac.za/workshop/workshop03/WWLSMatlala.doc>)

(b) De Beer v Keyser:⁷⁹ ‘In with the old out with the new’

The way in which the issue of public policy was handled in the above decision however constitutes a rejection of the approach elaborated upon in the previous section. In this case the Supreme Court of Appeal was concerned with the question whether the provisions of a micro-lending franchise agreement were enforceable or not. The respondent was of the opinion that the agreement was unenforceable because the purpose of the agreement (the establishment of a micro-lending business) was contrary to the public interest.⁸⁰

The micro-lending business contemplated in the agreement under consideration would be run in terms of a system where a debtor would conclude a loan at an excessive lending rate. As security for repayment of the loan the debtor would hand her ATM card and secret PIN code to the creditor, who would then on the date that her salary is paid into the account, utilise the card and secret code to claim capital and interest payments due to it in terms of the loan, by a direct withdrawal of funds from the account.⁸¹

In this case the court elected once again to exercise its public policy choice in favour of the stronger bargaining agent. The court holds that it is not the manner in which a micro-lending scheme is operated which is contrary to public policy, but rather the fact that lenders are forced to make use of this technique.⁸² The court finds it shocking that lenders have to take such drastic steps as retention of the ATM card and secret code in order to secure payment of monies due to them in order to enforce borrowers’ payment obligations or secure honouring of those

⁷⁹ 2002 (1) SA 827 (SCA).

⁸⁰ Ibid 837B.

⁸¹ Ibid 837G-J.

⁸² Ibid 838B-C.

obligations.⁸³ According to the court this points to the unwillingness of borrowers to honour their obligations and, implies the court, these lenders are from the outset not of the intent to honour their payment obligations, partly because their financial position would not be any better when the loan becomes repayable than it was when the loan was entered into.⁸⁴

The implication seems to be that the court accepts that the debtors to these contracts contract in bad faith from the outset and that the creditor is aware of this bad faith but has no choice but to contract with them. He can therefore do nothing else but protect himself as far as possible against the bad faith of the debtor by taking the drastic precautions to insure against the non-payment. Consequently, the court holds that the manner in which the micro lending business is practiced does not amount to a form of *parate executie* and accordingly does not offend public policy.⁸⁵

This bad faith assumption apparently does not hold for the contractual situation of the lenders. Apart from the fact that nothing is said about the excessive rates these lenders often charge in bad faith and contrary to the public interest, Nugent JA, concedes that the possession of a borrower's card and secret code can give rise to fraud, but finds for the benefit of the creditors that the technique is not contrary to public policy just because the possibility of such fraud exists.⁸⁶ The same benefit of the doubt is however not afforded the borrowers. These borrowers are rather branded as 'as anxious to avoid repayment of their loans as they were to secure them in the first place'.⁸⁷

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid 838D-J.

⁸⁶ Ibid 838I.

⁸⁷ Ibid 838B-C.

This arbitrary award of general moral attributes to the different parties, again reveals a lack of sensitivity for a plethora of very real variables forming part of the equation. Logically, one can ask but what of the borrower who is bona fide of the intention to repay the loan but is socio-economically not capable to provide one of the traditional forms of security? Nothing is said about the unequal bargaining position such a borrower will find herself in when contracting on these terms with a micro lender in circumstances where he is not prepared to hand over his card and secret code. The fact of the matter is that the lender will simply not contract with him. In the same breath one can as readily envisage, especially in the light of recent revelations of corruption in the marketplace, a lender who is from the outset of the intention precisely to commit fraud by exploiting the way in which the micro-lending business is conducted.

Furthermore, the court seems to lose sight of the fact that it is an integral part of a micro-lending scheme's business to charge excessively high interest rates and that lenders are quite aware that these agreements are more often than not entered into as a matter of necessity or economic survival by debtors who simply cannot provide security required by a commercial bank – a knowledge which often leads to an exploitation of the debtor's bargaining position manifest in the form of excessively high interest rates. This is an unequal bargaining position which the court seems simply to ignore and not take notice of. Here one can agree with Tladi where he remarks that:

The failure or unwillingness of the Supreme Court of Appeal to even consider the values underlying the Constitution and the drive towards substantive equality in determining whether the practice offends against public policy is also, to say the least, disappointing.⁸⁸

⁸⁸ Tladi (note 5 above) 316.

An application of the constitutional value system could have easily led to the conclusion that the purpose of the agreement in casu was indeed contrary to the spirit, purport and objects of the Bill of Rights. One can think here of the right to equality, human dignity, access to the courts and other rights which clearly outweigh the lender's interest in securing obligations due to it or even its freedom of contract to contract for such a form of security.

(c) *Brisley v Drotsky*:⁸⁹ 'A milestone for the South African law of contract'⁹⁰

In stark contrast with what was said in *Mort NO v Henry Shields-Chiat* and in an endorsement of the, in my view, elitist approach in *De Beer v Keyser* the judgment of the majority in this case shows a regression back into the old trenches of *pacta servanda sunt*.

(i) The majority decision

At issue was a dispute between Mrs Antoinette Drotsky, a widow from Pretoria and Ms Madeleine Brisley. Brisley rented a townhouse from Drotsky at R3 500 per month which rent was due and payable on the first of every month according to the written contract between them.⁹¹ Brisley and Drotsky however orally agreed after conclusion of the written contract that Brisley would for some months be late with payment of the rent.⁹² For a few months Drotsky accepted these late payments, but in January 2000 she put her foot down and evicted Brisley as a result of the late and irregular payments.⁹³ Brisley's defence centred around the contention that she and Drotsky orally agreed that payments could sometimes be made late, regardless of the

⁸⁹ See note 57 above.

⁹⁰ Sakebeeld, Monday 20 May 2002 10.

⁹¹ *Brisley v Drotsky* (note 57 above) 9F.

⁹² *Ibid* 10E.

⁹³ *Ibid* 9G-H.

written agreement which provided for payment of the rent on the first day of every month.⁹⁴ The High Court however ordered an eviction against which order Brisley brought the appeal.⁹⁵

The majority of the Supreme Court of Appeal held, Harms, JA speaking on its behalf, that a provision in a contract which provided that later oral agreements would have no legal validity unless also reduced to writing, is still as much part of the South African law of contract as when it was adopted by the Appellate Division 38 years before in the case of *SA Sentrale Ko-Op Graanmaatskappy Beperk v Shifren en Andere*.⁹⁶ This kind of provision in a contract is known as a non-variation clause and the principle is that such a clause is valid and enforceable and became commonly known as the *Shifren* principle. The Supreme Court of Appeal based its finding primarily on the view that overthrowing the *Shifren* principle would cause large scale legal uncertainty and evidentiary difficulties.⁹⁷

The court viewed the argument on behalf of the appellant that self imposed entrenchment provisions could be rendered inoperative by mere agreement as an argument similar to one it rejected in the *Harris* decision⁹⁸ where the parliament of the day attempted to circumvent a statutorily entrenched provision by mere majority vote and the Appellate Division found that it could not be done. The *Harris* decision is seen as the ‘historical and jurisprudential context’ of the *Shifren* principle.⁹⁹ Along these lines the court holds that the non-variation clause is not ‘contra bonos mores from the outset; our constitutional dispensation is built upon an analogical principle and it is often recorded in legislation.’¹⁰⁰

⁹⁴ Ibid 10E

⁹⁵ Ibid 9I-10B.

⁹⁶ Ibid, 1964 (4) SA 760 (A).

⁹⁷ *Brisley v Drotsky* (note 57 above) 11F.

⁹⁸ *Harris & Others v Minister of the The Interior & Another* 1952 2 SA 428 (A).

⁹⁹ *Brisley v Drotsky* (note 57 above) 10H.

¹⁰⁰ Ibid.

There is something in this part of the decision that simply does not follow. Firstly, it appears as if the court employs the historical context of the *Shifren* principle as a justification to hold that it cannot be overthrown *today*. The court states this explicitly where it holds that in its opinion the *Shifren* principle must be viewed in its historical and jurisprudential context. In addition, the court holds that '[d]ie *Shifren*-beginsel is 'trite' en die vraag ontstaan waarom dit, na bykans veertig jaar, omvergewerp moet word?'¹⁰¹ It appears that one of the most persuasive factors in the court's decision is the consideration that the *Shifren* principle is trite and almost forty years old, and that it should for this reason alone not be tampered with. The court does not explain why, apart from the alleged certainty its application entails, *Shifren* is still justifiable in an open and democratic society based on freedom, equality and human dignity, considerations which I will return to in this context later.

It is almost as if the normative divide between the Constitution and the South African law before its enactment, is not viewed as an event of sufficient importance in the forty years of the *Shifren* lifetime to warrant an enquiry into or re-evaluation of its propriety in a new dispensation. All of this notwithstanding the fact that legal principles older and more 'trite' than *Shifren*, have been overthrown¹⁰² or developed¹⁰³ without much ado, in the light of the new moral order and constitutional standards.

Concerning the analogy with the *Harris* decision the Court's analogy occurs with a sleight of hand that reminds of conjuring. Firstly, it should be clear that the *Harris* decision is just on the facts

¹⁰¹ Ibid 11F. (Author's translation from the original Afrikaans.)

¹⁰² For extreme examples see *S v Makwanyane* 1995 (3) SA 391 (CC), where the death sentence was abolished; *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) where sodomy as a crime was abolished.

¹⁰³ *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C) in which Van Zyl J expanded the application of the aedilician actions also to goods bartered.

distinguishable from both *Shifren* and *Brisley v Drotsky*. The fact of the matter is that in *Harris* the court had to deal with a parliamentary attempt to override the voting system by a simple majority vote where the Constitution was calling for a two-thirds majority to amend the voting system. It had absolutely nothing to do with reducing subsequent oral amendments to a written form in order for the oral agreement to be valid. To say that a requirement that Parliament had to pass a two third majority to amend the voting system is analogous to a party who has to reduce an oral agreement to writing for it to validly amend a contract, to my mind, simply does not follow.

The court continues in this curious manner and holds that the *Shifren* principle cannot yield to principles of reasonableness, fairness and good faith in contractual matters.¹⁰⁴ This decision is based on the view that the court in *Miller and Another NNO v Dannecker*¹⁰⁵ (on which the tenant relied) arrived at the (wrong) conclusion on the basis of ‘the minority judgment that represents the views of a single judge’¹⁰⁶ that it could deviate from the decision in *Shifren* on the basis of considerations of good faith. The minority judgment to which the court refers is of course that of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.¹⁰⁷ The court in casu holds that the minority judgment of a single judge cannot override a judgment of the Supreme Court of Appeal and that Olivier JA’s judgment in the above mentioned case is largely based on ‘what we consider as doubtful grounds’.¹⁰⁸

Concerning the argument that the judgment of Olivier, JA was underwritten by the Supreme Court of Appeal in a later decision,¹⁰⁹ the court holds that its dicta concerning Olivier, JA’s

¹⁰⁴ Ibid 12G-19B. Also see Lubbe (note 21 above) 397.

¹⁰⁵ 2001 (1) SA 928 (C).

¹⁰⁶ *Brisley v Drotsky* (note 57 above) 13F

¹⁰⁷ See the discussion of this judgment in the previous section.

¹⁰⁸ Ibid 14A.

¹⁰⁹ *NBS Boland Bank v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA).

judgment in the *Saayman* case, was rendered in passing, did not form part of the ratio decidendi in that case and that the views of Olivier, JA represents ‘still only that of a single judge’.¹¹⁰

The court holds that the judgment of Olivier, JA cannot be taken to imply (as Davis, J indicated in *Mort NO v Henry Shields-Chiat*) that the enforcement of contractual terms should depend on community convictions because it would warrant a state of unacceptable chaos and uncertainty in our law of contract.¹¹¹ The court holds that good faith and freedom of contract are underlying values of the law of contract and that it is the task of the courts to weigh these underlying values against each other when they are at odds and to slowly and gradually make changes when they appear necessary.¹¹²

In this case such slow and gradual change was clearly not regarded as necessary, even though the underlying values of freedom of contract and good faith were in conflict. For the court it would entail performing a somersault or a cartwheel¹¹³ to overthrow *Shifren* and it was clearly not inclined to such circus-like moves. What is troubling is that it is once again clear that the political decision in favour of liberal ideology was made before a practical reasoning with the evidence, the outcome and the constitutional propriety even crossed the court’s mind. From the outset the majority rigorously defended *Shifren*, discredited Olivier, JA’s good faith approach and emphasised the interests of certainty and the chaos which would ensue was *Shifren* to be overthrown. To further justify its political decision it claims that a court does not make somersaults and cartwheels but takes one step at a time; (but then fails to even take the one step).

¹¹⁰ *Brisley v Drotsky* (note 53 above) 13I.

¹¹¹ *Ibid* 15A-D.

¹¹² *Ibid* 15E–16A.

¹¹³ *Ibid* 16A-B.

These types of arguments and the contention that the enforceability of contractual clauses cannot depend on community convictions are clearly used as a shield to resist more difficult questions such as, were the enforceability of contracts to depend on community convictions, how is a court to determine those convictions in a heterogeneous society; who constitutes that community in a contractual context and how are these questions influenced by the constitutional rule of law? It is certainly easier to hold that the enforcement of contracts do not depend on community convictions than it is to attempt to provide answers to these pressing questions. The court even affirms its view that the judiciary should shy away from the Constitution (and the development of the common law in terms thereof) where it states: "n Hof kan nie skuiling soek in die skadu van die Grondwet om vandaar beginsels aan te val en omver te werp nie."¹¹⁴ (A court cannot hide in the penumbra of the Constitution to attack and overthrow principles from there).

In accordance with this approach the court holds that it would be contrary to the controlled developmental approach to:

[E]ensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou. Die gevolg sal immers wees dat die beginsel van *pacta servanda sunt* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou.¹¹⁵

(Suddenly afford judges a discretion to ignore contractual principles when they regard those principles as unreasonable or unfair. The consequence would be that the principle of *pacta servanda sunt* would largely be ignored because the enforcement of a contractual provision would depend on what a specific judge regards as reasonable and fair in the circumstances.)

¹¹⁴ Ibid 16D-E.

¹¹⁵ Ibid 16B-C.

The above dicta underwrites, by necessary implication, the perpetuation of the decade-long preference afforded to an individualistic rule-bound approach. The necessary question is how the court plans to make these controlled developmental changes¹¹⁶ if it is primarily still concerned with protection of the *pacta servanda sunt* rule above considerations of good faith, equity and reasonableness in the contractual context and what would constitute allowable and necessary adaptations of the common law in the light of the Constitution?¹¹⁷

In respect of the submission on behalf of the tenant that the non-variation clause is so unfair that the court should in the public interest refuse to enforce it, the court distinguishes the decision in *Magna Alloys*¹¹⁸ from the case before it by asserting that the consideration that everyone should be allowed as far as possible to freely participate in commercial activity, does not fall to be considered in the circumstances.¹¹⁹

The *Sasfin* decision is trumped in a similar manner where the court finds firstly that because the non-variation clause as such is not invalid, the *Sasfin* principle finds no direct application.¹²⁰ This conclusion is simply wrong. It will be remembered that the certificate clause in *Sasfin* was also not *as such* invalid (that is why the court upheld a similarly worded clause in *Doneby*¹²¹) and that the court held specifically that it was because the clause had the effect of enslaving the doctor to the

¹¹⁶ Ibid 10H.

¹¹⁷ Also see *De Beer v Keyser* (note 79 above) where the court elected not to have public policy considerations trump the sanctity of contract, quite aware of the harsh reality of the way in which micro-lending businesses conduct their operations.

¹¹⁸ See the discussion of this case in Chapter 3.

¹¹⁹ *Brisley v Drotzky* (note 57 above) 17F.

¹²⁰ Ibid 18C.

¹²¹ See the discussion of this aspect in Chapter 3.

bank, that it was unfair and unenforceable.¹²² A clause does not have to be as such invalid in order to invoke the *Sasfin* principle.

In addition, the court holds that even if the *Sasfin* principle (namely that contract terms which are unfair to such an extent that they are invalid) found direct application, the tenant's case in the judgment of the court falls far short from the rigid test of extreme inequity required to invoke the *Sasfin* principle.¹²³ Again one is tempted to ask: Where is the line between extreme inequity and 'normal' inequity? How is a court to determine this? And again the court's moral choice not to invoke the Constitution indirectly, precisely to determine this, shows up in the statements that the tenant's situation is far too equitable to invoke *Sasfin*, but without telling us why it is too equitable.

The direct constitutional argument in this case was based on the contention of the tenant that even if the lease was validly cancelled, the court a quo should not have granted an eviction order because of the provisions of section 26(3) of the Constitution.¹²⁴ The section provides as follows:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The tenant alleged that the circumstances under which the contract was cancelled, as well as her and her mother and child's personal socio-economic circumstances, all constituted relevant circumstances which the court a quo should have taken into account.¹²⁵ The court does not agree

¹²² *Sasfin v Beukes* 1989 (1) SA 1 (A) 13H.

¹²³ *Brisley v Drotosky* (note 57 above) 18B-G.

¹²⁴ *Ibid* 19C.

¹²⁵ *Ibid* 19E.

with these contentions and hold that, although section 26(3) has horizontal application, circumstances can only be relevant where they are *legally* relevant (regtens relevant), because section 26(3) does not afford a discretion to the court to refuse to make an eviction order under certain circumstances to an owner which would otherwise have been entitled to such an order.¹²⁶ According to the court the landlord as owner is entitled to an eviction order and the circumstances which the tenant alleges are not legally relevant circumstances which would provide a basis for the court to refuse to grant the eviction order.¹²⁷

Formalistically and clinically, the court refuses to take the tenant's personal circumstances into account in order to determine whether the eviction order violated her constitutional rights in terms of section 26(3), because it had no discretion to refuse to grant the order and because the alleged circumstances were not legally relevant circumstances. According to the court the only legally relevant circumstances are the facts that the landlord is owner and the tenant is in unlawful occupation (possession).¹²⁸

In this context, the following question begs an answer: what is the point of the inclusion of section 26(3) in the Constitution if it provides for nothing more than a codification of what is already trite under the common law? In the light of the later decision in the *Ndlovu*-case,¹²⁹ the approach to section 26(3) as followed by the court in the present case is currently still wrong. In *Ndlovu* the SCA held that tenants holding over (like Ms Brisley) qualified as 'unlawful occupiers' in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹³⁰ (PIE). This indeed means (contra *Brisley v Drotsky*) that the court does have a discretion to order

¹²⁶ Ibid 21A-B.

¹²⁷ Ibid 21C.

¹²⁸ Ibid 21D.

¹²⁹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

¹³⁰ Act 19 of 1998.

the eviction on the basis of whether it is just and equitable to do so taking into regard factors similar to those alleged by Ms Brisley and further, that tenants' personal socio-economic circumstances are relevant circumstances *and* that they do fall to be protected by the procedures stated in section 4 of PIE.¹³¹

A few months before, Davis, J held in the Cape High Court that 'the task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.'¹³² For all of the above reasons I cannot but conclude that the task in this dispute was precisely to disguise equity and not to develop contractual principles in the image of the Constitution. It appears as if the Constitution is itself employed to whitewash the extreme view of sanctity of contract and the public interest in such an extreme view. Although I have no doubt that freedom of contract is an important constitutional value it is not the only, sudden-death constitutional value to exclusion of all others, which in the light of this decision, seems to be the view of the Supreme Court of Appeal.

(ii) Olivier, JA in the minority (again)

In contrast with the majority, Olivier, JA in a separate concurring judgment again pleads convincingly that the bona fides, infused by the Constitution, deserves greater recognition in our law of contract. At the same time, the learned judge does not deny the problematic nature of such a recognition,¹³³ but emphasises the importance of the courts in solving this problematic issue:

¹³¹ It should be noted that the parliamentary Housing Portfolio Committee will propose to Parliament that PIE be amended to exclude bona fide landlords from the provisions of PIE. See in this regard http://www.fin24.co.za/articles/business/display_article.asp?Nav=ns&lvl2=buss&ArticleID=1518-1786_1814842 (11 October 2005).

¹³² *Mort NO v Henry Shields-Chiat* (note 76 above) 475C-D.

¹³³ *Brisley v Drotsky* (note 57 above) 29B.

‘Die werking van die bona fides in ons kontrakreg is nog lank nie volledig verken en inhoud gegee nie. Dit sal oor jare en aan die hand van baie uitsprake moet geskied. Uiteindelik sal, hopelik, 'n nuwe raamwerk en denkpatroon in ons kontrakreg ontstaan.’¹³⁴ (The operation of the bona fides in our law of contract has long not yet been fully explored or given content. This will have to happen over years and through many judgments. Eventually, a new framework and mindset will hopefully evolve in our law of contract).

Olivier, JA points out that our law finds itself in a developmental phase where contractual justice is emerging more than ever before as a moral and juristic norm of superlative importance and that this tendency will be strengthened by constitutional values.¹³⁵ The constitutional values are enunciated as the core values of freedom, equality and human dignity and the application thereof in the law of contract by virtue of section 39(2) and section 173.¹³⁶

Olivier regards the *Magna Alloys* decision, in conflict with the majority, as precisely the analogous approach in the determination of the question whether the *Shifren* principle is socio-ethically so unacceptable, that it should not, or not entirely, be enforced. Olivier, JA holds specifically that the test for enforceability of such a clause was stated in *Magna Alloys* as being the public interest and that the public interest is determined, inter alia, by reference to the question of reasonableness.¹³⁷ With regard to the majority’s view in respect of legal uncertainty Olivier, JA mentions that: ‘...dit is die prys wat 'n viriele regstelsel, wat billikheid net so belangrik as regsekerheid ag, moet betaal: 'n balans moet gevind word tussen kontinuïteit van die regsisteem en die aktualiteit van die sosiale werklikheid.’¹³⁸ (it is the price which a virile legal system, which values fairness just as highly as

¹³⁴ Ibid.

¹³⁵ Ibid 29E-F.

¹³⁶ Ibid 29G.

¹³⁷ Ibid 30F.

¹³⁸ Ibid 31C.

certainty, has to pay: a balance has to be struck between continuity of the legal system and the actuality of social reality.)

Olivier, JA continues to point out the unreasonable appearance of Ms Drotsky's sudden reliance on the written contract in circumstances where the oral agreement has to be accepted as having been proved.¹³⁹ No notice was given to Brisley of the sudden reliance on the written agreement and she also was not given a reasonable opportunity to comply with the written agreement in the future. Olivier, JA points out that there was no reason to adopt a ruthless approach towards Ms Brisley.¹⁴⁰

In respect of the majority's decision that the circumstances of the tenant were not legally relevant circumstances and could thus not be pleaded to successfully invoke section 26(3) of the Constitution, Olivier, JA holds in accordance with the new approach that:

Die waardes van die goeie trou, redelikheid en billikheid en kontraktuele geregtigheid sal verloën word, as dit neergelê word dat summiere uitsettingsbevele sonder enige uitsondering en sonder oorweging van die *menslikeid* daarvan na regmatige kansellasië of afloop van 'n huuroorkontrak moet en sal volg.¹⁴¹

(The values of good faith, reasonableness, fairness and contractual justice will be denied, should it be established that summary eviction orders must follow after lawful cancellation without exception and without consideration of the humanity thereof.)

This formulation should, in my view, be welcomed as a more acceptable post-constitutional approach in these matters, rather than the majority's clear liberal approach in protection of pacts

¹³⁹ Ibid 31E.

¹⁴⁰ Ibid 31E-G.

¹⁴¹ Ibid 33C.

servanda sunt.¹⁴² In the light of *Ndllovu* it also appears that this formulation is to be preferred as in line with constitutional requirements in the contractual sphere. Generally, Olivier’s approach seems to me to be far more conscious of constitutionally relevant considerations, nuanced and indicative of an engagement with the law and its application in the circumstances, than the approach of the majority. Also, Olivier’s approach is openly political and does not hide behind claims of certainty or sanctity of contract.

Notwithstanding this, Olivier, JA does conclude that the appeal should be denied.¹⁴³ But he does offer non-doctrinal reasons why: because there is evidence of readily available alternative housing and removal companies to facilitate Brisley’s move.¹⁴⁴ At the same time he does make it clear that this is a borderline case – not denying the legitimacy of Ms Brisley’s claim, which is something that the majority doubts right from the outset.¹⁴⁵

¹⁴² For a similar approach see *Janse van Rensburg v Grieve Trust CC* (note 103 above) where Van Zyl, J held that the application of the aedillian actions should be expanded to transactions of barter, because it is ‘consonant with the spirit and values contained in the Bill of Rights’.

¹⁴³ *Brisley v Drotsky* (note 57 above) 33D.

¹⁴⁴ *Ibid* 33E.

¹⁴⁵ *Ibid* 31G.

(iii) Cameron, JA's 'constitutional' reading of freedom of contract

Cameron, JA's view of the matter is also commendable: '[t]he Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity'¹⁴⁶ and '[p]ublic policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines.'¹⁴⁷

However, Cameron, JA, further argues that the Constitutional values in fact requires the controlled developmental approach to contract law reform¹⁴⁸ and that it is 'evident' that 'neither the Constitution nor the value system it embodies gives a court the discretion to strike down a contract on the basis of judicially perceived notions of unjustness or... imprecise notions of good faith'.¹⁴⁹

I again feel compelled to take issue with these statements: Firstly, if Cameron, JA is going to state that it is 'evident' that neither the Constitution nor its value system allows for a good faith jurisdiction in contract, why not tell us from which provisions in the Constitution this 'evidence' flows? Why it is that the Constitution does not allow for this. Why can the convictions of the community determine whether a delict has taken place, but the convictions of the community cannot determine whether a breach of contract (including a breach of the duty to contract in good faith) has taken place? The majority held that this is the case because parties freely will their

¹⁴⁶ Ibid 36A.

¹⁴⁷ Ibid 34G.

¹⁴⁸ Ibid 35E.

¹⁴⁹ Ibid.

contractual obligations and not their delictual ones, which is obvious, but why then have a public policy enquiry in contract at all?

Furthermore, Cameron, JA seems to miss the point that it is precisely the constitutional enquiry which is supposed to ensure that the good faith jurisdiction does not become a capricious, arbitrary and discretionary exercise. The court / judge will in each case have to justify its interpretation of good faith in a specific case with reference to the constitutional value system and a specific interpretation of *its* values. If public policy in its modern guise is rooted in the Constitution as Cameron, JA claims, then why can the enquiry not simply be the undisputed common law lawfulness requirement ie whether the contract is unlawful and unenforceable because in the light of the constitutional convictions of the community it is inequitable?

Cameron, JA's view that 'contractual autonomy is part of freedom'¹⁵⁰ and 'shorn of its obscene excesses'¹⁵¹ it 'informs also the constitutional value of dignity'¹⁵² is subject to the same criticism. Apart from the fact that this reading of freedom and dignity is based on a specific (liberal) reading of the Constitution, I for one simply fail to grasp how human self-respect and dignity is enhanced by allowing a person to conclude a written agreement, allowing her further to orally amend that agreement and accept performance in terms of that agreement, and finally to allow her to fall back, on the written agreement in breach of the later oral agreement – all in the name of freedom.

The actuality of social reality is that the South African law of contract (as a result of enactment of the Constitution) finds herself currently in a dispensation which is politically opposed to and in stark contrast with the dispensation that makes up most of the law's history. This is a

¹⁵⁰ Ibid 35E.

¹⁵¹ Ibid 35F. (I am also interested in understanding in which circumstances the court will regard freedom of contract as sufficiently 'shorn of its obscene excesses'.)

¹⁵² Ibid.

dispensation enjoining each and every person to exercise a moral decision in all matters of law he or she may be confronted with. It can no longer be denied that the Constitution has a profound impact on the continuity of certain of the aspects of the legal system which have been (and still are) believed to be untouchable and in fact indispensable. Our past has shown how many things regarded as untouchable and indispensable were in fact invented to keep ‘the enemy at the gates’. The interpretation of constitutional values can no longer be marginalised or circumvented in the law of contract by continued application of the strict law masked as constitutionally acceptable. The Constitution requires from each of us a commitment to its values also in contractual dealings. In the light of this it is no longer acceptable or legitimate to mask forms of contractual *dissensus* (which do not fall into one of the crystallised categories nullifying consensus) behind the strict ‘underlying’ principle of *pacta servanda sunt*.

(d) Afrox Healthcare Beperk v Strydom¹⁵³

The South African positive law’s persistent clinging to traditional values of contract is just further perpetuated in the above mentioned decision, rendered only a few months after *Brisley v Drotosky*. I include it so as to support my claim that there is a sustained political commitment to steer clear of the Constitution and its value system in the South African law of contract.

(i) The facts

The core issue in this matter was whether a contractual provision which exempts a hospital from liability for the negligence of its nursing staff, is valid and enforceable.¹⁵⁴ The appellant owns the Eugene Marais Private Hospital in Pretoria to which the respondent was admitted for an

¹⁵³ *Afrox Healthcare Bpk v Strydom* (note 58 above).

¹⁵⁴ *Ibid* 32C.

operation and post-operative care. After the operation complications set in after it was discovered that a nurse had dressed a bandage too tightly which resulted in the cut-off of blood supply to a sensitive post-operative area.¹⁵⁵ According to the respondent the complications caused damages of over R2 million to him. The respondent averred that an agreement between him and Afrox Healthcare came into existence at his admission and that it was a tacit term of that agreement that the appellant's nursing staff would treat him in a professional way, exercising a reasonable amount of care.¹⁵⁶ The respondent further contended that the negligence of the particular nurse constituted a breach of contract on the side of the appellant.¹⁵⁷

The respondent consequently claimed the damages from the appellant in the Transvaal Provincial Division, based on the breach of the alleged agreement. The appellant relied, amongst other defences, on clause 2.2 of the agreement, which indemnified it against claims for damages caused to a patient, with the only exception of damages resulting from the 'wilful default'¹⁵⁸ of the appellant. This is a standard disclaimer in hospital admission contracts and according to the appellant, it blocked the claim, as the claim was based on negligence.¹⁵⁹

(ii) The respondent's case

The respondent averred that the indemnity clause was not enforceable for the following reasons:

- the clause was contrary to the public interest;
- the clause was contrary to the contractual bona fides; and

¹⁵⁵ Ibid 32D-E.

¹⁵⁶ Ibid 32C-E.

¹⁵⁷ Ibid 32E.

¹⁵⁸ Ibid 32E-F.

¹⁵⁹ Ibid 32F-G.

- the admissions clerk at the hospital was legally obliged to alert him to the disclaimer when the contract was concluded, which he did not do.¹⁶⁰

Again we see that the conflict exists between freedom of contract and the concern for contractual justice. The court a quo held in favour of the respondent.¹⁶¹ It found that the clause was *contra bonos mores* because, *inter alia*, it infringed upon the respondent's (plaintiff in the court a quo) right to access to proper health care in terms of section 27 of the Constitution. The court a quo employed its duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights to found its decision. It appears therefore that the court held that it can employ the constitutional values and provisions to develop the *boni mores* criterion to escape in this way the hegemony of freedom of contract – a victory for equitable considerations over freedom of contract.¹⁶²

But Tladi appears to be more sceptical of the court a quo's decision and is of the opinion that, if one looks beyond the nuances, it is still freedom of contract which comes out as the winner.¹⁶³ Tladi claims that the court only makes it clear that the *bona fide* principle requires the defendant to draw the plaintiff's attention to the clause and to explain to him the nature and scope of its application.¹⁶⁴ So, had the plaintiff done this, the clause would have still been substantively enforceable, without any question to the fairness of inclusion thereof in a contract the nature of

¹⁶⁰ Ibid 33G.

¹⁶¹ For a discussion of the High Court judgment see Brand (2002) "Disclaimers in hospital admission contracts and constitutional health rights: *Afrox Healthcare v Strydom*" located at http://communitylawcentre.org.za/ser/esr2002/2002sept_afrox.php (accessed 14 September 2004).

¹⁶² Tladi (note 5 above) 315.

¹⁶³ Ibid 315.

¹⁶⁴ Ibid.

the one under discussion, which appears to be a clear policy choice in favour of freedom of contract.¹⁶⁵

Against this decision the appellant hereafter approached the Supreme Court of Appeal in which the policy choice was exercised in far clearer terms in favour of freedom of contract and the appeal in accordance herewith, upheld.¹⁶⁶

(iii) The respondent's public interest argument and the Court's decision

In the Supreme Court of Appeal the respondent relied on three grounds concerning its argument that the exemption clause was contrary to public policy:

- there existed an unequal bargaining position between the parties at conclusion of the agreement;
- the nature and scope of the acts of hospital staff that were indemnified against were too wide; and
- the appellant was a provider of professional health care services and had prevented the respondent from enforcing the constitutional right of access to professional health care and in doing so also promoted negligent conduct of its staff.¹⁶⁷

As a point of departure the court applies the dictum in *Sasfin v Beukes*,¹⁶⁸ where it is warned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. In addition, the court held that disclaimers or indemnity clauses are in principle enforced in our law, but that the court has the power to limit the interpretation thereof

¹⁶⁵ Ibid.

¹⁶⁶ *Afrox Healthcare Bpk v Strydom* (note 58 above) 33C.

¹⁶⁷ Ibid 35A.

¹⁶⁸ *Sasfin v Beukes* (note 122 above) 9B-F.

and occasionally acts in terms of this power. This, according to the court, does not mean that a specific indemnity clause may be declared to be contrary to public policy and therefore unenforceable.

The court found that the standard applied to determine the unenforceability of disclaimers, when it is contended that the clause is contrary to public policy, does not differ from the standard that applies generally in respect of other contractual provisions:

The question in each case is whether the enforcement of the relevant indemnity or other contractual clause will be detrimental to the interests of the community, either because of exceptional unfairness or because of policy considerations.¹⁶⁹

Concerning the argument in respect of the unequal bargaining position of the parties, the court proceeds to hold that a contractual provision which is to the benefit of the stronger party, is not necessarily contrary to the public interest.¹⁷⁰ Although unequal bargaining power was recognised by the court to be a considering factor, along with other factors, that play a role in the determination of the enforceability of the agreement on the ground of public policy, it nevertheless concludes that there was no evidence of an unequal bargaining position in the present case.¹⁷¹

The implication of the respondent's second ground of appeal was that it is contrary to public policy for a provider of professional health care services to indemnify itself against the gross negligence of its nursing staff. Conceding that an indemnity clause excluding liability for gross negligence could be contrary to public policy, the court finds on a technicality that the

¹⁶⁹ *Afrox Healthcare Bpk v Strydom* (note 58 above) 34F. (Author's translation from the original Afrikaans).

¹⁷⁰ *Ibid* 35B-C.

¹⁷¹ *Ibid* 35C.

respondent did not rely in the pleadings on the gross negligence of the nursing staff and that the question whether the exclusion of liability of a hospital for the gross negligent conduct of its nursing staff is contrary to public policy, cannot be judged in the present case.¹⁷² The court finds, in addition, that the clause would not, without more, be invalid even if it was found that such an indemnity was contrary to public policy, for the court would then use its power to restrict the application of the provision in order to exclude the gross negligence.¹⁷³

Concerning the limited interpretation of exemption clauses and the artificial results of this practice, courts in England have been following a hostile approach for quite some time. This approach has been followed in South Africa and is best expressed by Lord Denning in a passage from *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*:¹⁷⁴

None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or time-tables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press... It was a bleak winter for our law of contract... Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the Judges did what they could to put a curb on it. They still had before them the idol, 'freedom of

¹⁷² Ibid 35F: 'Hy [die respondent] steun op nalatigheid sonder meer.' (He [the respondent] relies on negligence per se).

¹⁷³ Ibid 35G.

¹⁷⁴ [1983] QB 284 296-7 ([1983] 1 All ER 108 (CA)).

contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract." They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause... But when the clause was itself reasonable and gave rise to a reasonable result, the Judges upheld, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount.

In 1969 there was a change of climate. Out of winter into spring. It came with the first report of the Law Commission on Exemption Clauses in Contracts, which was implemented in the Supply of Goods (Implied Terms) Act 1973. In 1975 there was a further change. Out of spring into summer. It came with their second report on Exemption Clauses which was implemented by the Unfair Contract Terms Act 1977.¹⁷⁵

Hoffmann remarks that these legislative interventions had introduced the fairness concept to the English law of contract and courts were given the power to decide the reasonability (or not) of an

¹⁷⁵ Ibid 113.

exemption clause and it was no longer necessary to follow artificial interpretations to escape the hegemony of a specific exemption clause.¹⁷⁶

Hoffmann also points out that he is not convinced that our courts' approach to exemption clauses is based on a search for the true meaning of these clauses:

I think we must accept that we are dealing with what I would call “policy-based interpretation.” The cases in England and South Africa and Zimbabwe show, to my mind quite clearly, that the Courts interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the Court claiming that they do not make law but only interpret it.¹⁷⁷

This point of view is confirmed by the Supreme Court of Appeal's positivistic approach to the exemption clause in the present case.

The third ground of the respondent's appeal on which it was relying for the argument that the disclaimer was contrary to public policy, also constituted the ground on which the court a quo's decision in the respondent's favour was primarily founded; namely that the appellant was the provider of professional health care services and that it was contrary to the provisions of section 27(1)(a) of the Constitution to include a provision such as the one in question into its standard contracts. The respondent argued that everyone in terms of this section has the right to

¹⁷⁶ J Hoffmann from the firm Dyason in his reaction to the SALC proposed Bill on the Control of Unfair Contract Terms SA Law Commission Report Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998) 22.

¹⁷⁷ *Ibid.*

access to health care and that the right of access to health care was unduly restricted by the inclusion of such a clause in a hospital's standard contract.¹⁷⁸

The court however holds that even if it is accepted (in favour of the respondent), that section 27(1)(a) has horizontal application in terms of section 8(2) and accordingly applies to private hospitals, the disclaimer did not deprive the respondent of his right to access to health care. According to the court, section 27(1)(a) does not prevent the hospital from setting legally enforceable conditions for the provision of professional health care services. The issue remains still whether the disclaimer in the present case constituted such a legally enforceable condition.¹⁷⁹

The respondent contended that when considering whether a particular agreement is contrary to public policy, due regard should be afforded to the fundamental rights enshrined in the Constitution, in correspondence with the provisions of section 39(2) which stipulates that every court must take into account when developing the common law, the spirit, purport and objects of the Bill of Rights.¹⁸⁰ Along these lines it was contended that the disclaimer is contrary to the spirit, purport and objects of the Bill of Rights and accordingly contrary to public policy.¹⁸¹

The court again in principle, accepts that the provisions of section 27(1)(a) should be taken into account, although they did not yet apply when the instant agreement was concluded on the 15th of August 1995, (in other words before enactment of the final Constitution) and there had not been a corresponding provision in the Interim Constitution.¹⁸² The court also accepts (seemingly for the benefit of the respondent) that in applying section 39(2), the determination of what the

¹⁷⁸ *Afrox Healthcare Bpk v Strydom* (note 58 above) 36A-B.

¹⁷⁹ *Ibid* 36D.

¹⁸⁰ *Ibid* 36E.

¹⁸¹ *Ibid* 36F-G.

¹⁸² *Ibid* 37B.

legal convictions of the community encompass, cannot take place without due consideration for the value system enshrined in the Constitution. The *dictum* of Cameron, JA in *Brisley v Drotzky* is quoted with approval in this regard:¹⁸³ ‘Public policy...nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines.’¹⁸⁴

However, not surprisingly, the court holds that the substructure of the argument that the disclaimer will promote negligent and unprofessional conduct rests upon a ‘*non sequitur*’. According to the court it does not follow that the inclusion of such type of disclaimers will result in an increase in negligent conduct of hospital staff. In the opinion of the court, the appellant’s staff would under such circumstances still be bound to their professional code of conduct and subject to disciplinary action. Furthermore, negligent conduct of the appellant’s staff would not be conducive to its reputation and competitiveness as a private hospital.¹⁸⁵

For all of the above reasons, the court holds that the respondent’s argument that the disclaimer is contrary to public policy, cannot be upheld.

(iv) Critique

As Brand has put it: ‘the judgment of the court puzzles’.¹⁸⁶ The part of the decision that contains, in my opinion, detrimental implications for post-constitutional adjudication of contractual disputes, is formulated by the court as follows: ‘[t]he constitutional value of freedom of contract

¹⁸³ *Brisley v Drotzky* (note 57 above) 37D-E.

¹⁸⁴ *Ibid* 35E.

¹⁸⁵ *Afrox Healthcare Bpk v Strydom* (note 58 above) 37H-J.

¹⁸⁶ Brand (note 161 above).

encompasses, on its part, the principle that is explained by and contained in the maxim *pacta servanda sunt*.¹⁸⁷

The court continues to refer to the principle as stated by Steyn, CJ in *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere*: ‘the elementary and fundamental principle that contracts freely and seriously entered into by parties of sound capacity should, in the interest of the public, be enforced.’¹⁸⁸ The court relies heavily on these considerations in arriving at its decision that the respondent’s view that the disclaimer is contrary to public policy, cannot be upheld.¹⁸⁹

As an alternative basis for his case the respondent contended that even if the disclaimer is held not to be contrary to public policy, it is still unenforceable because it is unconscionable, unfair and contrary to the principles related to the contractual *bona fides*.¹⁹⁰ The court holds however that this good faith approach was put in perspective in the decision of *Brisley v Drotsky* and holds as follows:

Concerning the place and role of abstract ideas such as good faith, reasonableness, fairness and justice, the majority in the *Brisley* case held that, although these considerations are subjacent to our law of contract, they do not constitute an independent or ‘free-floating’ basis for the setting aside or the non-enforcement of contractual provisions; put differently, although these abstract considerations represent the foundation and very right of existence of rules of law and can also lead

¹⁸⁷ *Afrox Healthcare Bpk v Strydom* (note 58 above) 38C (Author’s translation from the original Afrikaans).

¹⁸⁸ *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* (note 96 above) 767A.

¹⁸⁹ *Afrox Healthcare Bpk v Strydom* (note 58 above) 38E.

¹⁹⁰ This basis finds its origin in the minority judgment of Olivier, JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* (note 60 above) 318.

to the shaping and transformation of these rules, they are not self-contained rules of law. When it comes to the enforcement of a contractual provision, the Court has no discretion and does not act on the basis of abstract ideas, but precisely on the basis of crystallised and established rules of law.¹⁹¹

This formalistic approach of the post-constitutional Supreme Court of Appeal baffles. Or does it really, in light of other key contract decisions of this court?¹⁹² What is more perplexing is the fact that the court concedes that the values of reasonableness, fairness and justice may shape and transform rules of law, but holds at the same time that it has no discretion to act on the basis of these values and therefore must act on the basis of the established rules. The approach is clearly contrary to the constitutional duty of the courts to precisely act on the basis of abstract values when developing the common law. Who then, if not the courts, must shape and transform the established rules in consideration of abstract values?

Notwithstanding the approving manner in which the seemingly value-sensitive *dicta* of Cameron, JA in the *Brisley*-case is quoted, the court appears to experience no problem in justifying an approach that reveals a clear preference for that which is known – the black lettered, value neutral, individualistic rules of the law of contract. The rules that have been around for centuries and that are justified an existence in a legal system where the Constitution (as the supreme law of the country) is saturated with values, just because that's the way things are; because the rules after all, are the rules.

¹⁹¹ *Afrox Healthcare Bpk v Strydom* (note 53 above) 40H-41A (Author's translation from the original Afrikaans). This approach appears to ignore (or merely pays lipservice to) the presumption that all common law contracts are deemed to be entered into bona fide. See *Meskin NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) 802A and *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651B-652G.

¹⁹² See Chapter 3.

In contrast with its following of the *dictum* in *Shifren* which is in accordance with the precedent system, the court holds that if a High Court, with regard to the constitutional dispensation, is of the opinion that an earlier decision no longer reflects the boni mores or public interest accurately, it is compelled to deviate from that decision, because ‘considerations of what is in the public interest do not remain static.’¹⁹³ But it is nevertheless held that a principle formulated 38 years ago remains in the best interests of the public. According to the court, the position as set out in *Shifren* survived not only 38 years of dynamics in the concept that is the public interest, but also a complete constitutional transformation. Although we may have all thrown out the bellbottoms and the polka dot skirts, the state of the public interest in contractual matters remains, (if one is to believe the Supreme Court of Appeal), the same in 2002 as it was in 1964 and furthermore, the values underlying the decision in *Shifren*, is in accordance with the value system contained in the Constitution.

The provisions of section 39(2) are marshalled to support the decision in favour of freedom of contract above all other. The basic values of freedom, equality and human dignity are clearly interpreted to protect the idol that is freedom of contract. This is illustrated where the court concurs with Cameron, JA’s other famous remark in *Brisley v Drotosky* namely that ‘contractual autonomy is part of freedom’ and ‘contractual autonomy informs also the constitutional value of dignity’.¹⁹⁴ In this respect Hopkins asks: ‘And what about equality? ... If one is going to contend that the Bill of Rights (as a whole) informs the public policy doctrine, then one cannot afford to be selective – all the values must be considered, including human dignity and equality.’¹⁹⁵

¹⁹³ *Afrox Healthcare Bpk v Strydom* (note 58 above) 39D.

¹⁹⁴ *Brisley v Drotosky* (note 57 above) 35E-F.

¹⁹⁵ K Hopkins ‘The influence of the Bill of Rights on the enforcement of contract’ (2003) 425 *De Rebus* 25.

It is clear that Cameron JA, allows for a broad interpretation of the constitutional value of freedom to include freedom of contract. By the same token, the constitutional value of equality will presumably also then be broad enough to include equality in bargaining power¹⁹⁶ - but the court elected not to embark upon that treacherous route. As Lubbe remarks: ‘When used in such an un-nuanced manner, equality, freedom and dignity work in only one direction, serving to dissipate pressure on traditional doctrines and to stultify a creative tension that might result in the wholesome development of the common law’.¹⁹⁷

The questions as to exactly how freedom of contract serves the other two constitutional values of dignity and equality are conveniently left open. So too the questions as to how public policy favours freedom of contract where the parties are clearly and contrary to the constitutional value of equality, in an unequal bargaining position. I for one could not see how the court found that no evidence was present that indicated an unequal bargaining position in the instant case. To my mind it should be clear, merely from a superficial reading of the facts, that an ill patient in need of professional health care (access to which happening to be a constitutional right), finds himself in an unequal bargaining position when he is forced to contract with a competitive private hospital who, as a standard clause, contain an indemnity in their contracts with patients. So does all other private and public hospitals.

Nobody seems to have reminded the court that this was not a case of Mr Strydom being able to go just around the next block or across the street to a hospital that does not contain an indemnity in their standard form contracts for all hospitals do. In addition, nobody, and certainly not the court itself, was reminded that Mr Strydom entrusted the hospital with his physical integrity (to which he also has a right in terms of the Constitution¹⁹⁸) and that an exemption

¹⁹⁶ Ibid.

¹⁹⁷ Lubbe (note 21 above) 420.

¹⁹⁸ See section 12(2) of the Constitution.

clause of this nature is simply contrary to the relationship that arises when physical integrity is so entrusted.¹⁹⁹

Rather than to follow an approach that allows for a satisfying interpretation of the influence of constitutional values on contractual morality, the court steers clear from such an interpretation by employing technicalities, for example the decision that there was no evidence of an unequal bargaining position and that the respondent did not in his pleadings rely on gross negligence, but on negligence as such and accordingly could not submit that the hospital was not allowed to indemnify itself against its own gross negligence. To solve its problem the court could merely have interpreted the reference to negligence in the pleadings, as a reference to the broad concept of negligence which includes the specific form of gross negligence. But that was not done.

What makes decisions like this even more anachronistic and the shying away from equality even more reprehensible is the fact that the findings are delivered in a judicial environment where a report and draft Bill on unreasonable, unconscionable and oppressive terms in contracts have been submitted by the Law Commission to the legislature,²⁰⁰ amongst other reasons, because the report found how far South Africa is behind in the pursuit of contractual justice in relation to other comparative legal systems with less sophisticated constitutions than that of South Africa. These legal systems have had legislation dealing with contractual justice for decades and did not turn into the much-feared litigation paradises as a result.²⁰¹

¹⁹⁹ I acknowledge and thank Prof LM Du Plessis for this helpful insight.

²⁰⁰ SA Law Commission Report Project 47: *Unreasonable Stipulations in Contracts and the Rectification of Contracts*. See further Chapter 5.

²⁰¹ The South African Law Commission's research team found that courts in Germany, England, the United States of America, Sweden, Israel, the Netherlands and Denmark have the power to declare unfair contractual provisions unenforceable.

Is it not one of the goals of the constitutional democracy to elevate the values of freedom, equality and human dignity to the status of core determinants of the public interest? Should the question when deciding the enforceability of a contract not be whether its enforcement will serve and further the values of freedom, equality and human dignity, rather than being set on panel beating these values (or at least some of them and ignore the harder ones) until they adhere to a specific understanding of freedom of contract?

Apparently not – and the SCA is not backing down. Having held in May 2004 that ‘[s]ince the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines’²⁰² and that ‘an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values’²⁰³ the SCA, as recently as September 2004, confirmed the position in *Brisley* and *Afrox* in its decision in *South African Forestry Co Ltd v York Timbers Ltd*.²⁰⁴ Here it was held that:

although 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....After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.²⁰⁵

²⁰² *Price Waterhouse Coopers Inc And Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 73E-

H.

²⁰³ *Ibid.*

²⁰⁴ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

²⁰⁵ *Ibid* 338J-339B. It should however be said that the SCA in this case did employ good faith in a very narrow and restricted manner to hold that had there been any ambiguity (and only when there had been ambiguity) in

This assertion misses the point that these values cannot be cast into traditional constructs and rules to provide clear answers in any given case. It is the constitutional duty of the courts to determine whether the rules of contract serve the constitutional values adequately in the particular circumstances and, if not, to hold that it does not. Fairness and justice may lie in the eye of the beholder, but that beholder is in South Africa, the Constitution and not the rules of contract law as such.

IV CONCLUSION

More than ten years past, in the South African law of contract very little has changed. Like Adams and Brownsword remark: ‘the world may change, but the traditional rules [of contract] like “Ol’ Man River”, ‘jus’ keep rollin along.’²⁰⁶ Freedom of contract remains the incontestable idol of the law of contract and the supreme values of the country, namely freedom, equality and human dignity become the pliable servants of the court, with which the false claim is maintained that constitutional legitimacy is actually being achieved in the law of contract.

Van der Vyfer’s suggestion in 1994 that the *boni mores* concept in contractual matters will probably be transformed in light of what would be reasonable and justifiable in an open and democratic society based on equality and freedom,²⁰⁷ is not realised. Exactly the opposite proves to have come true: the values of equality and freedom are afforded a ‘common law’ meaning in light of how they are interpreted to adhere to an outdated version of the contractual *boni mores*. The lip service to the Constitution is perpetuated, the reification continued – or is it just an overly sceptical and cynical perception of reality that leads one to come to this conclusion?

relation to the parties rights and obligations, the principles of good faith, reasonableness and fairness would decide the matter (341D).

²⁰⁶ JN Adams and R Brownsword ‘The ideologies of contract’ (1987) 7 *Legal Studies* 205.

²⁰⁷ JD Van der Vyfer ‘The Private Sphere in Constitutional Litigation’ (1994) 57 *THRHR* 378.

In this reality (which may of course be another's illusion) it is with reluctance that one accepts the truth and there is no other choice but to agree with Van der Walt's 2000 contention that:

...it has to be concluded that our courts will probably never reach the point where they apply relevant values directly to contractual provisions. Insofar as the courts are left to themselves and the precedent system to distinguish between provisions that will be enforced or not, and between provisions that are void or valid, they will not get to it. In the mean time the courts will probably continue to apply the underlying value of good faith indirectly, behind the mask of all kinds of legal constructs, remedies and discretions. The latter method should not, from the point of view of judicial action, be regarded with disparagement. But unless expeditious progress is made in respect of the direct approach, an acceptable equilibrium of rights and duties (that which is to be regarded as just and equitable) will not be achieved by the courts.²⁰⁸

It may very well be that our judiciary is still too caught-up in the entanglements of its history to facilitate a proper constitutional infusion of the common law. In my view it finds itself in a position very similar to that of Plato's prisoners in the cave:

The immediate problem of Plato's prisoners in the cave, it will be recalled, was understanding what was going on in the cave (for they could see only the shadows on the wall). ... the situation of those who try to operate consistently within the constraints imposed by the traditional exposition of contract (sometimes referred to as the 'black-letter' approach), is somewhat akin to that of Plato's prisoners. They

²⁰⁸ CFC Van der Walt 'Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?' (2000) 1 *JSAL* 33

may perceive shadows, but they are unable to interpret them from the confines of their position.²⁰⁹

It is doubtful that the common law principles such as the *boni mores*, the public interest and the *bona fides* will, absent of legislative intervention, be developed by the courts to properly recognise the values enshrined in the Constitution and the values associated with the societal notion of *ubuntu*. These decisions of the Supreme Court of Appeal are already forming a line of precedent indicating the contrary.²¹⁰

Currently, the common law door which provides for a transformative reading of traditional values by way strictly of an indirect horizontal application of the Constitution, is contained in the contractual validity requirement of lawfulness (with reference to the *boni mores* and public policy) as well as the good faith criterion. It is here where the *boni mores* as part of the public interest requirement and good faith must operate as the tools of the constitutional infusion of contract. But it is equally doubtful whether our courts will in the future refrain from its individualistic interpretation of these requirements, according to which contractual freedom is and remains the core determinant of the public interest and all contracts are simply deemed to be entered into in good faith.

Although it is trite that these concepts should be informed by the values of the Constitution and that the values of freedom, equality and human dignity are the new ‘*boni mores* of our

²⁰⁹ Adams and Brownsword (note 206 above) 205.

²¹⁰ Also see the decision in *Juglal NO and Another v Shoprite Checkers (Pty) Lts t/a OK Franchise Division* 2004(5) SA 248 (SCA) 258A-C where the court again declined to re-examine the common law in light of constitutional considerations and held that ‘the common law does not limit the right of access to the courts. Nor does it fall short of the spirit, purport or objects of the Constitution’.

constitutional community’,²¹¹ the development has, more than ten years later, still not been set in motion. It is true that: ‘[t]he transition from the apartheid society of pre-1994 to a new society founded on the values and principles of the Constitution is an ongoing process that is yet to be completed.’²¹² In the meantime, the ‘have-nots’ assemble outside courtrooms, crying: ‘How long *do* we have to wait? Who do we have to wait for? How will it happen? When will it happen?’ At some or the other point someone will have to answer.

It has been said that the Court in *Afrox* missed an opportunity and again insulated the common law from constitutional infusion; that it failed to convincingly apply the values of the Constitution in the law of contract.²¹³ One cannot help to ask whether the opportunity was consciously or conscientiously missed.

From what has been shown from Chapter 3 to 5 it is (hopefully) clear that in the South African law of contract the individualism/rules pole is and remains the privileged or favoured pole of the contract law duality, and that the enactment of the Constitution did not bring about the change / shift which could have been expected. The grand narrative of the South African law of contract is indeed one of proliferation of the will theory, the abolishment of equitable doctrines which do not fit the picture and a liberalist reading of the Constitution which purports to legitimise the will theory.

In the remainder of this study I shall investigate the Law Commission’s efforts to bring about transformation in the law of contract. Finally, I shall suggest a re-emphasis on good faith as the ethical element of contract.

²¹¹ *Sayed v Editor, Cape Times, and Another* 2004 (1) SA 58 (C) 61F.

²¹² Tladi (note 5 above) 306.

²¹³ Brand (note 161 above).

CHAPTER 5:
THE SOUTH AFRICAN LAW COMMISSION'S
PROJECT ON UNFAIR CONTRACTS

CHAPTER 5:
THE SOUTH AFRICAN LAW COMMISSION’S PROJECT
ON UNFAIR CONTRACTS

I INTRODUCTION: THE CHALLENGE OF REFORM: THE SALC’S PROJECT 47
ON UNFAIR CONTRACTS

Hawthorne has indicated that no clear criteria have up to now developed out of our courts to provide guidance where the weighing of competing interests to determine the public interest in the law of contract, is at stake.¹ In addition, she is of the opinion that there has been no serious examination of, on the one hand, the facts which a court may take judicial notice of in determining the public interest and, on the other, the evidence which will be relevant in such an assessment.² Issues relating to the question how conflicting values and customs, inherent in a heterogeneous society in which public policy has to be determined, should be dealt with, has similarly not been properly enquired into or clearly articulated.³

These factors, coupled with the perceived inability of the South African courts to apply considerations of fairness *directly* to the South African law of contract, before but particularly since the decision in *Bank of Lisbon*⁴ was noted by Kerr as early as 1982 and worded in a request that legislation should be considered dealing with the issue of unfair contracts in South African

¹ L Hawthorne ‘Public policy and micro lending – has the unruly horse died?’ (2003) 66 *THRHR* 116, 118.

² *Ibid.*

³ *Ibid.*

⁴ See the discussion of this judgment in Chapter 3.

law.⁵ Eventually, the request and the above concerns resulted in a preliminary research team, under the guidance of Prof CFC van der Walt tasked by the South African Law Commission (SALC) with the responsibility to enquire into the need for law reform in this area.⁶ The findings of the preliminary project were reported in a working document tabled before the project committee of the South African Law Commission for consideration. After further consideration and amendment the SALC issued Working Paper 54 in May 1994.⁷

This working paper examined unfair contract terms and the possibility / desirability of legislative control thereof. After some amendments to the Working Paper the Law Commission issued Discussion Paper 65: Project 47 in July 1996 which contained its prima facie findings regarding unfair contracts and their legislative control.⁸ The project aims to address the following question: Should the courts be enabled to remedy contracts or contractual terms that are unjust or unconscionable and thus be enabled to modify the application of such contracts or terms to particular situations before the courts so as to avoid injustices which would otherwise ensue?⁹

The discussion paper identified three approaches to the above question, which to my mind embody three different stories we tell about the South African law of contract. I also believe that these approaches again reflect the fundamental contradiction and specific positions within the duality of substance and form as discussed in Chapter 3. The three approaches are as follows:

⁵ AJ Kerr 'Does a claim for rectification depend on a mistake having been made and/or upon the requirements of the *exceptio doli generalis* being met?' (1982) 45 *THRHR* 86. Also see J Jamneck 'Die Konsepwet op die Beheer van Kontraksbedinge, 1994' 1997(4) *JSAL* 637 note 1.

⁶ SA Law Commission Discussion Paper 65 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (July 1996) par 1.12.

⁷ SA Law Commission Working Paper 54 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1994).

⁸ SA Law Commission Discussion Paper 65 (note 6 above).

⁹ *Ibid* 1.

- The answer to the aforementioned question should be an unqualified ‘no’;
- The answer should be an unqualified ‘yes’;
- The answer should be a qualified ‘yes’.¹⁰

II THE NO ANSWER

The ‘no’ answer relies on the familiar arguments that a fairness criterion in the law of contract will give rise to large scale legal uncertainty, because parties will not be able to predict the outcome of their dispute and will thus not know whether the contract will be modified to the detriment of one or the other of them.¹¹ From the legal uncertainty argument flows the argument that a fairness criterion will in any event be counter productive, because no-one would longer want to contract with persons in relatively weaker socio-economic positions.¹² A further argument relates to that ever-present anxiety of the floodgates of litigation in cases where equity jurisdiction becomes part of the playing field.¹³ The fourth argument of the ‘no’ approach holds that it is in any event unnecessary, because other constructions like error, metus and contractual misrepresentation, already assist the prejudiced party in circumstances of contractual inequity.¹⁴

¹⁰ Ibid par 1.5

¹¹ Ibid 2.

¹² Ibid par 1.6.

¹³ Ibid.

¹⁴ Ibid par 1.7.

III RESPONSE TO THE ‘NO’ ARGUMENTS

Those who feel themselves opposed to this tale of the law of contract point out that the adequacy of this indirect operation of fairness in the law of contract via the constructions affecting consensus, has been questioned.¹⁵ The fact that cases with factual scenarios indicative of contractual positions of extreme inequity, make it to the Supreme Court of Appeal in this day and age of escalating litigation costs, can leave one only to wonder how many cases of substantial contractual inequity are out there which never reach the courts – both where the unfairness is manifest within the delineated structures of the doctrines affecting consensus and where it is not. It is submitted that even if this number is grossly underestimated, it still suggests that the current accommodation of fairness *via* the indirect route of doctrines affecting consensus, is inadequate in that it does not send out a clear signal to the contracting public that unfair contracts will not be enforced.

With regard to the concern for the proliferation of contract law litigation which our courts will simply not be able to handle, the argument in my opinion loses sight of the problem of access to justice in South Africa, a detailed discussion of which falls outside of the scope of this study.¹⁶ Suffice it to say that there exists substantial proof that access to the courts (or other appropriate fora) is still very restricted in South Africa, especially in the context of private law litigation. If the so-called ‘have-nots’, for whose benefit it is trite the fairness criterion in contract will operate predominantly, are expected to flood the courts with litigation, the expectation is certainly over-estimated.

¹⁵ CFC van der Walt ‘Beheer oor onbillike kontrakbedinge – Quo vadis vanaf 15 Mei 1999?’ (2000) 1 *TSAR* 33,41.

¹⁶ This problem is discussed by A Pillay ‘Accessing justice in South Africa’ (2004) Paper presented at the Annual South North Exchange on Theory, Culture and Law, San Juan, Puerto Rico, 9-13 December 2004. (Copy on file with author).

It is a simple fact that those perceived beneficiaries of a fairness criterion in contract are at this point in time still the ‘have nots’ of adequate access to justice; those for whom there is simply no choice between going to court over an unfair contract or putting food in the mouths of hungry children. Kötz words a related problem as follows: ‘the unfair contract term will typically harm people who are too poor to pay for the expenses of litigation but are too “rich” to qualify for legal aid, if legal aid is available at all. Even where legal aid is available the persons affected may belong to population groups who lack the skills and sophistication required to make use of existing procedures’.¹⁷ One can add to this the fact that legal aid in South Africa is primarily concerned with providing aid to accused in criminal cases.¹⁸ It is, in any event, expected (and recent developments certainly indicate) that efforts to improve the adequacy of access to justice will (at least chronologically) parallel the occurrence of cases flowing from the enactment of an equity jurisdiction in contract – therefore the system may be said to at least have the potential to be developed so as not to have cases flowing from the equity jurisdiction in contract law to be stigmatised as resulting from the litigation paradise.

These responses however, feel that a preventative measure of control is necessary in the form of the office of an ombudsperson, in addition to the powers of the courts to control unfair contract terms.¹⁹

¹⁷ SA Law Commission Discussion Paper 65 (note 6 above) par 1.24.

¹⁸ See the South African Legal Aid Board qualification criteria for legal aid available at <http://www.legal-aid.co.za/services/qualifications.htm>.

¹⁹ SA Law Commission Discussion Paper 65 (note 6 above) par 1.20

IV THE UNQUALIFIED ‘YES’ ANSWER

The unqualified ‘yes’ answer is based on the principle that it is in the public interest to exercise social control over private volition in the law of contract. The discussion paper seems to accept it as given that: ‘[I]n modern contract law a balance has to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other.’²⁰ The discussion paper point out that public policy in recent times is more sensitive to concepts such as justice, fairness and equity than ever before.

The rise of the movement towards consumer protection, which served as a catalyst for the argument that legislative measures are needed to deal with contractual unfairness on a general level, is but one way in which this realisation has been borne out.²¹ The movement towards consumer protection pointed out that the traditional ways of dealing with contractual equity, namely interpretation and specific legislation dealing with certain types of unfair contracts, are insufficient. This has resulted in legislative measures taken in many foreign jurisdictions (most of them comparative) dealing with contractual unconscionability on a more general level. The legislative action in most instances is based on the principle of good faith.²²

In short, the proponents of the unqualified ‘yes’ answer hold the view that ‘modern social philosophy requires curial control over unconscionable contracts’²³ and that South Africa will be

²⁰ Ibid par 1.30.

²¹ Ibid par 1.44.

²² Ibid par 1.44 – 1.47.

²³ Ibid par 1.48. See in general JM Feinman ‘Critical Approaches to Contract Law’ (1983) 30 *UCLA LR* 829, 842-843; D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard LR* 1685 1717; P Selznick ‘The Idea of a Communitarian Morality’ (1987) 75 *California LR* 445.

rather the exception and its law of contract deficient in comparison with those foreign countries which recognise and require compliance with a standard of good faith in contract.²⁴

In one of a series of articles on the justifiability of a system of preventative control over freedom of contract in the South African law of contract, CFC Van der Walt makes the following claims and illuminates the following factors as socio-economic arguments in support of an approach focusing on contractual justice in South Africa.²⁵

Firstly, Van der Walt points out that the general reasons for support of a doctrine of contractual justice globally, also apply in the South African context.²⁶ These include the fact that classical nineteenth century economic premises and views on the relationship between the individual and the community has lost substantial ground to transformed views of the individual, groups and enterprises, the State and on economic premises themselves. These transformed views sparked research into the effect of contractual terms on the parties thereto and the joint conclusions from these studies generated a renewed realisation of and an emphasis on the ethical element of contract.²⁷ These transformed views hold ‘that the principles of good faith, based on public policy still plays and should play an important part in the South African law of contract as in any legal system which is sensitive to the views of the community who is ultimately the creators and users of the law in regard to the moral and ethical values of justice, fairness and decency.’²⁸

²⁴ SA Law Commission Report *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Report (April 1998) xiii.

²⁵ CFC Van der Walt ‘Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg’ 1993 (56) *THRHR* 65, 68-69.

²⁶ *Ibid* 68.

²⁷ *Ibid* 68-69, 76. May this be the almost lost memory of Aristotle finally again whispering in the ear of economists, philosophers, politicians and lawyers?

²⁸ SA Law Commission Report (note 24 above) 56.

Concerning the South Africa-specific issues in support of contractual justice, Van der Walt pointed out in the same article that the political, economic and social challenges that South Africa faces, makes it ‘urgently necessary’ that the formulation and pursuit of contractual justice should be revisited.²⁹ Further factors include the following:

- The transforming configuration of economic thrusts coupled with an increased use of standard term contracts over which control is required;
- The fact that South Africa has reached a phase of ‘from status to contract’ due to the abolishment of racially based legislation;
- The increased importance of the informal sector in the economy to which a substantial portion of the GDP is attributed;
- From the above two factors flow the realisation that newly gained freedom of contract rests in the hands of people who can barely communicate, least to say contract, in the predominant language of contract³⁰ and that it is the exploitation of their interests that needs to be guarded against;
- To the above one should add that 68%³¹ of the country’s population is partially or completely illiterate. (Of course a substantial part of newly gained freedom of contract also lies in the hands of these people who are even more vulnerable to exploitation);
- Increased urbanisation results in commercially inexperienced persons finding themselves in an environment of ‘contract or die’;

²⁹ Van der Walt ‘Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg’ (note 25 above).

³⁰ Most contracts in South Africa are concluded in Afrikaans or English which is the third or fourth language of a major part of the population.

³¹ Currently the statistics indicate that one in three South Africans aged 20 and older had not completed primary school or had no schooling at all. (Information obtained from <http://www.projectliteracy.org.za/>)

- The implicated ignorance of the law amongst the above mentioned categories of people. (To this may be added the cultural inheritance of an intense suspicion of the law);

The high poverty level in the country, coupled with the new human rights dispensation which implies affirmative action, creates increased expectations amongst the poor for means to achieve upliftment. It is submitted that a focus on contractual justice and control over freedom of contract is an indirect means of achieving upliftment or at the very least a means of preventing further social and economic decay. Carefully chosen government / judicial intervention have the potential to diminish the negative effects of the free market tradition and can lead to a better outcome for all. The complicated problem, however, is and remains the political one, namely who it is that will be responsible for the careful choosing.³²

V THE QUALIFIED ‘YES’ ANSWER

The qualified ‘yes’ answer rests on an attempt to achieve a balance between ‘the continued application of the existing law and the actuality of social reality,’³³ that is an attempt to balance the interests of fairness and justice in individual cases with those of certainty. The proponents of this approach are in favour of legislation introducing a doctrine of contractual unconscionability, but feel that it is necessary to delineate the scope and extent of such powers so as to provide concrete content to the general good faith and unconscionability criterion.³⁴ The approach favours the inclusion in legislation of guidelines to the courts with which its power of intervention can be limited and so indicating the ambit of the unconscionability doctrine – which will at the same

³² J Milnor ‘John Nash and “A Beautiful Mind”’ (1998) 45(10) *Notices of the AMS* 1329, 1332.

³³ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) 31C-D. (Author’s translation from the original Afrikaans.)

³⁴ SA Law Commission Discussion Paper 65 (note 6 above) par 1.49.

time afford the system a measure of legal certainty in the unconscionability context.³⁵ The research team of the Working Committee of the SALC held that the inclusion of guidelines in the proposed legislation were ‘indispensable for legal certainty’³⁶ and supported the inclusion of an open-ended list of guidelines, capable of being adapted to changed circumstances.³⁷

The Working Committee however did not support and in fact declared itself in the discussion paper ‘completely opposed’³⁸ to the incorporation of guidelines in the proposed legislation, primarily for the reason that it may result in the courts considering themselves bound exclusively by those guidelines even though the guidelines are open-ended.³⁹ The Working Committee foresees the potential danger that where an unfair situation is not covered or does not fall within the ambit of one of the guidelines, the court may find that the specific term is not unfair.⁴⁰ With regard to the question whether the proposed legislation should apply to all types of contract, the Working Committee is again opposed to any restriction of the application of the proposed legislation, primarily because it does not follow, according to the Committee, that provisions in existing legislation aimed at curbing unfairness, will necessarily result in contracts connected with the legislation being fair.⁴¹

With regard to a waiver of the benefit of the proposed legislation the Working Committee proposed that it should not be possible to waive the benefit of the proposed Act and advocated

³⁵ Ibid par 1.52-1.54.

³⁶ Ibid par 1.55.

³⁷ Ibid.

³⁸ Ibid par 1.57.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid par 1.62.

the inclusion of a provision in the proposed Act to the effect that all clauses purporting to exclude the provisions of the proposed Act, shall be void.⁴²

VI THE 'OFFICIAL' STORY

The Law Commission never supported the 'no' approach and stated its position regarding the objections held by the 'no'-ists as follows:

The Commission is, however, of the view that this is a price that must be paid if greater contractual justice is to be achieved, that certainty is not the only goal of contract law, or of any other law, and lastly in any event, that the fears provoked by the proposed Bill are exaggerated, in the light of the experience of countries that have already introduced such legislation.

After having received and reviewed comments by a number of respondents,⁴³ however, it appeared that the Law Commission was no longer opposed to the enactment of guidelines and also changed its view that the proposed Act's application should not be restricted.⁴⁴ The arguments tendered by the different respondents, feature within the framework of the different approaches I have indicated above. Some of the respondents welcomed the qualified 'yes' approach, others were completely opposed to it and others still, held the opinion that a qualified 'yes' approach was the correct one to recommend to Parliament. In April 1998 the SALC issued

⁴² Ibid.

⁴³ See the list of respondents in SA Law Commission Report *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (note 24 above) Annexure C, 226.

⁴⁴ Ibid par 1.7.

its Final Report on Project 47 in which it opted to recommend to Parliament the qualified ‘yes’ approach.⁴⁵

In a report running over 200 pages the Commission dealt with each of the further objections and recommendations and concluded as follows:

The Commission is finally of the view that reform is called for and that legislation is the most viable and expedient method to effect legal reform. The Commission is of the view that there is a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced. The Commission consequently recommends the enactment of legislation addressing this issue.⁴⁶

The Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms was proposed by the SALC as the final product of decade long efforts to achieve a more just South African law of contract.⁴⁷ The Bill envisages both judicial and preventative control over unfair contracts. But it is into Parliament where the trail becomes cold. The above mentioned Bill was tabled before Parliament on the 18th of September 1998 but the SALC has confirmed that Parliament is currently not dealing with Project 47 and Cabinet has not been approached for leave to promote the legislation.⁴⁸

⁴⁵ Ibid.

⁴⁶ Ibid xiii.

⁴⁷ See Ibid Annexure A

⁴⁸ CFC Van der Walt ‘Beheer oor Onbillike Kontraksbedinge – *Quo vadis* vanaf 15 Mei 1999?’ (note 15 above)

Van der Walt has argued that there is an urgent need for liaison within Parliament over the road ahead and that active deliberation will have to take place within the portfolio committees and parliamentary processes to iron out the possible difficulties with implementation of the legislative control of unfair contracts.⁴⁹ Van der Walt has also suggested some valuable methods to deal with the interim phase until an office of ombudsperson has been set up through which the control of unfair contracts can become reality.⁵⁰ However, very little seems to have followed from this. We remain thus without a facilitator other than the courts to bring us closer to a public deliberation about contractual justice.⁵¹

In the meantime, as we have seen, the ‘no’ approach prevails on the pages of the law reports and this is, until further notice (if any) the legal position in respect of unfair contracts in South Africa. This is a position which does not differ in any great parts from the position before enactment of

⁴⁹ Ibid.

⁵⁰ Ibid 50-51.

⁵¹ A ray of light in this dark labyrinth is the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 and the commencement in 1999 of the Consumer Affairs Act 7 of 1996 which established the Gauteng consumer protector and consumer affairs court. Other provinces have similar legislation but have not yet been able to set up their courts. These courts are said to extend protection to consumers against unfair business practices (which can include unfair contracts). Most of the cases in these courts have been settled out of court up to now. These Acts do not however, change or amend the law of contract applicable to these agreements where the emphasis remains on freedom of contract. While it can indeed be argued that it creates an increased awareness of the ethical element of contract (good faith bargaining), the national act, for instance, provides for elaborate investigations and referral of reports on the alleged unfair business practice by a committee to the Minister who may then make the decision as to the unfairness of the business practice (agreement) in question. It is submitted that these courts will remain inefficient where the law pertaining to the agreements is not also transformed, seeing that the committee as well as the Minister will be influenced in their decisions by the law applicable to the agreement. Furthermore, these Acts do not change the position where unfair contracts are before an ordinary court of law.

the Constitution, except that it has been constitutionally whitewashed by the Supreme Court of Appeal.

VII CONCLUSION

Christie deals in the latest edition of his text on the South African law of Contract with unfair contracts under the heading ‘Current Problems’.⁵² Initially Christie acknowledges that *pacta servanda sunt* is necessary as a general principle, but adds that the enforcement of an unfair contract (note unfair, not extremely unfair) cannot be justified on any grounds. Furthermore, Christie appears to be of the view that it is an objective fact that the conclusion, terms or enforcement of contracts are often unfair.⁵³ Christie concludes in this respect by stating that he is of the opinion that legislation would prove to be unnecessary were the office of an ombudsman introduced who would have the capacity to bring test cases through which the courts’ existing common law powers may be expanded - but he quickly adds that the Supreme Court of Appeal may of course fail the test.⁵⁴

To my mind the problem with this lies in the courts’ perceptions of what an appropriate test case will be. We have already seen how our courts have fallen into a tendency of indirect application of fairness to the law of contract. In the light of the facts in *Brisley* and *Afrox* it is almost beyond imagination to picture a factual scenario which would warrant that the South African positive law, after all these years and a constitutional transformation, suddenly change its approach. It is more probable than not that our courts are, from this predisposition, in any event not in a position to recognise a test case when it is brought. In my view the underlying principle of *pacta servanda*

⁵² RH Christie *The Law of Contract* (4ed) (2001) 14.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

sunt is rooted so deeply in the paradigm of the South African judiciary that the office of an ombudsperson with the ability to bring test cases will be inefficient and a waste of time, *unless* the courts are compelled by legislation to apply fairness directly (in the form of a good faith jurisdiction) to the law of contract.

No matter how acceptable, virtuous and admirable minority judgments and bills are, they have only persuasive authority in the South African law. One can only hope that the persuasive authority of these sources will, in time, culminate in a new approach to the law of contract; whether this happens through implementation of legislation or a transformative interpretation of constitutional values as they apply to the law of contract. What is clear is that the existing common law powers of the court are inadequate to bring about transformation. Even where it is accepted that the open-ended values of the common law of contract (eg good faith, public policy, *boni mores*, reasonableness and fairness) exist in theory as common law powers, everything that foregoes this conclusion indicate that the courts will either decline to employ them or employ them in an essentially classical liberalist way which falls far short from what is envisaged by a post-constitutional law of contract.

The sounds of an approaching reform can, nevertheless, be heard above the white noise generated by the liberalist rhetoric. The fact that comparative jurisdictions have already adopted similar legislation, the fact that the Law Commission sticks to its view that legislation is the only way in which fairness will significantly infuse the law of contract, the creation of unfair business practices courts as well as increasingly convincing pleas of academics in this context all places significant pressure on and problematises the legitimate perpetuation of the traditional approach. In spite of the current position, it can thus no longer be denied that the law of contract in South Africa, now more than ever, finds herself on the verge of reform.