THE IMPACT OF THE CONSTITUTION ON THE LAW OF CONTRACT IN SOUTH AFRICA

By

KRISTEN SPRIGHTON

U16088825

Submitted in partial fulfilment of the requirements for the degree of

LLM

In the Faculty of Private Law,

University of Pretoria

Prepared under the supervision of:

Professor SJ Cornelius

DATE SUBMITTED: FEBRUARY 2023

TABLE OF CONTENTS

1 THE IMPACT OF THE BILL OF RIGHTS ON THE COMMON LAW OF CONTRACT

1 1 INTRODUCTION

In *Pharmaceutical Manufacturers of South Africa* [1], the Constitutional Court held that:

> "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to Constitutional control."

South Africa entered into a new era with the advent of the new constitutional dispensation, first by the Interim Constitution in 1994[2] and thereafter by the Constitution in 1996[3], which heralded a new era of constitutionalism and a paradigmatic shift from parliamentary sovereignty to constitutional supremacy. For the first time, a justiciable Bill of Rights was entrenched in the Constitution and has become 'the frame of reference within which everything must function and against which all actions must be tested.'[4] The adoption of 1996 Constitution and the incorporation of a justiciable Bill of Rights into our legal system has provided a new South African jurisprudence which has been described by Klare as being *post-liberal and transformative in nature*.[5]

The Bill of Rights in Chapter 2 of the 1996 Constitution is horizontally applicable.[6] What this means is that the domain of the Bill of Rights extends beyond the traditional constitutional supervision of public power, it also seeks to deal with private power as exercised between private individuals and sanctioned by the long-established common law.[7] Traditionally the relationship between private persons was not governed by public law. However, the transformative Constitution of South Africa included 'private spheres' to be regulated by constitutional law and subjected to

---

[1] *Pharmaceutical Manufacturers of South Africa: In ex re parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44.

[2] Constitution of the Republic of South Africa Act 200 of 1993 (hereafter referred to as the 1993 interim Constitution).

[3] Constitution of the Republic of South Africa, 1996 (hereafter referred to as the 1996 Constitution).

[4] Botha *Statutory Interpretation* (5th edition) at 184.

[5] Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* at 146.

[6] As per ss 8 and 39(2) of the Constitution.

[7] Bhana D, "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.

consistency with human rights standards and values of the Constitution.[8] What this means for the common law of contract is that accordingly, if the substantively progressive and transformative vision of the Constitution is to become a reality in South Africa, then contract law must conform and if necessary be aligned with our Constitutional goals. This is essential in moving forward as the common law of contract is not to be trapped within the limitations of the past and must thus, seek renewed validation both in terms of the constitutional values of *freedom, dignity and equality* as well as any applicable fundamental rights as set out in the Bill of rights.[9]

1 2 RESEARCH QUESTION AND OBJECTIVE:

This begs the question as to the extent to which the horizontal application of the Bill of Rights impacts and/or permeates the current common law system of contract law in South Africa. This dissertation aims to resolve and analyse this question in chapters to follow. This question of horizontal application was finally confirmed by the 1996 Constitution. In reaction to the application debate on the matter to what extent the Bill of Rights applied to private matters, the Constitutional assembly when drafting the 1996 Constitution, specifically noted that if we were to maintain the position confirmed in the *De Klerk*[10] case, we would not achieve the social engineering that we seeking to achieve and addressing the injustices/imbalances of the past if that was to be the case and that is why the Constitution specifically drafted to provide for horizontal application. Therefore, as a result of *Du Plessis v De Klerk* limited the application of the Bill to state action, section 8(2) was specifically included in the 1996 Constitution which provides:

> 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.

Section 8(2) sanctions for indirect horizontality to this extent that the Constitutional Assembly opted for the approach as laid out in the *Motala* case[11] whereby, the court

[8] Pieterse 'What do we Mean When We Talk about Transformative Constitutionalism' (2005) 20 *SAPL* at 162.
[9] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para 84.
[10] That the Bill of Rights has horizontal application but only applies in the traditional way that most Bill of Rights would have applied in that it only effects government action and does not apply to regulate individual conduct amongst each other, the citizens of the country.
[11] *Motala and another v University of Natal* 1995 (3) BCLR 374 (D).

recognised that certain rights can only have vertical application, such as the right to citizenship,[12] while other rights may have direct or indirect horizontal application such as the right to fair labour practices.[13]

However, it must emphasised that the Bill of Rights and the impact/reach it has on the law of contract is mainly a constitutional matter, which Cornelius explains is a branch of public law.[14] The broader category of public law concerns itself mainly with public or general interests.[15] Thus, it can be argued that the horizontal application of the Bill of Rights on Contract Law (specifically private conduct), ultimately did sanction some form of indirect horizontality in that the Bill of Rights should regulate law rather than conduct.[16] So, the key would be to focus on the constitutional muster of the applicable rules (and standards) of the common law and not the conduct of the parties per se. Therefore, when considering the applicability of the Bill of Rights to the law of contract and/or to an individual contract, what must be considered is the 'public or private' nature of the transaction or agreement.[17] Cornelius defines the 'public' and 'private' nature of a transaction to mean the extent of accessibility or inaccessibility of that transaction to the general members of society. [18] Therefore, what is meant by the 'public' nature of a transaction is that the Bill of Rights will apply more readily and more strictly to transactions that concern the general interests of the public such as banking or insurance and retail shopping.[19] Whereas, transactions of a 'private' nature' finds less direct applicability on the Bill of Rights to such transactions to which public access is limited for example to contracts for the establishment of private clubs or matters concerning family members.[20]

As so far as the application of the Bill of Rights of the 1996 Constitution is concerned, the horizontality debate is centred around whether direct or indirect horizontal application is to be preferred, the received premise being that the Bill of Rights must

---

[12] S 20 of the 1996 Constitution.
[13] S 23(1).
[14] Cornelius *Principles of the Interpretation of Contracts* (2016).
[15] *Ibid.*
[16] Bhana D, "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.
[17] Cornelius *Principles of the Interpretation of Contracts* (2016).
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

apply to contract law and the interpretation of contracts in particular.[21] In this respect, section 8(2) and 8(3) of the 1996 Constitution has been the centre stage of debate when it comes to direct and indirect application of the Bill of Rights to private disputes.

1 3 RESEARCH METHODOLOGY AND OUTLINE

Chapter 1 sets the tone for the dissertation by analysing the question as to the extent to which the horizontal application of the Bill of Rights impacts and/or permeates the current common law system of contract law in South Africa. This study primarily aims to consider the impact of the Constitution on the Law of Contract in South Africa by primarily focusing on the areas of restraint of trade as well as the interpretation of contracts.

For this purpose, in Chapter 2 below, I begin by considering the extent to which the Bill of Rights impacts our current common law of contract. I provide a brief outline on the operation and application of sections 8 and 39(2) of the Bill of Rights for all contract matters with a view to it sanctioning a return to the value-based methodology or indirect horizontality through the common law framework.

Then in Chapter 3, I revisit the Supreme Court of Appeal's and Constitutional Court's approach to the constitutionalisation of contract law. I review the main contract law cases and most noteworthy judgements of *Brisley v Drotsky and Afrox Healthcare Bpk v Strydom.*[22] Such seminal judgements were able to qualify our foundational constitutional values of freedom, dignity and equality within the common law framework. These judgements have become the foundation of further SCA and Constitutional Court judgments which show that the courts have moved to a more liberal approach by applying a value-based methodology (teleological theory) while adjudicating and interpreting contracts. Though *Brisley and Afrox* ostensibly aligned the common law of contract with the Bill of Rights which in essence outlines the scope (content) of horizontal application of the Bill of Rights, it must be noted that the cases do not provide clear guidance in terms of the form (method) of such application - being direct or indirect application. The 1996 Constitution demands the courts to apply a

[21] Bhana D, "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.
[22] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

more value-orientated approach when adjudicating and interpreting contracts. However, this horizontal application of the Bill of Rights (either direct or indirect) provides quite a large scope as to how the values of the Constitution can be incorporated into the law of contract.[23] Thus, when one considers the question of how the values of the 1996 Constitution impact the law of contract and specifically the indirect horizontal application of the Bill of rights to contracts, one must take into consideration that fact that constitutional interpretation has a much more subtle impact and is easily overlooked if one is not studying the interpretation and drafting of contracts in detail.

It is against this backdrop; I review how these values have been incorporated into the law of contract by primarily focusing on the areas of restraint of trade. I discuss the seminal judgements found in *Magna Alloys v Ellis,* [24] *Knox D'Arcy Ltd v Shaw,* [25] *Polygraph Center - Central Provinces CC v Venter and another.*[26]

In the end of Chapter 3, I do the likewise in relation to the interpretation of contracts by reviewing Barkhuizen v Napier,[27] and *Beadica 231 CC and Others v Trustees*.[28] *Beadica* brings us to the most recent case of the Constitutional Court in relation to the constitutionalisation of the common law of contract and specifically deals with the enforcement of a renewal clause.

Finally, I conclude that after analysing the applicable Constitutional provisions namely sections 8 and 39(2) of the 1996 Constitution and seeing how courts have proceeded to follow an indirect horizontal approach while adjudicating and interpreting contracts. By reading these provisions of the 1996 Constitution in accordance with the restraint of trade and the enforcement of a renewal clause case law shows a strong indication that the drafters of the Constitutional Assembly actually did not envision the provisions of Chapter 2 Bill of Rights having direct horizontal application, in that we are not going to measure each individual contract against the Bill of Rights but instead measure the law of contract against the Bill of Rights value system

[23] As per sections 8(2) and 8(3) of the 1996 Constitution.
[24] 1984 4 SA 874 A.
[25] 1996 2 SA 651 A.
[26] [2006] 4 All SA 612 (SCA).
[27] 2007 5 SA 323 (CC) .
[28] Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 ZACC 13.

2 OPERATION AND APPLICATION

2 1 INTRODUCTION

As indicated in Chapter 1, the level of application of the Bill of Rights contained in Chapter 2 of the 1996 Constitution has been determined, the received premise being that the Bill of Rights must apply to contract law, the effect of the Bill of Rights on the adjudication and interpretation should be considered. Before discussing the effect that the Bill of Rights has on contracts (private sphere), one must first consider the extent to which the 1996 Constitution guarantees or limits the right to contractual freedom and sanctity of contracts.

Freedom of contract forms the foundation of the classical theory of contract, which still informs the South African law of contract regardless of the fact that social and political values and conditions have changed.[29] Contractual freedom dictates that the creation of a contract is through free choice and that the state should therefore, not interfere - the idea is here, that people are free to decide whether, with whom and on what terms to contract, which is known as party autonomy. [30]

The law of contract is concerned with the enforcement of obligations. Thus, the principle of freedom of contract limits state interference and promotes individualism to an extent that it can be said that the law of contract maximises the liberty of the individual.[31] Contractual freedom has been recognised by our courts in *Barkhuizen v Napier*[32] whereby, the Constitutional Court confirmed that, 'freedom of contract has been said to lie at the heart of constitutionalised prized values of dignity and autonomy.'[33] Our courts thus, recognise freedom of contract as a Constitutional right and are not particularly concerned with the substantive fairness of a contract but instead will enforce a contract provided the parties entered into the agreement voluntarily. The justification behind contractual freedom namely being - the fact that contracts freely and fairly entered will be enforced promotes both legal and commercial

[29] Hawthorne (1995) 157.
[30] Pillay "The Impact of pacta sunt servanda in the Law of contract' (2015).
[31] *Ibid.*
[32] *Barkhuizen v Napier* 2007 5 SA 323 (CC).
[33] *Barkhuizen* at para 15.

certainty which is a key component to a flourishing and free-market South African economy. [34]

The extent to which the 1996 Constitution guarantees or limits the right to contractual freedom was explained by Malan[35] as:

> this right is currently subsisting in diluted form in section 22 [of the 1996 Constitution] providing for the right of every citizen to freely choose his or her trade or profession subject to legal regulations.
>
> Secondly, the constitutional proscription of unfair discrimination by individuals in the private sphere (section 9(4) [of the 1996 Constitution]) also contains an inherent restriction upon the right to free economic activity, since freedom gives rise to inequality and discrimination.
>
> Thirdly, it may be argued that the insertion of equality before freedom both in the limitation clause of section 36(1) [of the 1996 Constitution] as well as in the interpretation clause in section 39(1)(a) [of the 1996 Constitution] (in contrast to the opposite position under the [1993] Constitution), suggests that whenever the values of liberty and equality are at loggerheads, the latter should take precedence.
>
> The cumulative effect of these considerations (together with the explicit recognition of certain socio-economic rights in sections 26 and 27 [of the 1996 Constitution]) proves that the current bill of rights undoubtedly slants in an egalitarian and socialist (or social democratic) direction. This is obviously inimical to the traditional liberal-capitalist doctrine of *pacta sunt servanda* which favours liberty to equality, and provides a further impetus to restrict freedom of contract in favour of an endeavour to promote equality in the sphere of contractual relationships.

As far as the principle of freedom of contract and the effect of the Bill of Rights on the common law of contract is concerned, there has been a considerable amount of ambivalence as to the extent and manner in which the Bill of Rights impacts the notion of contractual freedom and party autonomy. This begs the question of whether individual contracts should be measured against the provisions of the Bill of Rights, or whether a more indirect approach should be followed.

---

[34] Pillay "The Impact of Pacta sunt Servanda in the Law of Contract' (2015).
[35] Malan K *Fundamental Rights: Themes and Trends* at E7-7.

2 2 THE APPLICATION DEBATE: DIRECT VERSUS INDIRECT HORIZONTALITY

The 1996 Constitution introduced a legal dispensation in South Africa in which the Bill of Rights embodied in Chapter 2, the cornerstone of public law legal relations, also came to play a fundamental role in private law legal relations.[36] At issue in the jurisprudence of (what is generally referred to as) horizontal application is the extent to which the Bill of Rights not only binds the state, but also private legal subjects.[37] As so far as the application of the Bill of Rights of the 1996 Constitution is concerned, the horizontality debate is centred around whether direct or indirect horizontal application is to be preferred. The received premise being that the Bill of Rights must apply to contract law and the interpretation of contracts in particular.[38] The difference between direct and indirect horizontal application of the Bill of Rights is that direct application means that individual contracts can be measured against the provisions in the Bill of rights. Indirect application means that the law of contract is measured against the Bill of Rights. So, the Bill of Rights only affects individual contracts in so far as it impacts on the law of contract.

In this respect, section 8(2) and 8(3) of the 1996 Constitution has been the centre stage of debate when it comes to direct and indirect application of the Bill of Rights to private disputes. Before discussing the form of application, the scope(content) leg of the horizontality debate will first be analysed. Van Der Walt[39] provides that the horizontal application of the Bill of Rights rests on no less than four provisions in the 1996 Constitution:

1) Section 8(1): 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2) Section 8(2): 'A provision in the Bill of Rights binds a natural or a 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.'

---

[36] Van der Walt "Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common Law and Constitutional Jurisprudence" 2001 *SAJHR* 341.
[37] *Ibid.*
[38] Bhana D, "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.
[39] Van der Walt "Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common Law and Constitutional Jurisprudence" 2001 *SAJHR* 341.

3) Section 8(3): 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.'

4) Section 39(2): 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

2 3 SECTION 8(2):

Section 8(2) of the Constitution reads:

> A provision in the Bill of Rights binds a natural or a 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.

This section clearly provides for horizontal application as the 'natural or juristic' counterparts relate to the binding of *private persons* to the Bill of Rights.[40] Section 8(2) was specifically included into the 1996 Constitution in order to move forward from the traditional verticalist constitutional framework and the attendant vertical-horizontal distinction, as contemplated by *Du Plessis v De Klerk,*[41] to provide specifically for horizontal application thus, binding private persons (private contracting parties) to the Bill of Rights. Therefore, there is no doubt that section 8(2) provides for horizontal application of the Bill of Rights. However, the question that arises is, *how do we effect that?* What this means is that section 8(2) intimates the extent of horizontal application in its proposed binding of such private conduct that are legally to be subjected to the Bill of Rights. However, it is unclear whether this section provides for direct or indirect horizontality.[42]

The South African distinction between direct and indirect horizontality depends mainly on whether or not the common law acts as the portal through which the Bill of Rights applies to a legal dispute between private individuals.[43] Bhana indicates that:

---

[40] *Ibid.* Emphasis as per the original text.
[41] *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC).
[42] Bhana , "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.
[43] Ibid.

> Indirect horizontality contemplates an indirect application of the Bill of Rights to private legal disputes by way of an intermediate invocation of the common law framework, together with its legal process of interpreting, applying and (where required), developing new common law rules and standards, in accordance with the dictates of the Bill of Rights.
>
> Direct horizontality, in contrast, contemplates a direct application of the Bill of Rights to the conduct of private individuals, meaning that a plaintiff can rely directly on a particular substantive right, (insofar as it is applicable to private individuals), to found a cause of action and the defendant, likewise is able to do so for the purpose of raising a defence.[44]

The above distinction reflects the conventional distinction between law and conduct from the 1993 interim Constitution[45]. Van Der Walt favours this direct application in which he submits that one should be in the position to measure specific conduct or a specific contract against the provisions of the Bill of Rights.[46] As mentioned earlier, under the 1993 Interim Constitution there was no clear indication of horizontal application except for section 35(3),[47] in terms of which, it was argued in the *De Klerk* case that the Bill of Rights should regulate law rather than conduct.[48] So, the key would be to focus on the constitutional muster of the applicable rules (and standards) of the common law and not the conduct of the parties per se.[49] The 1996 Constitution has clarified this first leg of direct indirect horizontality debate inasmuch as it accepts and delineates the scope of horizontal application of the Bill of Rights, it also adopts as the basic principle for the ensuing form of such application, that the common law must act as the medium through which private conduct is subjected to the Bill of Rights.[50] Van Aswegen contextualises this point by stating that a contract of which the conclusion, performance or purpose is contrary to statute or common law is unlawful [51] Apart from

---

[44] *Ibid.*

[45] *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC).

[46] Van der Walt (2001) *SAJHR* 341.

[47] Section 35(3) of the 1993 Interim Constitution reads:

> "in the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirt, purport and objects of this Chapter.'

[48] *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC).

[49] Bhana, (2015) 10.

[50] *Barkhuizen v Napier* 2007 5 SA 323 (CC): The Constitutional Court basically held that as between private contractants, the Bill of Rights can only apply indirectly to a contract, by way of an invocation of the common law of contract's standards of public policy.

[51] Van Aswegen "The Implication of a Bill of Rights for the Law of Contract and Delict" 1995 *SAJHR* 50.

the relatively rare instances where a statutory enactment or common law rule explicitly declares a particular contract or type of contract illegal, contracts are held to be illegal when they are contrary to public policy or good morals (*contra boni mores*).[52] Since the object of the common law has always been to regulate such private conduct which it deems worthy of legal protection, this stands to reason, where the extant law fails (effectively) to distinguish such private conduct, which the Bill of Rights would now insist upon regulating, it would be the *law* that would need to be reformed accordingly.[53] Bhana thus, contemplates the secondary level of the 'direct-indirect' horizontality distinction that is brought into play:

The first leg of the direct versus indirect horizontality debate concerned the law versus conduct which was ultimately, confirmed by the 1996 Constitution as per sections 8 and section 39(2). The second leg of the debate concerns a rights based versus values based analysis.[54] This stage of the debate concerns mainly whether the Bill of Rights applies directly or indirectly to the common law. Bhana explains the second leg:

> *Direct horizontality entails a rights-based analysis in terms of which the common law (a particular conduct or contract) is tested directly against a substantive right as embodied in the relevant provisions of the Bill of Rights. In other words, direct horizontality contemplates the testing of common law rules and standards outside of the traditional common law framework. Rather, the Bill of Rights' legal framework, (coupled with its methodology) finds application.*[55]

Direct horizontality concerns the substantive right that is invoked by the claimant and considers whether firstly, it horizontally applicable, secondly whether it has been infringed by a common law rule or standard, and thirdly whether such infringement of such right is reasonable and justifiable limitation in terms of section 36(1) of the Constitution.[56] By following the direct horizontality route in remedying the situation, the courts have a variety of *constitutional remedies* at their disposal. Namely developing, striking down or even replacing the common law- ultimately a constitutional body of contract law, as per the Bill of Rights framework, is envisaged.[57]

---

[52] *Ibid.*
[53] As per section 8(2) read with section 8(3) of the Constitution.
[54] Bhana (2015) 12.
[55] Ibid.
[56] Ibid.
[57] Bhana (2015) 13.

Therefore, direct application of the Bill of Rights in relation to contracts between private parties would entail abandoning the common law of contract's methodology in favour of the Bill of Rights' methodology.[58] The direct application of the Bill of Rights to contractual disputes poses a risk of two sets of common law - on the undesirability of a 'bifurcated' approach where constitutional rules rather than common law rules would apply. Presumably this would mean, the parallel *constitutional* law of contract, as developed by the direct horizontal application of the Bill of Rights, eventually will replace its common law counterpart. [59] Therefore, the *constitutional* law (a direct application of the Bill of Rights) of contract poses a serious risk of being piecemeal, incomplete, and unpredictable -surely not what the drafters of the Constitutional Assembly would have envisaged.

The indirect horizontality in contrast, entails a what Bhana calls:a *value-based analysis* in terms of which:

> the Bill of Rights constitutes the 'objective, normative value system' that must inform the interpretation, application and development of the rules (standards and remedies) of the common law. The indirect horizontality approach contemplates the application of the Bill of Rights to the common law of contract from within- meaning by invocation of the common law's legal framework, coupled with its concepts and methodology.[60]

Therefore, by incorporating the common law of contract, the current portal of horizontal application would be evaluated through the doctrine of legality and the public policy scale.[61] The doctrine of legality governs the reach of contractual autonomy and provides for the legality in which contracts should be measured against in light of competing policy considerations and foundation contract law values-namely freedom of contract and good faith.[62] Public policy serves as the guideline in which the legal as well as the socio-economic desirability of contracts are to be determined. Therefore, by using an indirect horizontal application through the common law framework would continue to invoke the legality doctrine's public policy scale but at

---

[58] *Ibid*.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*

the same time to infuse its content and methodology with the values encapsulated in the Bill of Rights.[63]

Cornelius agrees with the above approach as he argues that again, specifically going back to Roman-Dutch roots of the common law we find that there is no need to directly invoke the Constitution (specifically provisions of the Bill of Rights) because the common law a similar or mostly provides the same result. Thus, by using the indirect approach, one is actually reshaping the common law to become constitutional through the public policy portal. If judges were to rely on the common law of contract properly as in the case of *Highlands Park Football Club Ltd v Viljoen and Another*[64] in comparison with the case of *Coetzee v Comitis,*[65] there would be no need to invoke specific provisions of the Bill of Rights and courts could simply interpret contracts in a way to correctly use a value-based approach from within the common law framework. The results of the cases were exactly the same however, the first was decided before the new Constitution under the common law and the latter was decided based on direct application of the Bill of Rights.

2 3 1 *Highlands Park Football Club Ltd v Viljoen and Another*[66]

The *Highlands Park*[67] case illustrates how the common law of contract was specifically designed to protect people. In this case Highlands Football Club sought an interdict against one of their players (the second respondent) for playing professional football for any club in South Africa other than the applicant.[68] The order was based on a clause in the contract which basically constituted a restraint of trade against the second applicant after the contract had come to an end. The clause read as follows:

> "The player agrees, undertakes and binds himself that on the expiry of this agreement and unless and until he is formally transferred by the Club to another club, he will not for a period of three years after the date of such expiry play professional football in the Republic of South Africa, save with prior written permission of the Club."

The court found that under common law it was unreasonable to prevent the second respondent from plying his trade elsewhere in South Africa. In reaching its decision,

---

[63] *Ibid.*
[64] *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) at p. 192.
[65] *Coetzee v Comitis* 2001 1 SA 1254 (C).
[66] 1978 (3) SA 191 (W) at p. 192.
[67] *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) at p. 202.
[68] Mould and Cornelius, "The Case for Specific Performance as remedy for breach of athlete's contracts" 2017.

the court depended on certain principles of labour law which suggested that an employee should not be "debarred from exercising his skills, knowledge and service to the advantage of both himself and the State."[69] Furthermore, the court decided that "a man's aptitudes, his skill, his dexterity and his manual and mental ability are not his master's property, but his own.' Finally, the court stated that an employer could not protect himself from his servant's competition after the contract of employment had already expired.[70]Consequently, the court refused to grant the interdict sought.

2 3 2 *Coetzee v Comitis*[71]

In terms of the *Coetzee* case,[72] the facts were very similar to the above. The rules of the National Soccer League ("NSL") provided that any footballer wishing to play professional football had to register with the NSL. They provided further that a professional footballer was required to obtain a clearance certificate from his club before he could be registered by the NSL as a player of a new club. If such a player concluded a contract with a new club, his former club was entitled to compensation. If a player stopped playing competitive football upon the expiry of his contract, he remained registered as a player of the club with which he was last employed for a period of 30 months, after which the club was no longer entitled to compensation. An arbitrator would calculate the amount of the compensation payable (in the event that the two clubs could not agree upon the amount of compensation), in terms of a pre-set formula. This formula did not take into account factors personal to the player. The player was unable to register with the new club before the compensation was set and paid.

The applicant was a professional footballer. He applied for an order declaring that the NSL's constitution, rules and regulations relating to the transfer of professional soccer players were contrary to public policy and unlawful. He further requested an order that NSL's constitution, rules and regulations be declared inconsistent with the provisions of the Constitution and therefore invalid. The applicant brought the application both in his personal capacity and as a class action on behalf of other players. The NSL opposed the application and, *inter alia*, contended that the applicant lacked *locus*

[69] *Ibid.*
[70] *Ibid.*
[71] *Coetzee v Comitis* 2001 1 SA 1254 (C).
[72] *Coetzee v Comitis* 2001 1 SA 1254 (C).

standi to bring the application. It further contended that the applicant had entered into the contract with his previous club freely and voluntarily and thus the contract, which was in terms of the NSL's rules, did not violate his rights to freedom of movement, the right to choose a profession or occupation freely and the right to dignity in terms of section 21, section 22 and section 10 of the Constitution. The court held that the compensation regime constituted a restraint of trade, which was unreasonable. Public policy required that it be declared unlawful and inconsistent with the provisions of the Constitution, and therefore invalid.[73]

The court held the skills that the player learnt as a football player belongs to him as a football player and what the club is doing is anti-competitive which is contrary to public policy. The court referred to section 22 of the 1996 Constitution and applied it directly.[74] This rule in NSL is another contract, and this rule violates section 22 and thus NSL must amend it or revoke it.

However, if the court was to rely on the common law correctly, in line with the decision in *Magna Alloys* and in the *Highlands Park* case*,* in that the court found that the compensation regime constituted a restraint of trade which was unreasonable and against public policy. Thus, under common law this restraint is not permissible, and section 22 re-affirms the common law position.

As Devenish stated before the introduction of a justiciable Bill of Rights included in our 1996 Constitution, the so-called presumptions of interpretation could however, be considered as a surrogate for a Bill of Rights since, considered as a whole, they reflect overwhelmingly the libertarian ethos of our common law.[75] Devenish continues by stating that, 'the various assumptions can be viewed as the court's effort to provide, in effect, a common law Bill of Rights-a protection of the civil liberties of the individual against invasion by the state.[76] David Dyzenhaus agrees with Devenish's view as he states that before the inclusion of the Bill of Rights into our 1996 Constitution, it was often argued before courts by lawyers that judges should read statutes (all legal instruments) in light of the common law presumptions.[77] In the absence of a Bill of

[73] *Coetzee v Comitis* par 41.

[74] Section 22 of the 1996 Constitution reads:

> 'Every citizen has the right to choose their trade, occupation or profession freely. the practice of a trade, occupation or profession may be regulated by law.'

[75] Devenish *Interpretation of Statues* at 42-43.

[76] *Ibid.*

[77] Dyzenhaus, 'The Past and Future of the Rule of Law in South Africa' (2008) 124 *SALJ* at 374.

Rights during apartheid, the common-law presumptions which were based on what is fair and just could have easily operated as a surrogate for the Bill of Rights, to protect individual rights and liberty thus, if used correctly the common law is quite value- based and if used correctly only an indirect horizontal application of the Bill of Rights is required.

2 4 SECTION 8(3):

The provisions of section 8(3) of the 1996 Constitution are of seminal importance here:

> *(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –*
>
> *(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and*
>
> *(b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).*

Cornelius explains that section 8(3) of the 1996 Constitution lays down a three-fold process whenever the question of a fundamental right is raised in the context of a contractual relationship.[78] Firstly, the process starts by the courts applying the existing common law. As it was stated by Ngcobo J while handing down the majority judgement in *Barkhuizen v Napier*[79],

> the fundamental question of the appropriateness or otherwise of testing a contractual provision directly against a provision in the Bill of Rights. This raises the question of horizontality, that is the direct application of the Bill of Rights to private persons as contemplated in s 8(2) and (3) of the Constitution… the proper approach of constitutional challenges to contractual terms where both parties are private parties[.] Different considerations may apply to certain contracts where the state is a party. This does not arise in this case.
>
> … Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents

[78] Cornelius *Principles of the Interpretation of Contracts* (2016).

[79] *Barkhuizen v Napier* 2007 5 SA 323 (CC). see Madala J, Nkabinde J, Skweyiya, Vander Westhuizen J and Yacoob J concurring with Langa CJ and O'Reagan J delivering concurring judgements. Significantly the dissenting judgements by Moseneke DCJ and Sachs J also seem to follow the indirect public policy approach laid down by Ngcobo J.

> the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.
>
> . . . What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable. . . In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.'

The court in *Knox D'Arcy Ltd v Shaw*[80] which was latter confirmed by the court in *Polygraph-Central Provinces CC*[81] were decided before the seminal *Barkhuizen*[82] judgement however, the courts followed the same approach whereby the courts confirmed that, 'the door is now open for the courts to mould all/ law, including private law governing private relationships, according to contours of the 1996 Constitution.'[83] Therefore, section 8(3) clears the confusion created by section 8(2) whether the drafters of the Constitution intended to re-write the South African common law- but envisages the inclusion of the principles underlying the Bill of Rights in the existing body of private law. Cornelius explains that this also means that when it comes to

[80] 1996 (2) SA 651 (A).
[81] *Polygraph Center – Central Provinces CC v Venter and another* [2006] 4 All SA 612 (SCA).
[82] *Barkhuizen v Napier* 2007 5 SA 323 (CC).
[83] Cornelius *Principles of the Interpretation of Contracts* (2016).

matters between individuals, the Constitutional Assembly did not intend to replace the common law on a certain topic with a provision in the Bill of Rights but instead intended the Bill of Rights and the common law to complement each other.[84]

This is confirmed by section 8(3)(b)[85] of the 1996 Constitution, that the common law may even limit a right contained in the Bill as applied between individuals.[86] However, Section 8(3)(b) does not provide for an individual contract but the common law itself can limit a right in the Bill of Rights. It must conform to a rule of law that limits the right. In this regard, a rule of common law that limits a right contained in the Bill of Rights must be of general application. A rule is of general application if it applies equally to all and is not arbitrary. It must also be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[87] Section 36(1) states that a limitation is only permissible if it is by means of law of general application and that is why section 8(3)(b) which says that any limitation must accord with section 36(1)- have to keep in mind that section 36(1) states that only a law of general application can limit a right therefore, an individual contract cannot do that by definition. A rule of common law can do that because that is law of general application, but an individual contract cannot do it. Therefore section 36(1) is a strong indication that the Constitutional Assembly had in mind that, not going to measure each individual contract against the Bill of Rights but going to measure the *law* of contract (common law) against the Bill of Rights. Therefore, by using an indirect horizontal application through the common law framework would continue to invoke the legality doctrine's public policy scale but at the same time to infuse its content and methodology with the values encapsulated in the Bill of Rights.[88]

Therefore, in conclusion whether one follows a direct or indirect approach to the horizontal application of the Bill of Rights to the law of contracts, the same result is sanctioned by our constitutional dispensation and particularly by section 8(2) and 8(3) – that when interpreting *all* law, including contracts that the interpretation and adjudication must be in line with the 'spirit, purport and values' of the Bill of Rights

---

[84] *Ibid.*

[85] Section 8(3)(b) of the 1996 Constitution reads:

> may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).

[86] Cornelius *Principles of the Interpretation of Contracts* (2016).

[87] Section 36 of the 1996 Constitution.

[88] *Ibid.*

thus, sanctioning a return to the value-based methodology or indirect horizontality through the common law framework. Chapter 3 illustrates the direct and indirect application debate through an analysis of case law by discussing the provisions of section 8 as well as how the courts have dealt with how and/or the extent to which the Bill of rights impacts/permeates the current common law of contract in South Africa.

3 THE IMPACT OF THE BILL OF RIGHTS ON THE COMMON LAW OF CONTRACT: THE HORIZONTAL APPLICATION THROUGH CASE LAW

3 1 GENERAL

Van Aswegen advocates for an indirect horizontal application of the Bill of Rights to private disputes but acknowledges that the law of contract, unlike the law of delict, does not consist mainly or even to any significant degree, of general principles of liability in the form of open ended-standards.[89] Contractual liability can thus be said to consist mainly of 'very precise, detailed rules with a fixed area of application.'[90] The law of contract functions around the determination of consensus which is determined by the precise rule of offer and acceptance. Furthermore, breach of contract likewise consists of detailed forms and requirements.[91] Van Aswegen continues by stating that,

> even a policy-orientated issue like the imposition of contractual liability in the absence of consensus to protect (reasonable) reliance on the part of one of the contracting parties, has until quite recently been exclusively dealt with in case law by means of the *iustus error* doctrine, consisting again of precise detailed rules. Likewise, nominate contracts are additionally regulated by precise legal rules. The exception to the operation of these rules in the law of contract is the open-ended standard applied in the determination of contractual liability.[92]

The contractual liability in regards to the operation of the law of contract is centred on the principle that a contract of which the conclusion, performance or purpose is contrary to statute or common law is unlawful.[93] However, apart from seldom circumstances whereby statute or common law declares a specific contract or common law rule unlawful, contracts are declared to be unlawful when they are contrary to public policy or good morals (*contra boni mores).* This can therefore be said to constitute open-ended standard determined by policy considerations.[94]

---

[89] Van Aswegen "The Implication of a Bill of Rights for the Law of Contract and Delict" 1995 *SAJHR* 50.
[90] I*bid*.
[91] *Ibid*.
[92] *Ibid.*
[93] I*bid.*
[94] *Ibid.*

As was explained in the previous chapter of this dissertation, the preferred application of the Bill of Rights to the law of contract is that of the indirect horizontality approach. The application of this approach will result in the values underlying the Bill of Rights (chapter 2 of the 1996 Constitution) having to be considered as important policy considerations in the determination of the legality of contracts as well as in the process of drafting and the interpretation of those contracts. Cornelius states that,

> *'in our law, public policy is determined by our courts on the basis of values and norms that reflect the community's sense of justice and it is influenced by the jurisprudence of natural law, the 1996 Constitution, international law and comparative law.*[95] *In this regard a court must often balance competing interests in a way that satisfies the community's demands for justice.*[96] *Public policy is not constant but subject to continuous change.*[97] *An important development in this regard in South Africa was the commencement, on the 4th of February 1997, of the Bill of Rights contained in the 1996 Constitution. Cornelius further provides that the Bill of Rights,*
>
> *' …signals, just as the 1993 interim Constitution did before it, a move toward a dispensation founded on* ***value-based standards*** *and, to a large extent, gives expression to the concept of public policy. As such, it has put the writing on the wall for the literalist/ intentionalist method of interpretation applied by the courts and paved the way for the acceptance of a more liberal approach to interpretation. Since many of the rights contained in the Bill have direct horizontal application, they will now have to be taken into consideration when determining the nature and extent of public policy and its effect on the application of a contract. The 1996 Constitution is the ultimate expression of public interest and the starting point in determining public policy.'*[98]

In *Brisley v Drotsky*[99], the Supreme Court of Appeal situated the existing common law of contract within the constitutional context by emphasising the point that the Bill of Rights applies to the common law of contract and when courts are adjudicating and interpreting contracts, they must be done so in a manner that promotes the Bill of Rights spirit, purport and objects.[100] Cameron JA[101] acknowledged that the contractual

---

[95] Cornelius *Principles of the Interpretation of Contracts* (2016). See sections 39(1)(b) and 232 of the 1996 Constitution.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Brisley v Drotsky* 2002 (4) SA 1 (SCA)
[100] At para 88-95.
[101] As he then was,

doctrine of legality and its accompanying public policy scale were the appropriate portal for the constitutionalisation of contract law

> 'in its modern guise, public policy is now rooted in our Constitution and the values it enshrines.'[102]

Cameron JA contextualised the foundational values of freedom, dignity, and equality within the common law of contract by explaining that the value of freedom encapsulates the fundamental principles of freedom of contract and sanctity of contract.[103] Additionally, the value of human dignity applies hand-in-hand with the value of freedom in that, contracting parties locate their dignity in their contractual freedom-the notion of individualism and autonomy allows parties to govern their own private lives by deciding themselves whether, and if so on what terms to contract however, Cameron JA qualified contractual autonomy by stating that any 'obscene excess' of autonomy must be rejected as counter-intuitive to individual dignity and self-respect.[104] In *Afrox Healthcare Bpk v Strydom*[105] the court confirmed that freedom of contract was itself held to be a constitutional value.[106] The SCA also recognised the value of equality is relevant insofar as parties are presumed to contract on equal footing and thus, have the ability to exercise actual freedom of contract.[107]

Therefore, the goal of this chapter is to show that because *Brisley and Afrox*[108] were able to qualify our foundational constitutional values of freedom, dignity and equality within the common law framework these judgements have become the foundation of further SCA and Constitutional Court judgments which show that the courts have moved to a more liberal approach by applying a value-based methodology (teleological theory) while adjudicating and interpreting contracts.[109] Though *Brisley and Afrox* ostensibly aligned the common law of contract with the Bill of Rights which in essence outlines the scope (content) of horizontal application of the Bill of Rights, it

---

[102] At para 91.
[103] Sanctity of contract entails that obligations in terms of a contract must be honoured because the contract was entered into voluntarily. This maxim is known as *pacta sunt servanda.*
[104] Bhana D, (2015) 4: 'the values of freedom and dignity require courts to continue to exercise 'perceptive restraint' when deciding to strike down or refuse to enforce a contract on the basis that it is against public policy, an obscene excess of autonomy being the exception, rather than the norm.
[105] 2002 (6) SA 21 (SCA).
[106] At para 17-24.
[107] At para 12: where there is evidence of unequal bargaining power, it must be considered in order to ensure that contractual autonomy is not undermined.
[108] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[109] See for instances *Johannesburg Country Club v Stott* 2004 (5) SA 511, *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 and *Barkhuizen v Napier* 2007 5 SA 323 (CC).

must be noted that the cases do not provide clear guidance in terms of the form (method) of such application - being direct or indirect application. The 1996 Constitution demands the courts to apply a more value-orientated approach when adjudicating and interpreting contracts. However, this horizontal application of the Bill of Rights (either direct or indirect) provides quite a large scope as to how the values of the Constitution can be incorporated into the law of contract.[110] Thus, when one considers the question of how the values of the 1996 Constitution impact the law of contract and specifically the indirect horizontal application of the Bill of rights to contracts, one must take into consideration that fact that constitutional interpretation has a much more subtle impact and is easily overlooked if one is not studying the interpretation and drafting of contracts in detail.

An example of how these values have been incorporated into the law of contract and specifically how the Bill of Rights has impacted/permeated the drafting and interpreting process of contracts is evident in the case law to be discussed below.

3 2 FREEDOM OF TRADE AND FREEDOM OF CONTRACT

The right to trade is guaranteed by the 1996 Constitution. However, *pacta sunt servanda* and freedom of contract is recognised as a Constitutional principle thus, once the parties in a contractual relationship have agreed on the contractual terms that govern their relationship, these terms should be honoured unless they are contrary to the law, public policy or public interest.[111] An example of how the values of the Constitution impact the law of contract is found in the restraint of trade case. Such case law indicates an indirect approach that is favoured by the courts.

The traditional approach followed by the courts to enforcing restraint of trade clauses was that contracts or contractual terms in restraint of trade were regarded as being against public policy and therefore *prima facie* void, ‘because the policy consideration of freedom to participate in the economy, that is in the business or professional world, freedom of trade, took precedence over the consideration that contracts freely entered into should be honoured, or sanctity or freedom of contract.[112] The starting point for

[110] As per sections 8(2) and 8(3) of the 1996 Constitution.
[111] Hutchinson & Pretorius (eds) (2017) 37.
[112] Van Aswegen "The Implication of a Bill of Rights for the Law of Contract and Delict" 1995 *SAJHR* 50.

the restraint of trade prior to the adoption of the 1996 Constitution was the case of *Magna Alloys v Ellis.*[113]

3 2 1 *Magna Alloys v Ellis*[114]

The appellant division altered the traditional approach when the court decided that freedom of contract weighed more heavily than freedom of trade in determining public policy and that restraint of trade clauses were consequently *prima facie* valid and enforceable.[115] The court recognised that the right to freely engage in economic activity and to pursue a livelihood, which can be equated to freedom of trade, was then recognised as a fundamental right in Chapter three of the 1993 interim Constitution.[116]

The court held as a starting point that restraint of trade *is lawful but as long as it is reasonable; and to the extent that a restraint of trade is unreasonable it is unenforceable*.[117]The restraint is not void or invalid but, it simply means a court will not intervene to enforce the restraint. Thus, the court answered the question of when is a restraint reasonable?

A restraint of trade is reasonable when it is designed to protect a lawful interest or legitimate business interest. Because a restraint of trade is unenforceable to the extent *that* it is unreasonable, a court could also reduce the scope of the restraint of trade and only order partial of the restraint to ensure that it is enforceable however, this is dangerous teritory to tread on particularly when one drafts a restraint of trade clause. Courts hardly ever conclude that a restraint is only partially enforceable, in most cases courts conclude that restraint of trade is so unreasonable that the entire restraint is unenforceable.[118]

After *Magna Alloys*[119] it was held that: if a party wishes to rely on a restraint of trade, that party bears the onus to show that there is contract containing as restraint of trade. Once established the restraint of trade and that there is an impending breach of that clause, the onus shifts to the party wishing to avoid the restraint of trade to show that

[113] 1984 (4) SA 874 (A).
[114] 1984 (4) SA 874 (A).
[115] Van Aswegen (1950) *SAJHR* 66.
[116] *Ibid.*
[117] 1984 (4) SA 874 (A).
[118] The court in this case concerned the enforcement of a restraint of trade that prohibited the employee from working for a period of 5 years in the whole of South Africa and the court narrowed the restraint of trade clause down to applying for 1 year to only the Gauteng Province.
[119] 1984 (4) SA 874 (A).

the restraint is unreasonable. However, a court hardly ever requires extensive evidence to show that the restraint is unreasonable.[120] Often mere argument to the court might even be sufficient and courts are more inclined to find that a restraint is unreasonable and therefore unenforceable.

Therefore, the case ultimately provided the following guidelines: The court said that a restraint of trade is in principle valid as long as the restraint is reasonable and to the extent that it is unreasonable it will be unenforceable. The court held that agreements in restraint of trade had to be treated as *prima facie* valid and enforceable as long as they are not contrary to public policy.[121] The court further, explained that although sanctity of contract is fundamental to South African law, public policy also requires that everyone should be free to seek fulfilment in the business and professional world. The court explained that an unreasonable restriction of a person's freedom of trade would be contrary to public policy and could therefore not be enforced.

3 2 2 *Knox D'Arcy Ltd v Shaw*[122]

Here the case was considered by the appeal court, in which the court had to consider whether the section 26(1)[123] provision under the 1993 Interim Constitution, the predecessor to section 22 of the 1996 Constitution, affected the common law pertaining to a restraint of trade clauses. The court concluded that the law that was laid down in *Magna Alloys*[124] remains unchanged by the 1993 Interim Constitution. In dismissing the argument that the *Magna Alloys* case should be re-evaluated, Van Schalkwyk J remarked as follows:

> 'The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy

[120] Although the party bears onus to prove restraint is unreasonable it is not a heavy or difficult burden to satisfy. The courts are amiable to any kind of argument or evidence to assist.
[121] *Magna Alloys* 874.
[122] 1996 (2) SCA 651 A.
[123] Section 26(1) of the 1993 Interim Constitution reads:
> 'Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.'
[124] *Magna Alloys v Ellis* 1984 (4) SA 874 (A).

which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.'[125]

Ultimately the court held that section 26(1) does not require the common law as laid down in *Magna Alloys* to be re-assessed.[126]

3 2 3 *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Automation v Booth and Another*[127]

The problem arose with restraint clauses when the provisions of interim Constitution[128] came into effect in the 1996 Constitution in Section 22[129]. Section 22 of the 1996 Constitution, under the heading of freedom of trade, occupation and profession', states that every citizen has a right to choose their, trade, occupation and profession freely. This section thus, impacted the enforcement of a restraint trade clause since section 22 is directly recognised under the 1996 Constitution, however, so is contractual freedom,[130] and the common law principle that courts will enforce agreements that are voluntarily entered into.[131]

Therefore, the court in the *Canon Case* recognised that section 22 of the 1996 Constitution changed the law relating to restraint of trade clauses and that moreover, the courts must qualify *Magna Alloys*[132] to the extent that section 22 changes the procedure for the party in terms of the burden of proof when relying on a restraint of trade clause. In terms of *Magna Alloys* if a party sought to enforce a restraint of trade the party had to prove firstly: there was a contract containing a restraint of trade and secondly that that there was a breach or impending breach of the restraint. The court would assume that the restraint is valid. The onus then shifts to the party seeking to avoid the restraint and show that the restraint is *unreasonable.* In theory there should be a heavy burden of proof on parties seeking to avoid a restraint but in practice a

---

[125] *Knox D'Arcy* 1710 I-J.
[126] Knox D'Arcy Ltd v Shaw 1996 2 SA 651 A

[127] 2005 (3) SA 205 N.
[128] Section 26(1).
[129] Section 22 of the 1996 Constitution reads:
'Every citizen has the right to choose their trade, occupation or profession freely. the practice of a trade, occupation or profession may be regulated by law.'
[130] *Barkhuizen v Napier* whereby, the Constitutional Court confirmed that,' freedom of contract has been said to lie at the heart of constitutionalised prized values of dignity and autonomy.'
[131] Ibid.
[132] 1984 (4) SA 874 (A).

party can actually present a few arguments and the court is quick to agree that the restraint is unreasonable.

The courts did not place a heavy burden of proof on the party seeking to avoid the restraint so if the party proved a restraint was *unreasonable,* the onus shifted back to the other party to show that there was a *legitimate business interest* that requires the protection. The court in the *Canon Case* held that section 22 changed the law relating to restraint of trade clauses. Specifically, section 22 changes the burden of proof in which a party who relies on the restraint must now prove:

Firstly, that there is a contract containing a restraint of trade clause and secondly that the restraint of trade does not violate particularly section 22 or any other provision in the 1996 Constitution. Only if a party proves these two points would the onus shift to the other party trying to avoid the restraint to show other grounds as to why the restraint should not be valid or enforced.[133]

3 2 4 *Rectron (Pty) Ltd v Govender and Another*[134]

The court was faced with the precedent set in the *Knox* case, that the 1993 interim Constitution did not change the law as set in *Magna Alloys* and; with the precedent set out by the Natal court in *Canon case,* which held that section 22 of 1996 Constitution had changed the law pertaining to the enforcement of restraint of trade clauses.

The court concluded that the *Canon case* was decided incorrectly and proceeded to conclude that the 1996 Constitution did not affect the law pertaining to the enforcement of restraint of trade clauses as laid down in *Magna Alloys.*

3 2 5*Barkhuizen v Napier*[135]

This majority judgement of this case has been discussed significantly above. The minority however, followed a different approach. The facts of this case related to an insurance contract that had a particular clause which stated that if the claim was rejected, the insured would only have 90 days to institute a claim. The Constitutional

[133] *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Automation v Booth and Another* at para 67.
[134] [2006] 2 ALL SA 301 (D).
[135] *Barkhuizen v Napier* 2007 5 SA 323 (CC).

Court had to decide whether the clause was contrary to the Bill of Rights and public policy.

The issue of direct-indirect application came before the Constitutional Court. The majority favouring an indirect approach and the minority favouring a direct approach. The minority followed the direct approach of the Bill of Rights to say this clause violates a particular Bill of Rights particularly the right to have any dispute decided by a court or independent tribunal.

The direct approach is not an ideal approach to follow as was stated in the majority of this judgement. Section 8 and 36 of the 1996 Constitution were analysed. The majority found that the Bill of Rights require the courts to apply or develop the common law and if one looks at the wording of section 36, this cannot be done by measuring an individual contract directly against the Bill of Rights.

Therefore section 36(1) is a strong indication that the Constitutional Assembly had in mind that, not going to measure each individual contract against the Bill of Rights but going to measure the *law* of contract (common law) against the Bill of Rights. Therefore, by using an indirect horizontal application through the common law framework would continue to invoke the legality doctrine's public policy scale but at the same time to infuse its content and methodology with the values encapsulated in the Bill of Rights.[136]

3 2 6 *Polygraph Centre- Central Provinces CC v Venter and another*[137]

The Supreme Court of Appeal had an opportunity to consider and provide guidance on the applicable law pertaining to the enforcement of restraint of trade clauses. The court here, provided that section 22 of the 1996 Constitution did not change the position as laid down in *Magna Alloys.*[138]

Effectively the court held that a party relying on a restraint of trade needed to present/prove the contract containing a restraint of trade. The onus was then on the party trying to avoid the restraint, to show that the restraint was *unreasonable.* One of the factors that the party could rely on in convincing the court that the restraint of trade

[136] *Ibid.*
[137] [2006] 4 ALL SA 612 (SCA).
[138] *Magna Alloys v Ellis* 1984 (4) SA 874 (A).

clause was unreasonable, was that it could be argued that the restraint was contrary to section 22 of the 1996 Constitution and that a court would take that into consideration as one of the factors which would make the restraint unreasonable and thus, unenforceable.[139]

It is very interesting that Van Aswegen was able to foresee this sought of value-based approach (which does not change the law pertaining to the enforcement of restraint of trade clauses) that was laid down in the *Magna Alloys* case prior to the adoption of our 1996 Constitution. Van Aswegen refers to *Waltons Stationary Co (Edms) Bpk v Fourie*[140] which dealt with the enforceability of a restraint of trade clause in a contract between private legal subjects. Van Aswegen[141] provides:

> The court considered the argument that the restraint of trade clause was illegal in light of section 26(1) of the Interim Constitution (equivalent to section 22 of 1996 Constitution). After referring to subsections (1) and (3) of the interpretation clause (s 35 of the Constitution), he decided that the purpose of the protection of fundamental rights in chapter three generally, and of section 26 specifically, was to describe and settle ('omskryf en vas te IW) the various fundamental rights and to override all other statutory measures such as acts of parliament, ordinances and regulations which in the past limited such fundamental rights. The constitutional protection of fundamental rights thus does not in his view affect the freedom of individuals to conclude contracts temporarily limiting their fundamental rights, and accordingly he held that the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* still reflected the law in force and was binding on him. In so far as this decision confirms that chapter three does not provide for direct horizontal application of its provisions, it deserves approval. However, it overlooks the indirect horizontal application provided for in s 35(3), in terms of which the weight to be given to the value underlying s 26 should have been specifically considered when deciding whether enforcement of the restraint of trade clause was against public policy. This could have led to a reappraisal of the approach accepted in *Magna Alloys,* and it is a pity that this possibility was not considered in the case.

Ultimately, the court held in *Polygraph Center* that section 22 of the 1996 Constitution did not change that law as stated in *Magna Alloys* case. Thus, the court held that the current legal rules regulating the enforceability of restraint of trade agreements

---

[139] *Polygraph Center-Central Provinces CC v Venter and Another* at para 27.
[140] 1994 (4) SA 507 (O).
[141] Van Aswegen (1995) 65.

between private individuals remained valid even though their application could result in a fundamental right protected in chapter 2 of the 1996 Constitution (Bill of Rights) in effect being limited or overridden as discussed by Van Aswegen. The *Polygraph Center* decision confirms the approach of the courts to adjudicating and interpreting contracts, albeit not in so many words, that the provisions of Chapter 2 of the 1996 Constitution (the Bill of Rights) do not enjoy direct horizontal application.

3 2 7 *Beadica 231 v Oregon Trust and Others142*

Beadica brings us to the most recent case of the Constitutional Court in relation to the constitutionalisation of the common law of contract. The CC handed down a judgement in an application concerning the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms.

The applicants entered into a franchise agreement with the second respondent (Sale's Hire) to operate Sale's Hire franchised businesses for a period of ten years. They acquired their businesses in terms of a black economic empowerment initiative financed by the third respondent (National Empowerment Fund) and coordinated by Sale's Hire. The applicants operate their businesses from premises leased from the first respondent (Oregon Trust), as required in terms of their franchise agreements with Sale's Hire. Mr Shaun Sale, one of three trustees of Oregon Trust, is also the sole member of Sale's Hire. The leases were intended to run for an initial period of five years but conferred on the applicants an option to renew the leases for a further period of five years. The renewal clause in the lease agreements provides that the option to renew be exercised by giving notice six months before the termination of the lease. The applicants did not exercise their renewal options within the requisite time and purported to exercise them only after the time period for doing so had expired.[143]

---

[142] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13. Hereafter, *Beadica.*

[143] It is important to note that the applicants were only few months late in exercising their renewal options which is significantly different to the previous cases that have dealt with the lapse of time such as *Barkhuizen, Makate and Mokone* where the applicants only instituted their actions between 2-5 years after.

Oregon Trust alleged that the options to renew had lapsed and the lease agreements had terminated.

This matter proceeded to the CC whereby the applicants contend that the strict enforcement of the contractual terms governing the renewal of their leases would be contrary to public policy.[144] According to the applicants, enforcement would be inimical to the values of the Constitution, in particular, the right to equality contained in Section 9(2) of the Constitution.[145] They allege that the termination of the lease agreements will bring an end to their franchise agreements, collapse their businesses and lead to the failure of the black economic empowerment initiative financed by the Fund. On the other hand, the respondents support the principle that courts should exercise the power not to enforce a contract on the basis of public policy "sparingly and only in the clearest of cases".[146] They contend that this is not a case for judicial interference. The respondents argue that this Court's judgment in *Barkhuizen* imposes an onus on parties that seek to avoid the enforcement of a contractual term on the basis of public policy to adequately explain their failure to comply with that term. The respondents submit that, as the applicants have failed to fulfil this requirement, the enforcement of the renewal clause cannot be found to be contrary to public policy.

The adjudication of this matter implicates the crucial question of how public policy, as a basis upon which a court may refuse to enforce the terms of the contract should be determined. There is deep contestation among our courts about the role of abstract concepts such as ubuntu, reasonableness and fairness, play in the judicial control of contracts. Therefore, the CC was presented with an ideal opportunity to provide much needed clarity on these issues- bringing an end to the uncertainty and confusion which have plagued our law of contract.

The first judgement as per Theron J held that contracting parties cannot escape the enforcement of contractual terms on the basis that the enforcement would be disproportionate or unfair in the circumstances.[147] Constitutional values do not provide

---

[144] Para 13.

[145] Section 9(2) of the Constitution provides: "equality includes the full and equal enjoyment of all rights and freedoms. to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[146] Para14.

[147] Para 59: this assumption which was implicitly endorsed by the SCA in this matter, is based on a misreading of the *ratio decidendi* in *Botha* and rests on a misconception as to what the case is about.

a free-standing basis upon which a court may interfere in contractual relationships. Rather these values form important considerations in the balancing exercise required to determine whether a contractual term or its enforcement is contrary to public policy.[148] It is only where the enforcement of the contractual term would be so unfair, unreasonable or unjust so as to be contrary to public policy that a court may refuse to enforce it.

The first judgement held that the applicants failed to discharge the onus of demonstrating that the enforcement of the strict terms of the renewal clause would be contrary to public policy in the particular circumstances of this case.[149] The applicants failed to adequately explain the reasons for non-compliance with the terms they sought to avoid and as a result the only inference to be drawn is that the applicants simply neglected to comply with the clauses in circumstances where they could of complied with them.[150] Furthermore, the applicants had not shown that the failure of their business, in these circumstances, would unjustifiably undermine substantive equality. Therefore, the public policy considerations advanced by the applicants were insufficient to demonstrate that it would be contrary to public policy to enforce the terms they seek to avoid. As a result, the applicants should face the same result as *Barkhuizen,* and the application must fail on these merits.

Furthermore, the first judgement held that in relation to the process of constitutionalising the common law of contract, Constitutional values have an essential role to play in the development of constitutionally infused common law doctrines.[151] This development must take place in an incremental fashion and yield clear and ascertainable doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting partiers.[152] Ultimately,

---

[148] Para 72.

[149] Para 91: a party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reasoning for failure to comply with the term…this rationale was explained in *Barkhuizen*.

[150] Para 93: "*[The representatives of the leases had all operated franchises and had previously been store or regional managers. They were not ignorant individuals. They may not have fully appreciated the niceties of the law, but they knew they had to give notice- they attempted to do so after the notice period had elapsed."*

[151] Para 78.

[152] See *Mokone* whereby the majority judgment set aside two established rules of common law as it was in the interests of justice to do so however, in the process they have misplaced the previous certain doctrines with uncertain and unpredictable outcomes (they the principles on the ash-heap).

the first judgement sets the regulation of fairness in our contract law squarely and unambiguously within the ambit of our constitutional value system.

The second judgment (dissenting) penned by Froneman J disagreed with the main judgement and provided three reasons for doing so. Firstly, that the regulation of unfairness in contract law is never simply a "legal" one that can be deduced from supposedly neutral legal principles in a self-executing way, this kind of regulation involves making an underlying *moral or value choice* within the objective value system of the Constitution.[153] Secondly, that further guidance should be provided on how these objective values can possibly be translated into practical application. It was suggested that this can be done by delineating reasonably certain, practical and objective legal principles and rules to guide perspective contracting parties, in a manner in which the caricature of rogue judges imposing their own subjective and arbitrary opinions of what is fair and reasonable upon unsuspecting litigants is dispelled.[154] This approach is best achieved by recognising that the individualism of our law of contract is one that has always taken account of reasonable expectations of the parties to the court as well as those of the wider community (the broader constitutional context).[155] This can be done in a manner that ensures objectivity, reasonable practicality and certainty.[156] Lastly, is the fact that the facts called for a different outcome from the proposed first judgement and that the appeal should succeed.

According to the second judgement*, Barkhuizen* is authoritative and binding precedent that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done directly in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. This is because public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu. This approach, according to the

[153] Para 106.

[154] This can be illustrated in the previous cases of *Botha* and *Makate* where the pendulum had swung too far in the direction of free-formed judicial discretion in relation to the issue of fairness.

[155] The plain reality is that in South Africa many franchisees (such as the applicants in this case) are typically not as financially resourced or well versed in the niceties of the law as the large corporates that dominate the franchise market. It is closing one's eye to reality to deny the obviously unequal relationship between franchisor and franchisee.

[156] Paras 106-108.

second judgment, leaves space for *pacta sunt servanda* to operate, but at the same time also allows courts to decline to enforce contractual terms that are in conflict with constitutional values even where the parties consented to them.[157]

The second judgment further disagreed with the first judgment that the applicants failed to explain why they did not comply with the notice clause in the lease agreement. The applicants provided an explanation – they were unsophisticated and not versed in the niceties of the law. It found that this explanation was not contradicted by any direct evidence but was supported by circumstantial evidence to back up their contention. Their lack of sophistication was illustrated by the content of the renewal notices, none of which were written by lawyers.[158] Furthermore, it was common cause that applicants were not businesspeople, but former employees of Sale's Hire. They acquired their businesses in terms of a black economic empowerment initiative that sought to facilitate "business ventures pioneered and run by historically disadvantaged persons" and their bargaining power as franchisees in terms of the franchise agreement was unequal to that of Mr Sale as the franchisor. Their prejudice in losing their businesses was obvious; against that of Mr Sale who stood to lose nothing.[159]

The third judgement as per Victor AJ agreed with the dissenting second judgement that the adjudication of fairness in contract cannot be plucked from a set of neutral legal principles. The third judgment recognised *ubuntu* as an important value that stands alongside values such as good faith, fairness, justice, equity and reasonableness.[160] By characterising *ubuntu* as an adjudicative value in reaching substantive fairness between contracting parties will achieve a constitutionally transformative result. *Ubuntu* provides a particularistic context in the law of contract when, for example, addressing the economic positions or bargaining powers of the contracting parties.[161] Furthermore, the recognition of *ubuntu* in interpreting contracts will not undermine the concept of certainty and contractual autonomy.

[157] Para 201.
[158] Para 198: One of the accountants of the applicants wrote their notice of renewal.
[159] Para 202.
[160] Para 206.
[161] Para 208.

3 2 8 CONCLUDING REMARKS

The *Beadica case* confirmed that Constitutional rights apply through the process of indirect horizontality.[162] "[A]bstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships … they perform creative, informative and controlling functions".[163] The abstract values include good faith , fairness, reasonableness, justice, *ubuntu* as a constitutional value (par , constitutional principles encapsulated in the Bill of Rights, the normative value system that the constitution and particularly the Bill of Rights embodies, constitutional rights and constitutional values in general.[164]

The abstract values inform the application of the common law rule that contractual clauses and their application may not offend public policy. The public policy rule is the gateway for the importation of constitutional values into the law of contract.

Therefore, *Beadica* Judgement confirms the indirect application of the Bill of Rights through common law framework which applies through the doctrine of legality and the public policy portal. Furthermore, the Constitutional Court provides guidance as to the public policy grounds in which a court may interfere with contracts (private transactions/matters).

[162] Para 71.
[163] Para 79.
[164] Para 76.

4 CONCLUSION

The research objective and question that this dissertation aimed to answer was centred around the extent to which the horizontal application of the Bill of Rights impacts and/or permeates the current common law system of contract law in South Africa.

Traditionally, as mentioned in the introductory Chapter, the relationship between private persons was not governed by public laws however, the transformative Constitution of South Africa included 'Private Spheres' to be regulated by constitutional law and subjected to consistency with human rights standards and values of the Constitution.[165] What this means for the common law of contract is that accordingly, if the substantively progressive and transformative vision of the Constitution is to become a reality in South Africa, then contract law must conform and if necessary be aligned with our Constitutional goals. Thus, when one considers the question of how the Bill of Rights and specifically the question of how the values of the 1996 Constitution impact/permeate our current common law of contract in South Africa, one must take into consideration the fact that constitutional interpretation and adjudication has a much more subtle impact and is easily overlooked if one is not studying the adjudication and interpretation process of contracts in detail.

As so far as the application of the Bill of Rights in the 1996 Constitution is concerned, the horizontality debate is centred around whether direct or indirect horizontal application is to be preferred, the received premise being that the Bill of Rights must apply to contract law.[166] In this respect, section 8(2) and 8(3) of the 1996 Constitution has been the centre stage of debate when it comes to direct and indirect application of the Bill of Rights to private disputes and was the centre of discussion in this research.

An examination of the above case law pertaining to the legality and enforcement of restraint of trade clauses and the enforcement of a renewal clause (specifically *Beadica case[167])* shows how the courts have become more open as to what kind of

---

[165] Pieterse 'What do we Mean When We Talk about Transformative Constitutionalism' (2005) 20 *SAPL* at 162.

[166] Bhana D, "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract," 2015 Stellenbosch *L R* 26 3-28.

[167] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13.

evidence we consider and how we view a contract. Since many of the rights contained in the Bill of Rights have direct horizontal application, they will now have to be taken into consideration when determining the nature and extent of public policy and its effect on the application of a contract. The above case law discussed in Chapter 2 and 3 illustrate how the common law of contract can operate in manner which promotes the, 'spirit, purport and objects' of the Bill of Rights without having to directly rely on the specific rights but instead will result in the values underlying chapter 2 of the Constitution (Bill of Rights) having to be considered as important policy considerations in the determination of the legality and interpretation of contracts. The 1996 Constitution is the ultimate expression of public interest and the starting point in determining public policy.[168] However, the restraint of trade case law and enforcement of a renewal clause (Beadica case) clearly qualifies the extent of public interest while still recognising the contractual freedom and the attending maxim of *pacta sunt servanda* as a Constitutional value worthy of protection.

Thus, in concluding, after analysing the applicable Constitutional provisions namely sections 8 and 39(2) of the 1996 Constitution and seeing how courts have proceeded to follow an indirect horizontal approach while adjudicating and interpreting contracts. By reading these provisions of the 1996 Constitution in accordance with the restraint of trade and the enforcement of a renewal clause case law shows a strong indication that the drafters of the Constitutional Assembly actually did not envision the provisions of Chapter 2 Bill of Rights having direct horizontal application, in that we are not going to measure each individual contract against the Bill of Rights but instead measure the law of contract against the Bill of Rights value system.

Therefore, in that aspect the values in the Bill of Rights will inform the adjudication and interpretation of the contracts but not going to say that this clause in the contract violates a particular section in the Bill of Rights therefore it is void. Will say that it is contrary to public policy and therefore it is void.

[168] Ibid.

BIBLIOGRAPHY

BOOKS

Davis D *Democracy and Deliberation: Transformation and the South African Legal Order* (Juta, 1999)

Baxter L Administrative Law 1984 Juta & Co Ltd: Johannesburg

Botha CJ *Statutory Interpretation- An Introduction for Students* 5th edition (Juta,2012)

Cornelius *Principles of the Interpretation of Contracts in South Africa* 3ed (2016) LexisNexis

Crawford ET *The Construction of Statutes* (Thomas Law Book Company, 1940)

Denning Lord The Discipline of Law 1979 Butterworths: London.

Devenish GE Interpretation of Statutes 1992 Juta & Co Ltd: Cape Town (cited as Devenish Statutes).

De Ville J *Constitutional and Statutory Interpretation* (Interdoc Consultants Pty Ltd, 2000)

De Vos P and Friedman W (ed) *South African Constitutional Law in Context* (Oxford University Press, 2014)

Du Plessis LM Re-Interpretation of Statutes 2002 Butterworths: Durban (cited as Du Plessis ReInterpretation).

Malan K Fundamental Rights: Themes and Trends 1996 Butterworths: Durban.

JOURNAL ARTICLES

Bhana D, “The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract,” 2015 Stellenbosch *L R* 26 3-28.

Carpenter, G “More About Language, Meaning and Statutory Interpretation” 1999 THRHR 626

Corry JA ‘Administrative Law and the Interpretation of Statutes’ (1937)*University of*

Toronto Law Journal 286-312

Davis DM and Klare K ‘Transformative Constitutionalism and the Common Law and Customary Law’ (2010) 26*South African Journal on Human Rights* 403-509

De Ville J “Meaning and Statutory Interpretation” 1999 THRHR 373.

De Vos P 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17*South African Journal on Human Rights* 1-33

Du Plessis LM “Tentative Reflections on the Systematization of the Rules and Presumptions of Statutory Interpretation” 1981 SALJ 189.

Dyzenhaus D ‘The Pasts and Future of the Role of Law in South Africa’ (2008) 124 *South African Law Journal* 734-761

Klare K ‘Legal Culture and Transformative Constitutionalism’ (1998) *South African Journal on Human Rights* 146-188

Hawthorne L ‘The Principle of Equality in the Law of Contract’ (1995) 58 *THRHR.*

Mureinik E ‘Administrative Law in South Africa’ (1986) 103 *South African Law Journal* 615-645

Pieterse M ‘What Do We Mean When We Talk About Transformative Constitutionalism’ (2005) 20*South African Public Law* 155-166

Van Aswegen A “The Implication of a Bill of Rights for the Law of Contract and Delict” 1995 SAJHR 50.

Van der Walt J “Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Cooperative Relation between Common Law and Constitutional Jurisprudence” 2001 SAJHR 341.

Williams, G "Language and the Law" 61 LQR 71

CASES

Absa Technology Finance Solutions (Pty) Ltd v Michael’s Bid a House CC 2013 3 SA 426 (SCA)

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

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).

Automotive Tooling Systems (Pty) Ltd v Wilkens and others 2007 2 SA 271 SCA.

Barkhuizen v Napier 2007 5 SA 323 (CC)

Beadica v Oregon Unit Trust 2018 1 SA 549 (W).

Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 ZACC 13.

Boomerang Trade CC t/a Border Sheet Metals v Groenewald [2012] JOL 29426 (ECG).

Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 2 SA 494 (SCA)

Brisley v Drotsky 2002 (4) SA 1 (SCA).

Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and another 2005 3 SA 205 N

Chanock v Barnard 1921 OPD 207

City of Johannesburg v Rand Properties (Pty) Ltd 2006 6 BCLR 728 (W).

Coetzee v Comitis 2001 1 SA 1254 (C).

Coopers & Lybrand and others v Bryant 1995 3 SA 751 A

Curren v Jacobs [2000] 4 All SA 584 (SE)

Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 A

Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 6 SA 520 (SCA)

Du Plessis v De Klerk 1996 (5) BCLR 658 (CC)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 1 SA 256 (CC)

Highlands Park Football Club Ltd v Viljoen and Another 1978 (3) SA 191 (W)

Holomisa v Argus Newspaper Ltd 1996 (2) SA 588 (W)

Johannesburg Country Club v Stott 2004 (5) SA 511,

Katzen v Mguno 1954 (1) SA 277(T).

Knox D'Arcy Ltd v Shaw 1996 2 SA 651 A

KPMG Chartered Accountants v Securefin 2009 4 SA 399 (SCA)

Lifeguards Africa (Pty) Ltd v Raubenheimer 2006 5 SA 364 D

Magna Alloys v Ellis 1984 (4) SA 874 (A).

Motala and another v University of Natal 1995 (3) BCLR 374 (D).

Paulsen v Slipknot Investments 777 2015 3 SA 479 (CC).

Pharmaceutical Manufacturers of South Africa: In ex re parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at para 44.

Polygraph Center - Central Provinces CC v Venter and another [2006] 4 All SA 612 (SCA)

Potgieter v Potgieter NO 2012 1 SA 637 (SCA)

Rates Action Group v Coty of Cape Town 2004 12 BCLR 1328 (C)

Rectron (Pty) Ltd v Govender and another [2006] 2 All SA 301 (D)

Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486

S v Makwanyane and Another 1995 (6) BCLR 665 at para 262.

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

Van Rensburg v Taute 1975 (1) SA 279 (A)

Van der Westhuizen v Arnold [2002] 4 All SA 331 (A)

Walter McNaughtan (Pty) Ltd v Schwartz and others 2004 (3) 381 (C).

Waltons Stationary Co (Edms) Bpk v Fourie 1994 (4) SA 507 (O).

Weinerlein v Goch Buildings Ltd 1925 AD 282 at 295.

DISSERTATIONS

Pillay LM ‘The Impact of Pacta sunt servanda in the Law of Contract’ University of Pretoria (2016).

LEGISLATION

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996.