

**Making Sense of *Barkhuizen 2*: An Investigation into the
Public Policy Defence of ‘Unfair Enforcement’ in South
African Law, with Reference to the Law on Covenants in
Restraint of Trade**

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ABSTRACT

This thesis investigates the application of the public policy test for determining the enforceability of a valid contractual clause established in *Barkhuizen v Napier*. After analysing the historical development of the application of the doctrine of public policy, the study examines the conceptualisation and application of the public policy test in the leading cases in South Africa. The study then provides an analysis of the recent judgment of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*, which outlined the current legal position on the proper constitutional approach to the judicial enforcement of valid contractual clauses. The study argues that, although the Constitutional Court in *Beadica* provided some clarity on what public policy is in modern South African law, it did not, from a practical point of view, set out the method that should be used to adjudicate such cases. The study thereafter suggests that, to address this issue, our courts should consider developing a methodological approach to measuring public policy in unfair enforcement cases.

To support this proposition, the study examines the law on determining the enforcement of restraint of trade agreements. It is argued that, within that context, the courts have formulated a methodological approach in the form of a list of standard questions that a judge should ask when determining the enforceability of a restraint clause. The thesis then closes with a case study, using guidelines established from the approach in restraint cases, to illustrate how the proposed guideline may be formulated, and how it could be applied in general unfair enforcement cases. The thesis argues that a practical guide of this nature would serve as a useful tool for judges to use when faced with a claim relating to the unfair enforcement of a valid clause other than a restraint clause, and would thus ensure consistency in contractual enforcement analysis in South Africa.

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Chapter One – Introduction

1.1 Introduction

In the South African law of contract, our courts have grappled with the issue of how to deal with claims relating to the unfair enforcement of an objectively valid contractual term or clause. Broadly defined, unfair enforcement claims are those where a party challenges the enforcement of an objectively valid clause (later referred to as “valid clause” or “valid term”) on the basis that its enforcement, in the particular subjective circumstances of the case, would be “unfair” or “unreasonable”, and that the courts should therefore not endorse its enforcement. The Supreme Court of Appeal has held that when any court is faced with an unfair enforcement claim, it must not refuse the enforcement of a clause simply on the basis that its enforcement would be “unreasonable” or “unfair” in the circumstances.¹ This found support from Ngcobo CJ who, writing for the majority of the Constitutional Court in *Barkhuizen v Napier*,² held that a court must refuse the enforcement of a valid clause only when it is satisfied that its enforcement would be contrary to public policy.³ The Constitutional Court expressly endorsed the concept of public policy⁴ as the appropriate contractual legal device (or doctrine) to determine the enforceability of a valid clause.⁵ This meant that open norms such as good faith and fairness were not self-standing principles that could be relied on to invalidate the enforcement of a valid clause. Furthermore, Ngcobo CJ held that, to determine whether a valid clause would be contrary to public policy, our courts must engage in a public policy enquiry.⁶

After *Barkhuizen*, South African courts sought to interpret the *Barkhuizen* test, which gave rise to various interpretations of the approach that should be followed in such cases.⁷ The first

¹ *Burger v Central South African Railways* 1903 TS 571 at 576; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27; *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) paras 32 – 34; *Trustees, Oregon Trust and Another v Beadica 231 CC and Others* 2019 (4) SA 517 (SCA) para 35; *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) para 27.

² 2007 (5) SA 323 (CC) para 56.

³ *Barkhuizen* para 56 – 58.

⁴ Our courts have regarded public policy as a difficult and contentious concept to define. Although it has mostly been described in general terms, in our current constitutional era, it has been defined as encompassing the values of the Constitution and the broader interests of the community. See *Brisley v Drotzky* 2002 (4) SA 1 (SCA) paras 88 – 95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28 – 29.

⁵ R Zimmermann “Good Faith and Equity” in Zimmermann and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) at 239 - 241.

⁶ *Ibid.*

⁷ D Hutchison “From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract” (2019) *Acta Juridica* 99 – 100.

interpretation was that the public policy enquiry entailed an assessment of public policy factors implicated by the enforcement or non-enforcement of the clause. These factors included substantive or concrete rules of contract law. This interpretation proposed that a court could only refuse to enforce a contract if such a refusal was based on these substantive rules. In contrast, the second interpretation provided that fairness, reasonableness, good faith and ubuntu were the unmediated standards upon which the validity of the enforcement of a clause must be tested. Therefore, the courts may refuse to enforce a valid clause if its enforcement would be contrary to the equitable values of fairness, reasonableness, good faith or ubuntu. This suggested that courts could rely on equitable values as self-standing principles to refuse the enforcement of contracts. The Supreme Court of Appeal vehemently expressed its disapproval of the second interpretation of the *Barkhuizen* test not only because it violated the fundamental contractual requirement of legality, but because it would dismantle legal and commercial certainty – which is crucial for the proper functioning of our economy. It was therefore important for the Constitutional Court to clarify which of these two approaches judges should follow, so that litigants in unfair enforcement cases could know precisely what was expected of them when challenging the enforcement of a valid clause.

In 2020, Theron J, writing for the majority of the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*⁸ provided some clarity on the correct approach. Theron J held that judges may refuse to enforce a valid clause if its enforcement would be contrary to public policy, and that equitable values could not be relied on directly to refuse the enforcement of a valid clause. She therefore rejected the second interpretation of the *Barkhuizen* test. Despite her clarification of the *Barkhuizen* test, the approach Theron J endorsed had its own shortcomings. In particular, it was not exactly clear how, practically, our courts should apply the test. In other words, it was not clear what the public policy enquiry entailed, and how courts should engage with the substantive rules or public policy factors that are alleged to be implicated in each case. It was therefore, not clear from a practical and methodological perspective, how courts should apply public policy to determine the enforceability of a valid clause.

This apparent shortcoming was faced by judges dealing with all types of valid clauses, except for one type of valid clause, the restraint of trade agreement, where a contextualised application of the *Barkhuizen* test has been applied since 1984. It is referred to in that context as “the

⁸ 2020 (5) SA 247 (CC).

reasonableness test”. Building on the principles for determining the reasonableness of the enforcement of a restraint clause,⁹ established over 23 years before *Barkhuizen*, South African courts have developed an approach for applying public policy to determine the enforcement of a restraint clause.¹⁰ The Appellate Division added layers to this approach in *Basson v Chilwan*,¹¹ and Davis J in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another*¹² later adapted the approach to give effect to the objectives of the Constitution. This approach required the court to engage in a public policy enquiry by identifying and balancing various public policy factors derived from the interests of the individual parties’ and the public interest at large – and with reference to the circumstances of the case, decide whether the enforcement of the restraint would be contrary to public policy and thus unenforceable.

Due to the much earlier development of the approach in restraint cases, there was a tendency to view and treat restraint of trade cases as *sui generis*. This created the perception that the enforcement of restraint clauses were dealt with in terms of distinct principles from those applicable to other types of valid clauses (ie. clauses governed by the *Barkhuizen* principles – general clauses). In reality, however, the same approach should have been followed in cases dealing with general clauses as they were in cases dealing with restraint clauses. As Harms JA said in *Bredenkamp and Others v Standard Bank of SA Ltd*,¹³ the approach to determining the enforcement of a clause:

“[R]eflects the approach our courts have taken in relation to the enforcement of clauses in restraint of trade. One considers, in light of the circumstances prevailing at the time of enforcement, whether or not it would be contrary to public policy to enforce the restraint”.¹⁴

Accordingly, the approach to determining the enforcement of restraint of trade clauses should have reflected the approach to determining the enforcement of general clauses. Although our highest courts have expressly acknowledged the link between the approaches in general cases

⁹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

¹⁰ *J Saner Agreements in Restraint of Trade in South African Law* (1999) [updated in 2020] 6.1.

¹¹ 1993 (3) SA 742 (A).

¹² 2009 (3) SA 78 (C).

¹³ 2010 (4) SA 468 (SCA).

¹⁴ *Bredenkamp* para 45; *National Chemsearch (SA) Pty Ltd v Borrowman* 1979 (3) SA 1092 (T) at 1107E – H; *Magna Alloys* at 895D – I.

and restraint cases,¹⁵ the link has not yet been discussed or investigated. This is the inspiration for this thesis: to investigate the relationship between the approaches for determining the enforcement of valid clauses with the approach in restraint of trade cases, and to assess whether anything can be learned from the approach in restraint cases to address the shortcomings in the approach to general unfair enforcement cases. In doing so, this study provides a thorough description and examination of the second leg of the *Barkhuizen* public policy test for determining the enforcement of an objectively valid clause (referred to hereafter as “*Barkhuizen 2*” for ease of reference). The study examines and compares the interpretation and application of the public policy test in the context of restraint cases and in general cases. It is proposed that a guide should be developed from the approach in restraint cases to inform the approach in general cases. It is submitted that the proposed guide would ensure clear, practical and consistent contractual enforcement analysis in South Africa – which would promote legal certainty – and litigants in unfair enforcement cases would have a general idea about whether or not a judge will enforce their agreement in the particular circumstances of their case.

1.2 Outline of the thesis

This thesis contains seven chapters. Chapter two discusses the history of the application of public policy in determining the enforceability of contracts. Chapter three discusses the development and application of *Barkhuizen 2* in determining the enforcement of a valid clause. Chapter four discusses the current legal position enunciated by the Constitutional Court in *Beadica*. Chapter five examines the approach to determining the reasonableness of the enforcement of restraint of trade clauses and argues that the courts have established suitable guidelines for applying public policy in determining the reasonableness of the enforcement of a restraint clause. Finally, chapter six utilises a case study to argue that a guide, based on the restraint of trade approach, can be developed to deal with the unfair enforcement of valid clauses in a manner that ensures a consistent application of *Barkhuizen 2*. Chapter six then concludes the study by summarising the salient submissions made throughout the thesis.

¹⁵ *Brisley* para 74 and *Bredenkamp* para 45.

Chapter Two – Historical Development

2.1 Introduction

The use of the doctrine of public policy to determine the enforceability of clauses can be traced back to South Africa's sources of law. The historical application of public policy and its related concepts¹ is discussed in this chapter. In the late 19th to early 20th century, the South African courts imported principles on public policy from various sources such as Roman and Roman-Dutch Law and English Law. Recently, the South African courts have identified ubuntu as a core tenet of public policy, and so ubuntu as source in South African customary law is briefly discussed below.

2.2 The historical application of public policy

2.2.1 South African customary law

Since the advent of constitutional democracy, South African judges have embraced African customary law and tradition as a primary source of South African law.² A concept that has been influential in our current conception of public policy in contract law is the concept of ubuntu that is grounded in South African customary law. It is considered as having been infused into the South African legal system as an equitable principle which “continues to play a major role in the reasoning of the South African judiciary”.³ It has further been considered as responsible for inspiring the establishment of *Barkhuizen*.⁴ Ngcobo CJ in *Barkhuizen* stated that “public policy takes into account the necessity to do simple justice between individuals and that it is informed by the concept of ubuntu”.⁵ Therefore, there is no doubt that ubuntu constitutes a value that is important in the enquiry into the fairness of the enforceability of a valid clause.

¹ Such as good faith, ubuntu, reasonableness and fairness.

² *Beadica* para 110; *Barkhuizen* para 51; *Everfresh* para 71; Zimmermann and Visser *Southern Cross* at 15 explain that one of the greatest challenges is finding a place for African customary law and tradition in our legal order; Du Plessis in H Du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract* (LLD Unisa 2017) at 377 stated that: “the harmonisation of good faith and ubuntu in the common law of contract is essential not only to establish a plural legal culture but also to develop the common law of contract in line with the Constitution”.

³ C Rautenbach “Legal Reform of Traditional Courts in South Africa: Exploring the Links between Ubuntu, Restorative Justice and Therapeutic Jurisprudence” (2015) 2 *Journal of International and Comparative Law* 275 – 304 at 277.

⁴ H Du Plessis “Harmonising Legal Values and uBuntu: The Quest for Social Justice in the South African Common Law of Contract” (2019) 22 *PELJ* 1 at 11.

⁵ *Barkhuizen* para 51.

This section attempts to outline a brief understanding of ubuntu, which has informed the current understanding of public policy as it applies in unfair enforcement cases.

The concept of ubuntu has been considered as difficult to define, a precise definition of it would not be attainable, and thus its meaning can only be expressed in general terms.⁶ In an academic article, Mokgoro J described ubuntu as a philosophy which provides that a person can only exist through other people – *motho ke motho ba batho ba bangwe*.⁷ This philosophy is manifested in everyday life through selfless and “anti-individualistic-conduct” towards other people.⁸ The values that underlie ubuntu are considered as “universally inherent to South Africa’s multi cultures”.⁹ In the seminal case of *S v Makwanyane*,¹⁰ Langa J described ubuntu in the following terms:

“It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all”.¹¹

Ubuntu thus requires that parties engage with one another with a sense of mutual respect. This means that when a dispute arises between parties, such as whether a contract should be enforced against another party or not, the parties should approach the dispute with the objective of restoring their contractual relationship, or at the least, resolve the matter in a way that is fair on both parties. Mokgoro J thus expressed the core elements of ubuntu as follows:

“communalism which emphasises group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a

⁶ JY Mokgoro “Ubuntu and the Law in South Africa” (1998) 1(1) *PELJ* 2; R English “Ubuntu: The Quest for an Indigenous Jurisprudence” (1996) 12 *SAJHR* 641.

⁷ Mokgoro 1996 *SAJHR* 2.

⁸ *Ibid.*

⁹ Mokgoro 1996 *SAJHR* 4.

¹⁰ 1995 (3) SA 391 (CC).

¹¹ *Makwanyane* para 224.

sense of national unity among South Africans; the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which emphasises retribution and seems repressive. The lawsuit is viewed as a quarrel between community members and not as a conflict. The importance of group solidarity requires restoration of peace between them; the importance of public ritual and ceremony in the communication of information within the group; the idea that law, experienced by an individual within the group, is bound to individual duty as opposed to individual rights or entitlement. Closely related is the notion of sacrifice for group interests and group solidarity so central to *ubuntu(ism)*; the importance of sacrifice for every advantage or benefit, which has significant implications for reciprocity and caring within the communal entity”.¹²

Interpreted within the context of contract law, ubuntu appears to have the effect of “balancing out the excesses and dominance of the principle of freedom of contract”, and “acting as a vehicle in the development of contract law to promote fairness in contracting between parties”.¹³ Ubuntu has further been recognised as playing a similar role to that of the principle of good faith, which requires contracting parties to have mutual respect for one another, and to not unreasonably promote their own interests at the expense of the other party.¹⁴ Bennett argued that ubuntu could be used to give the principle of good faith an essence that is consistent with African ideals.¹⁵ It is thus understandable why both good faith and ubuntu have been linked “to the aims of justice, reasonableness and fairness in contracts”.¹⁶ Referring to Rautenbach,¹⁷ Du Plessis stated that ubuntu placed a responsibility and duty on a person to promote the interests of the greater community.¹⁸ This suggests that ubuntu required contracting parties to always act in accordance with the public interest, and not entirely in accordance with their own interests. The abovementioned is consistent with the views of Himonga, Taylor and Pope, who suggested that ubuntu assisted the courts in resolving the potential conflicts that arise between

¹² Mokgoro 1996 *SAJHR* 8 - 9.

¹³ S Sewsunker “Contractual Exemption Clauses under the South African Constitution: An Examination of the Potential Impact of Public Policy and Ubuntu on such Provisions” (Master’s in Business Law Dissertation University of KwaZulu-Natal 2012) 60; Hutchison *Contract* 27.

¹⁴ *Barkhuizen* para 140.

¹⁵ TW Bennett, AR Munro and PJ Jacobs *Ubuntu: An African Jurisprudence* (2018) 122.

¹⁶ Du Plessis 2019 *PELJ* 11.

¹⁷ C Rautenbach “Exploring the Contribution of Ubuntu in Constitutional Adjudication – Towards the Indigenization of Constitutionalism in South Africa?” in Fombad CM (ed) *Constitutional Adjudication in Africa* (2017) 293 – 312 at 296.

¹⁸ Du Plessis 2019 *PELJ* 16.

individual interests and public interests, because its underlying values required that these interests be harmonised – the interests of the individual party are the same as the interests of the broader community.¹⁹

Against this background, South African customary law is valuable to our current understanding of public policy. This is because it imports the concept of ubuntu and its underlying values into the law of contract. The concept of ubuntu is thus significant because it informs the public policy test for determining the enforcement of a valid clause.²⁰ Its possible effect on unfair enforcement cases is illustrated below in chapter 6.

2.2.2 Roman and Roman-Dutch law

The doctrine of public policy has its roots in Roman Law²¹ and Roman-Dutch Law.²² However, there appears to be no mention of public policy as a distinct concept for determining the enforceability of a valid contract term in the Roman and Roman-Dutch law sources. Public policy and the *boni mores* were utilised primarily as a source to invalidate contracts that were objectively contrary to public policy. In Roman law, the focus was primarily on the recognition of contractual equity between contracting parties in terms of the principle of good faith because the law regarded the majority of contracts as *bonae fidei*.²³ Therefore, the origin of good faith can be traced back to Roman contract law.²⁴ However, the recognition of contracts based on good faith developed alongside the existence of the *stricti iuris* contract. During the early years of the Roman Republic, before the generalised concept of “contract” existed,²⁵ contracts were concluded through a strict formal procedure whereby a type of agreement, namely, a *stricti iuris* contract, was created.²⁶ A *stricti iuris* contract was binding if a material event signifying a person’s intention to be bound by the contract had occurred, such as the delivery of the thing,

¹⁹ C Himonga; M Taylor and A Pope “Reflections on Judicial Views of Ubuntu” (2013) 5 *PELJ* 369 at 420 – 421.

²⁰ Confirmed recently in *Beadica* paras 72 and 73; Ubuntu is regarded in South Africa as a core element of public policy. *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 73.

²¹ D H van Zyl *History and Principles of Roman Private Law* (1983) pg 254.

²² Grotius 3 1 42 and 3 1 43; Voet 2 14 16; Digest 28 7 15; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173 at 204.

²³ Stein *Buckland’s Text-book of Roman law* (1996) 413; Van Warmelo *Principles of Roman Civil Law* (1980) paras 393 – 394.

²⁴ Zimmerman *Southern Cross* 218.

²⁵ See P Collinet “The Evolution of Contract as Illustrating the General Evolution of Roman Law” (1932) 48 *Law Quarterly Review* 488 and A Watson “The Evolution of Law: The Roman System of Contracts” (1984) 2 *Law and History Review* 1 for a description of the evolution of contract law in Rome.

²⁶ Hutchison *Contract* 12; Van Zyl *History and Principles of Roman Private Law* 254; Christie *Law of Contract* 5; Gaius 3 89; Watson 1984 *Law and History Review* 4.

the use of formal words or by the recording of an agreed debt in a ledger. If the parties followed the prescribed formalities, the contract was strictly enforceable, even if one party induced the other by fraud or the contract had an immoral purpose. Contracts in early Rome were generally unilateral, meaning that consensus was not a requirement for the creation of binding obligations. Furthermore, the maxim *pacta sunt servanda* ruled the majority of contracts, particularly during the time of Justinian, who favoured the existence of contractual autonomy.²⁷ However, the Codex provided that contracts that were contrary to the *boni mores* would be of no force and effect.²⁸

Even though very little development had occurred, to the extent that “even a fixed terminology was lacking”,²⁹ the law had developed to the extent that the jurists rejected acts that were *contra bonos mores*, because such acts “violated the good ancestral custom”.³⁰ What the law regarded as *contra bonos mores* was “decided according to the moral standards of the people, not according to religious or philosophical doctrines”.³¹ The jurists later realised that the *stipulatio* (a type of *stricti iuris* contract which was prominent in early Rome) was inadequate in ensuring that contracting parties³² would live up to their obligations.³³ The jurists thus recognised consensual contracts³⁴ which bolstered the influence of good faith. The Roman jurists recognised that good faith must govern contracts because commercial life, and society, in general, would not function if each party to a contract “could not be counted on to perform his part of the contract”.³⁵ Consensual contracts were thus established and regarded as *iudicia bonae fidei*, which meant that the principles of good faith governed them.³⁶ The jurists later began to understand good faith as a normative value by which a court could refuse to enforce

²⁷ Codex 2 3 ; Aquilius (FP van den Heever) ‘Immorality and Illegality in Contract’ (1941) 58 *SALJ* 337 at 339; *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 37.

²⁸ Codex 2 3 6; 2 3 29.

²⁹ M Kaser *Roman Private Law* (1965) page 50.

³⁰ Kaser *Roman Private Law* (1965) 51.

³¹ Kaser *Roman Private Law* (1965) 51; Wessels *The Law of Contract In South Africa* vol 1 (1936) page 153; D 28 7 14.

³² Particularly in the context of contracts entered into between the Romans and foreigners.

³³ Watson 1984 *Law and History Review* 8.

³⁴ Collinet 1932 *Law Quarterly Review* 489.

³⁵ C Visser “The Principle Pacta Sunt Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade” (1984) 101 *SALJ* 641 at 643.

³⁶ M Kaser *Das Römische Privatrecht* 2 ed II (1971) 485 - 489.

a contract.³⁷ This normative framework giving rise to good faith was the *boni mores*.³⁸ In order to determine whether an agreement was *contra bonos mores*, the jurists would assess the moral standards of the people of Rome. The Roman law recognised that jurists must strike down all agreements that were contrary to these morals.³⁹

The fact that the *stricti iuris* contract was strictly enforceable led to harsh consequences on contracting parties who were subject to acts of bad faith, as they had no legal recourse to avoid the enforcement of such a contract. The general view, therefore, was that a *stricti iuris* contract was manifestly unfair because there was no recourse in law to challenge its enforceability if it was enforced in unreasonable circumstances.⁴⁰ To mitigate the harsh effect of *stricti iuris* contracts on contracting parties, the *praetor* introduced several equitable defences that could be raised by defendants who petitioned to escape the enforcement of a *stricti iuris* contract.⁴¹ One of the equitable defences introduced by the praetorian edict was the *exceptio doli*, the defence of bad faith. Initially, the *exceptio doli* functioned as a specific standard clause that was entered into by the defendant during the conclusion of a *stricti iuris* contract.⁴² The *exceptio doli* then transformed into a general defence which fell into one of two distinct scenarios for unenforceability.⁴³ The *exceptio doli specialis* provided that if the content expressed by the words of the contract were immoral, then the agreement would be invalid. Secondly, if the content of the agreement as described by its words were not immoral, the contract was valid. However, the *exceptio doli generalis* provided that the praetor could refuse to enforce the contract through the *exceptio doli* where the contract was entered into fraudulently, or a party brought the action to enforce the contract in bad faith.

³⁷ T Mayer-Maly “The Boni Mores in Historical Perspective” (1987) 50 *THRHR* 60; A J Kerr “Morals, Law, Public Policy and Restraints of Trade” (1982) 99 *SALJ* 183; *The Principles of Law of Contract* 3 ed (1980) 98; Christie’s *Law of Contract* (1981) 335.

³⁸ M Kaser *Roman Private Law* 2 ed (1965) 51 (translated by R Dannenbring); Visser 1984 *SALJ* 645; D 22 1 5; C 2 3 6.

³⁹ LE Trakman “The Effect of Illegality in South African Law – A Doctrinal and Comparative Study” (1977) 94 *SALJ* 327 at 330.

⁴⁰ H R Hahlo “Unfair Contract Terms in Civil-Law Systems” (1981) 98 *SALJ* 70.

⁴¹ Some examples of equitable defences that the praetor introduced were the defences based on *dolus*, *metus*, and *error*. In D 4 4 16 4 and C 4 44 4, 10 the following maxim is provided: “in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire” which means a party can do their best to outwit one another to obtain the best bargain out of the contract as long as it is not fraudulent.

⁴² Zimmerman and Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1 ed 217 - 220; Hutchison *Contract* 28.

⁴³ D 22 1 5; C 2 3 6; D 45 1 26; D 12 5 8; D 45 1 134; D 18 1 35 2; D 22 1 5; C 2 3 6.

In both cases, the *exceptio doli* allowed the courts to ensure that they upheld strictly enforceable contracts in reasonable circumstances. The *exceptio doli generalis* was thus a defence that imported the notion of good faith into the realm of strictly enforceable contracts by protecting parties against the harsh consequences of the enforcement of an agreement that would otherwise have been enforced by a strict application of its terms. The public interest was the foundation upon which the courts could refuse to enforce a *stricti iuris* contract.⁴⁴ Against this background, it is thus clear that parties could rely on the *exceptio doli generalis* as a defence against the enforcement of formally valid contracts (at the time, the contracts *stricti iuris*).

During the merging of Roman Law with the Dutch customary law from the Province of Holland and the Canon Law, scholars such as Grotius, Voet, Huber and Van de Sande⁴⁵ recognised that the courts would not enforce contracts that conflicted with the public interest.⁴⁶ The increasing emphasis on the concept of good faith as central to public policy bolstered the emphasis on the sanctity of contract as a fundamental principle in the determination of enforcement of a contract.⁴⁷ However, the jurists maintained that they would consider the sanctity of contract only if the contract was consistent with the *boni mores*. In his *Inleidinge* Grotius stated unequivocally that men are free to bind themselves by the promises they make, but that the *boni mores* limited this freedom. Therefore, the court would only uphold the contract if its form and content were in line with the *boni mores*.⁴⁸ In his *De Jure Belli ac Pacis* Grotius stated that even if an agreement was valid, parties should not be bound by the words of the agreement if its enforcement was

“considered to a reasonable outsider as being too great and unbearable hardship, either in an absolute sense by taking human nature into account, or [in a relative sense] by striking a comparison between the party and the subject-matter on the one hand, and the purpose of the agreement on the other”.⁴⁹

⁴⁴ Zimmerman and Visser *Southern Cross* (1996) 217 – 220; Watson 1984 *Law and History Review* 19.

⁴⁵ L Trakman “The Effect of Illegality in South African Law – A Doctrinal and Comparative Study” (1977) 94 *SALJ* 327 at 327 - 328.

⁴⁶ *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 502E - G.

⁴⁷ *Hutchison Contract* 13; Visser 1984 *SALJ* 647.

⁴⁸ *Inleidinge* 3 1 21; 4 1 42 - 43.

⁴⁹ *De Jure Belli ac Pacis* 2 16 27 1; Visser 1984 *SALJ* 651.

Grotius⁵⁰ and Voet,⁵¹ both wrote that a contract would be unenforceable if it was contrary to public policy⁵² and, in some cases, if it was contrary to the moral sense of the community.⁵³ Furthermore, Van Leeuwen⁵⁴ and Van der Linden⁵⁵ wrote that a contract was unenforceable if it was contrary to public policy, justice or equity, good faith or good morals. According to Grotius, all pacts were binding according to the natural law, and this principle gave effect to the principle of good faith.⁵⁶ He also adopted the view that good faith was central to the concept of justice. It was trite that “the contracting parties were bound to everything which good faith reasonably and equitably demanded”⁵⁷ and that “this meant that the courts should have had wide powers to read into a contract any term that justice required”.⁵⁸

In Roman-Dutch law, if parties sought to enforce a contract in a manner that was offensive to good faith, the courts had the power to read into a contract any term that justice required. It is for this reason that Roman-Dutch law was considered inherently equitable, and explains why good faith was at the core of any inquiry into the fairness of the enforcement of a contract.⁵⁹ The focus in Roman-Dutch law was whether the contract (and its enforcement) met the standard set by the principle of good faith. Due to the emphasis in Roman-Dutch Law on good faith as a principle underlying all contracts, the relevance of the *exceptio doli* as a defence in Roman-Dutch contract law “faded into obscurity”⁶⁰ and there was no alternative defence to the *exceptio doli*. It therefore appeared that the Roman-Dutch jurists did not recognise any particular substantive defence against the enforcement of a valid contract in bad faith. The substantive elements of the *exceptio doli generalis*, which allowed a party to challenge the enforceability of a valid clause, “was absorbed into the requirement of good faith” and thus, was no longer needed.⁶¹

⁵⁰ 3 1 42 and 3 1 43.

⁵¹ 2 14 16.

⁵² 1977 (4) SA 494 (N) at 502E - F.

⁵³ Savigny *System* vol 3 at 122.

⁵⁴ *Het Roomsche Hollandsche Recht* 2 4 2 13.

⁵⁵ J van der Linden *Koopmans Handbook* (1806) 1 14 2 and 1 14 6.

⁵⁶ Visser 1984 *SALJ* 649; *De Jurre Belli ac Pacis* 2 11 4 1.

⁵⁷ *Bank of Lisbon* at 601.

⁵⁸ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 652.

⁵⁹ *Estate Thomas v Kerr* (1903) 20 SC 354 at 374; 1988 (3) SA 580 (A) 606.

⁶⁰ *Hutchison Contract* 28.

⁶¹ R Zimmerman ‘Good Faith and Equity in Modern Roman-Dutch law’ in AM Rabello (ed) *Aequitas and Equity* (1997) 522; Hutchison ‘The nature and basis of contract’ *Contract* (2012) 27; Zimmerman *Law of obligations* (1990) 102 & 509; Du Plessis (LLD Unisa 2017) 118.

2.2.3 English law

The doctrine of public policy also has its roots in English law. This was made clear by the central role public policy played in the determination of the enforcement of restraint of trade agreements in England in the 19th century.⁶² As will be discussed below, South African courts adopted the approach in English law in the context of restraint of trade agreements during the late 19th century and early 20th century.⁶³ Public policy in English law was defined conservatively, based mainly on the principle of freedom to and sanctity of contract. The principle of freedom to and sanctity of contract was the cornerstone of English contract law, and it provided that individuals had an unlimited right to enter into legally enforceable agreements without any interference by the court.⁶⁴ Therefore the grounds upon which a court could refuse to enforce a valid contract were severely limited⁶⁵ because, in terms of the freedom to and sanctity of contract, public policy demanded that the courts must enforce all contracts freely and voluntarily agreed.

The widely recognised *dictum* by Sir George Jessel MR in *Printing and Numerical Registering Company v Sampson*⁶⁶ illustrated the position best:

“[if] there is one thing, which more than another, public policy requires, it is that [individuals] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts”.⁶⁷

The focus of the English courts in the 19th century was thus on the enforcement of contracts and therefore, the English law was not concerned with substantive contractual fairness.⁶⁸ As will be shown in chapter 5, the grounds upon which a court could refuse to enforce a valid clause were established mainly in the context of restraint of trade agreements.

⁶² See chapter 5 for a detailed discussion on the English law on restraint of trade agreements.

⁶³ See chapter 5.

⁶⁴ CJ Pretorius “The Basis of Contractual Liability in English Law and its Influence on the South African Law of Contract” (2004) 37(1) *SALJ* 96 at 98. See B Du Plessis & D Davis, “Restraint of Trade and Public Policy” (1984) 101(1) *SALJ* 86.

⁶⁵ *Reynolds v Donald Currie & Co* 1875 NLR 1; *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 465.

⁶⁶ 1875 LR 19 Eq 462 at 465.

⁶⁷ See Hahlo “Unfair Contract Terms in Civil-Law Systems” (1981) 88 *SALJ* 70.

⁶⁸ Pretorius 2004 *SALJ* 98.

2.3 Pre-Constitutional Approach in South Africa

In the late 19th century, South African courts adopted a blend of both Roman-Dutch law and English law.⁶⁹ The courts upheld the freedom to and sanctity of contract, but in some cases, recognised that the courts had an inherent power to refuse to enforce a contract if the contract was objectively contrary to public policy. The law had not yet developed to the extent where a court could refuse to enforce an objectively valid contract on the basis that its enforcement would be contrary to public policy.⁷⁰ The courts recognised the doctrine of public policy as central to the enquiry into the validity of a contract but adopted a limited understanding of public policy as one that favoured, as its paramount policy factor or value, the freedom to and sanctity of contract.⁷¹ The courts treated concepts such as good faith with caution, and instead emphasised other values such as legal certainty.⁷²

The first case in South Africa that dealt with the application of public policy in a contract enforcement case was *Eastwood v Shepstone*.⁷³ In this case, Innes CJ had to determine the validity and enforceability of a contract whereby, in return for rights of occupation and use of two farms, a native chief bound himself and his tribe to provide work on the farms without the workmen being parties to the agreement. Since the contract was contrary to legislation that expressly prohibited contracts of that nature, Innes CJ held that the contract was contrary to public policy and unenforceable.⁷⁴ According to Innes CJ, public policy was the appropriate device to deem the contract unenforceable because the court had the power to refuse the enforcement of a contract if it was against public policy.⁷⁵

In a later case, *Burger v Central South African Railways*⁷⁶ Innes CJ held that a court could not refuse to enforce a contract merely on the basis that its enforcement would be unreasonable.⁷⁷

⁶⁹ Du Plessis (LLD Unisa 2017) 141 – 142 and the footnotes cited there.

⁷⁰ *Van Rensburg v Staughton* 1914 AD 328; Hawthorne 2006 *THRHR* 50; Wessels *Law of Contract* 497.

⁷¹ *Wynns Car Care Products v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) 760; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 298 (A) 436; *Grinaker Construction v Transvaal Provincial Administration* 1982 (1) SA 78 (A) 96; *Haviland Estates (Pty) Ltd and another v McMaster* 1969 (2) SA 312 (A) 336; *Sleightholme Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd* 1967 (1) SA 13 (R) 18; Hawthorne 2006 *THRHR* 50 – 51.

⁷² *Mills and Sons v The Trustees of Benjamin Bros* (1876) 6 Buch 115 at 121.

⁷³ 1902 TS 294.

⁷⁴ *Eastwood* at 303.

⁷⁵ *Eastwood* at 301 - 302.

⁷⁶ *Eastwood* at 571.

⁷⁷ *Burger* at 576.

The contract had to be objectively contrary to public policy in order for a court to refuse its enforcement. He then further held in *Robinson v Randfontein Estates GM Co Ltd*⁷⁸ that, in the absence of fraud or deceitful conduct, “there may be circumstances in which a contract will not be enforced because it offends public policy”.⁷⁹ As it is in the public interest not to enforce contracts that are contrary to public policy, the courts are by law, equipped with the power to refuse to enforce contracts that infringe on public policy and the *boni mores*, in order to protect the interests of the public. Despite Innes CJ’s recognition of public policy as the appropriate device to determine the enforceability of a clause, the focus at the time was on the objective validity of the contract in light of public policy and not the validity of its enforcement in particular circumstances.

The courts adopted a strict approach to contracts that were objectively valid and strictly enforced them, even if their enforcement in the circumstances may have been unfair. In *Weinerlein v Goch Building Ltd*⁸⁰ Kotze JA stated that “equity cannot and does not override a clear provision of our law”. Even though our common law contained principles that had an equitable foundation, equity could not be relied on directly as a distinct doctrine of law. According to Kotze JA’s judgment, equitable principles such as good faith only played an informative role in existing laws and doctrines. Therefore, it was trite that a court ought to enforce a contract if it was valid, and the court could not rely on considerations of equity to refuse its enforcement.⁸¹ Wessels JA suggested that a court could only refuse to allow a person to enforce a claim against another in unconscionable circumstances,⁸² suggesting that our courts could well have an equitable power to refuse to enforce a contract if its enforcement would be contrary to notions of equity and justice.

Notwithstanding Wessels JA’s propositions in *Weinerlein* that equitable principles ought to play a more significant role in the public policy analysis, the Appellate Division in *Wells v South African Alumenite Company*⁸³ maintained its upholding of the freedom and sanctity of contract as the paramount principle of public policy. The court held that public policy required, more than anything, that men of full age and competent understanding “shall have the utmost

⁷⁸ 1925 AD 173.

⁷⁹ *Robinson* at 204 – 205.

⁸⁰ 1925 AD 282.

⁸¹ *ibid.*

⁸² *Weinerlein* at 292 - 293.

⁸³ 1927 AD 69.

liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice”.⁸⁴ In contrast, the Appellate Division in *Jajbhay v Cassim*⁸⁵ appeared to have favoured a different approach, holding that “public policy should properly take into account the doing of simple justice between man and man”.⁸⁶ It therefore appeared that there was no clear consensus amongst judges as to whether the courts had an equitable discretion to refuse the enforcement of contracts or whether they were strictly bound by the principles of freedom to and sanctity of contract when determining the enforceability of clauses.

2.3.1 *The exceptio doli generalis in unfair enforcement cases*

In the middle of the 20th century, the courts had not yet established an approach for dealing with the unfair enforcement of a valid contract. The question arising in this context is what legal principle would have been applicable if there was a challenge to the enforcement of a valid clause in particular circumstances? Academic commentators⁸⁷ and some judges of the High Court⁸⁸ generally assumed that the value of good faith governed disputes of that nature, mainly through the application of the *exceptio doli generalis*. Although this view was criticised by other academic commentators.⁸⁹ The Appellate Division in *Zuurbekom Ltd v Union Corporation Ltd*⁹⁰ made important findings in this regard. The case concerned the fairness of upholding an interdict against a property owner in circumstances where the enforcement of the interdict would have led to an inequitable result.⁹¹ In support of Wessels JA’s remarks in *Weinerlein*, Tindall JA recognised the role of the *exceptio doli generalis* in Roman law, and recognised its applicability to that dispute.⁹² Tindall JA supported the proposition that a judge can decide the matter in terms of what would be equitable between the parties. Tindall JA

⁸⁴ *Wells* at 73.

⁸⁵ 1939 AD 537.

⁸⁶ *Jajbhay* at 544.

⁸⁷ Kerr *Contract* 637; Aronstam “Unconscionable Contracts: the South African Solution” (1979) 42 *THRHR* 21; Van Wermelo “*Exceptio Doli*” (1981) *De Jure* 202; *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A); 1988 (3) SA 580 (A) 612; A J Kerr *Principles of the Law of Contract* 6 ed (2002) 637; G Glover “Lazarus in the Constitutional Court: An Exhumation of the *Exceptio Doli Generalis*?” (2007) 124 *SALJ* 449; Christie’s *Law of Contract* (2016) at 13.

⁸⁸ *Weinerlein* at 292 – 293; *Zuurbekom* at 535; *Paddock Motors* at 27 – 28; *Rand Bank* at 214.

⁸⁹ *De Wet Estoppel by Representation in die Suid-Afrikaanse Reg* 83 – 89; Van Huysteen *Onbehoorlike Beincloeding* 174.

⁹⁰ 1947 (1) SA 514 (A).

⁹¹ *Zuurbekom* at 537.

⁹² *Zuurbekom* at 536 - 537.

ultimately found that a judge may refuse a claim by the plaintiff for an interdict against the defendant if it would cause inequity or would amount to unconscionable conduct on the part of the plaintiff. The Appellate Division in *Zuurbekom* thus recognised the *exceptio doli generalis* as being available to a litigant, even though there was uncertainty regarding the precise extent and scope of its application.⁹³

The applicability of the *exceptio doli generalis* was considered further almost 30 years later in *Paddock Motors (Pty) Ltd v Igesund*.⁹⁴ *Paddock Motors* concerned a deed of settlement between a buyer of immovable property (on behalf of his business) and a seller. The deed provided that the buyer should pay timeously, and in full, an amount of R5580 by a specific date.⁹⁵ The buyer would be entitled to transfer of the immovable property by the seller once he paid the full amount. After having paid four of the six agreed upon instalment payments, the buyer failed to pay the two instalments as expected by the seller but rectified the default by paying the full balance with interest by the due date indicated in the deed of settlement. The seller accepted the late payments but refused to register transfer of the property to the buyer based on the late payments of the final two instalments. The seller thus sought to eject the buyer's business from the property and reclaim ownership of the property.

The buyer raised the *exceptio doli generalis* in response to the seller's claim, challenging the seller's claim on the basis that the seller brought it in bad faith. The buyer claimed that it was inconsistent with good faith that the seller retained both full payment and the title to the property and that based on the *exceptio doli generalis*, the court should reject the seller's claim.⁹⁶ Jansen JA recognised the *exceptio doli generalis* as a legitimate defence available to the buyer in the circumstances.⁹⁷ Jansen JA referred to a statement made in Sohm's *Institutes* translated by Leadlie:⁹⁸

“An *exceptio doli* was declared available... wherever the raising of the action constituted objectively a breach of good faith. The insertion of the *exceptio doli* in the formula was considered to empower the judge to take account of every single

⁹³ *Ok Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 293C – H.

⁹⁴ 1976 (3) SA 16 (A) at 27.

⁹⁵ *Paddock Motors* 24G – 25E.

⁹⁶ *Paddock Motors* 28A – E.

⁹⁷ 1976 (3) SA 16 (A) at 340.

⁹⁸ Ledlie *Contract* 3 ed at p280.

circumstance that would render the condemnation of the defendant substantially unjust”.

Furthermore:⁹⁹

“The *exceptio doli* was accordingly used for the purposes of mitigating the harshness of *jus strictum* that governed all transactions in which the resulting obligation was strictly and literally interpreted; for the purpose, in other words, of protecting the real meaning of formal promise from the consequences of a mere literal interpretation, and of thus protecting the underlying economic relation – as where a man had given a promise on the erroneous supposition that he was under a legal liability – from the strict operation of a formal contract. And in the same it was employed for giving effect to counter-claims.”

Jansen JA explained that in Roman law, jurists established the *exceptio doli* to regulate strictly enforceable contracts. The law developed to the effect that all contracts were *bonae fidei*, and therefore, the extent and scope of application of the *exceptio doli generalis* became limited.¹⁰⁰ However, Jansen JA further explained that the *exceptio doli generalis* was not so limited, and thus found application in our law if we considered contracts that were put in writing, and that were signed, as *negotium stricti iuris*, or strictly enforceable agreements. Therefore, if a contract were enforceable (in terms of freedom to and sanctity of contract, or *pacta sunt servanda*), then the *exceptio doli generalis* would apply if its enforcement lead to an inequitable or harsh result.¹⁰¹ Jansen JA added that the *exceptio doli generalis* could not be used as a defence to challenge the enforcement of a contract merely on the basis that its terms were unfair.¹⁰² Therefore, *Paddock Motors* stood as authority for the proposition that a court could refuse to enforce a contract on the basis that doing so in the particular supervening circumstances would be contrary to equity or good faith, by application of the *exceptio doli generalis*. In light of the *Zuurbekom* and *Paddock Motors* cases, it appeared that the *exceptio*

⁹⁹ Ledlie *Contract* 3 ed at p280 – 282.

¹⁰⁰ *Paddock Motors* at 28D - G.

¹⁰¹ *Paddock Motors* at 28E - G.

¹⁰² Jansen JA quoted with support the following statement by Fannin J in *Rashid v Durban City Council* 1975 (3) SA 920 9D) at 927B – D: “Mr. Mendelow, was able to refer me to no case in which it has been held that the *exceptio doli* can successfully be pleaded merely because one party to a contract has exercised, as against the other party, a right conferred upon him by that contract. To do that would, in my opinion, be to exercise a jurisdiction to regulate contractual relationships merely on the ground that the Court considered that one party had driven a hard, harsh bargain, and I do not think that our law confers any such jurisdiction upon our Courts, whatever may be the position in other countries whose law is, in whole or in part, derived from the Civil law.”

doli generalis could be relied on as a defence against the enforcement of obligations in inequitable or harsh circumstances.

In light of its interpretation of the leading cases dealing with the *exceptio doli generalis* at the time¹⁰³ Botha J in *Rand Bank Ltd v Rubenstein*,¹⁰⁴ applying the *exceptio doli generalis*, allowed the defendants to escape the consequences of the enforcement of a valid deed of suretyship because the plaintiffs sought to enforce the deed in bad faith.¹⁰⁵ The *exceptio doli generalis* did not operate to change the substantive aspects of the agreement or alter the terms of the validly concluded contract. However, it allowed the courts to refuse to enforce terms in circumstances where enforcement would be unfair or unconscionable,¹⁰⁶ even though the extent and scope of its application was uncertain and imprecise. Interestingly though, Botha J characterised the *exceptio doli generalis* as a weak, “flyblown defence” as it allowed litigants to raise it as a “last-ditch stand” to avoid the consequences of the enforcement of a valid agreement.¹⁰⁷

2.3.2 The end of the *exceptio doli generalis*

Despite the recognition of the *exceptio doli generalis* in *Zuurbekom*, *Paddock* and *Rand Bank*, the Appellate Division in *Bank of Lisbon and South Africa v De Ornelas*¹⁰⁸ dispelled the notion that the *exceptio doli generalis* applied in South Africa and rejected the prevailing view that the *exceptio doli generalis* was a legitimate defence to the unfair or unreasonable enforcement of a valid contract. In this case, Joubert JA, writing for the majority of the court, held that having not been a part of Roman-Dutch Law, our courts ought not to recognise the *exceptio doli generalis* as one of our common-law defences.¹⁰⁹ Therefore, our law did not inherit a general substantive defence for the enforcement of valid contracts in unfair circumstances. Joubert JA held that the *Rand Bank* and *Paddock Motors* decisions were not binding authority for the proposition that the *exceptio doli generalis* existed in our law. Joubert JA held that the *exceptio doli generalis* was a “superfluous, defunct anachronism” which should be “put to

¹⁰³ Such as *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T); *Otto en 'n Ander v Heymans* 1971 (4) SA 148 (T); *Rashid v Durban City Council* 1975 (3) SA 920 (D); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 (A).

¹⁰⁴ 1981 (2) SA 207 (W).

¹⁰⁵ *Rand Bank* at 215B - D.

¹⁰⁶ SJ van der Merwe, GF Lubbe, LF van Huyssteen “The Exceptio Doli Generalis: Requiescat in Pace – Vivat Aequitas” (1989) 106 *SALJ* 235 at 235 - 236.

¹⁰⁷ *Rand Bank supra* at 214A - C.

¹⁰⁸ 1988 (3) SA 580 (A).

¹⁰⁹ *Bank of Lisbon* at 605I - J.

rest”.¹¹⁰ Significantly, Joubert JA rejected the notion that the courts had an equitable discretion to determine the enforcement of valid contracts with direct reference to the concepts of fairness and good faith.¹¹¹ Rather, equitable values such as fairness and good faith inform already existing rules of law, and could not be directly relied on by the court to determine the enforceability of a valid contract.

Legal scholars¹¹² criticised the *Bank of Lisbon* decision because of its strict and formalistic approach in its analysis and application of the Roman and Roman-Dutch principles. They argued that even though the *exceptio doli generalis* was not part of South African law, the values of justice and equity required that the courts should be able to exercise its flexible jurisdiction to recognise a defence such as the *exceptio doli generalis*. By contrast, Jansen JA in his minority judgment in *Bank of Lisbon*, expressed a similar view to those expressed in his majority judgment in *Paddock Motors*. Jansen JA expressed the contrary view that the *exceptio doli generalis* and the doctrine of public policy were similar because they both amounted to a defence against the enforcement of a contract that was unreasonable or unfair.¹¹³ In other words, both legal devices gave the court the power to refuse the enforcement of a contract, or more generally, to decide on an outcome, according to principles of equity such as good faith and fairness.¹¹⁴

Nevertheless, the legal position was that the *exceptio doli generalis* had never formed part of our law, and thus could not be considered as a basis to challenge the enforcement of a usually valid contract. The question thus remained, how would the courts deal with claims against the unfair enforcement of an objectively valid contract. Inevitably, the focus shifted back to recognising public policy as an open norm¹¹⁵ for the refusal of unfairly enforced terms.¹¹⁶ Legal

¹¹⁰ *Bank of Lisbon* at 607B; Van der Merwe 1989 *SALJ* 236.

¹¹¹ *Bank of Lisbon* at 607A - C.

¹¹² Erasmus 1989 *SALJ* 674 - 676; Lewis 1990 *SALJ* 29; L Hawthorne and PH Thomas (1989) 22 *De Jure* 143; AJ Kerr “The Replicatio Doli Reaffirmed – The Exceptio Doli Available in our Law” (1991) 108 *SALJ* 583 at 585; R Zimmermann “The Law of Obligations – Character and Influence of the Civilian Tradition” (1992) 3 *Stell LR* 5 at 5 - 8.

¹¹³ *Bank of Lisbon* at 617F - I.

¹¹⁴ This found support by authors such as Lambiris in Lambiris 1988 *SALJ* 645 who suggested that the *exceptio doli generalis* could function as a mechanism “for the protection of consumers, as well as in other circumstances where unequal bargaining power and the use of standard-form contracts leads to harsh and unfair terms being imposed on a contracting party”.

¹¹⁵ Hawthorne 2014 *PELJ* 2822; Hawthorne 2013 *Fundamina* 303; Brand 2009 *SALJ* 75.

¹¹⁶ Glover 2007 *SALJ* 450 - 451.

scholars endorsed this approach,¹¹⁷ except Professor Kerr, who preferred that our courts recognise the *exceptio doli generalis* as forming part of our law.¹¹⁸ He suggested that our courts should develop the *exceptio doli generalis* to meet the needs of society, regardless of whether our courts had incorrectly imported it into South African law.

2.3.3 A unique approach developed in restraint of trade cases

During the same period, significant developments had occurred in the context of restraint of trade agreements, which similarly concerned the use of open norms¹¹⁹ to determine the enforceability of a type of valid clause. The courts developed an approach that focused mainly on the reasonableness of the enforcement of a restraint clause.¹²⁰ This development began as a result of the leading case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,¹²¹ where Rabie CJ, writing for the majority of the Appellate Division, held that restraint clauses were valid and enforceable. However, their enforcement could be refused if the restraints were unreasonable, and thus contrary to public policy. The court in *Magna Alloys* thus established that determining the reasonableness of the enforcement of a contract was in fact, a public policy enquiry. Therefore, a party could bring a claim against the enforcement of a valid contract on the basis that it was unreasonable, and the party would succeed if he or she could show that its enforcement would be contrary to public policy. Chapter 5 traces the development of the approach to restraint clauses in further detail.

As highlighted in 1.1, the Appellate Division in *Magna Alloys* expressly recognised that the above principle applied equally to all contracts.¹²² Didcott J in *J Louw & Co (Pty) Ltd v Richter*¹²³ suggested that the approach in *Magna Alloys* should be the approach applied generally to all types of contract terms.¹²⁴ Notwithstanding this suggestion, the approach was

¹¹⁷ Van der Merwe et al 1989 *SALJ* 235; Lambiris 1988 *SALJ* 644; Lewis 1990 *SALJ* 26; Erasmus 1989 *SALJ* 666; Zimmermann 1992 *Stell LR* 5.

¹¹⁸ Kerr 1991 *SALJ* 583.

¹¹⁹ An open norm is described by Du Plessis as “a rule or standard that has no fixed or restricted meaning’ which applies to “various situations and enables value judgments” Du Plessis (LLD Unisa 2017) 92. See also Hawthorne 2013 *Fundamina* 300 – 301; T Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 177; Bhana & Pieterse 2005 *SALJ* 868.

¹²⁰ Zimmerman and Visser *Southern Cross* 258.

¹²¹ 1984 (4) SA 874 (A).

¹²² J Louw at 243B; *Barkhuizen* para 28 – 30, 98 and 104; *Magna Alloys* 891G – I, 892I – 893A.

¹²³ 1987 (2) SA 237 (N).

¹²⁴ Didcott J in *J Louw* supra at 243B said: “Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy”.

still not expressly recognised as one applying to contracts other than restraint clauses. Therefore, the courts did not get an opportunity to apply the *Magna Alloys* approach to other forms of contractual agreements. Instead, several authors suggested that courts should consider the notion of good faith as a self-standing substantive defence against the unfair enforcement of a contract.¹²⁵ This occurred around the same period that our law considered *Paddock* as the authority for the principle that parties could use the *exceptio doli generalis* to challenge the enforcement of obligations in inequitable or harsh circumstances.

2.3.4 The “fraud exception”.

In factual scenarios apart from those relating to restraint of trade clauses, the only other instance where a court could refuse to enforce a valid contractual term was in specific factual circumstances giving rise to what our law refers to as the “fraud exception”.¹²⁶ The fraud exception is applied in the specific context of “voetstoots clauses” within the area of the law of sale. The buyer raises the exception when the seller fails to disclose a material defect in the item sold. The voetstoots clause, which is an objectively valid clause, indemnifies the seller against a damages claim if the item has any defects. However, what happens if the seller fraudulently conceals the defect or is aware of the defect and decides not to inform the buyer of the defect? The fraud exception provides that the party seeking to avoid his or her obligations under the (valid) contract of sale may do so if the party can prove that the seller concealed the defect or failed to inform the party of the defect.¹²⁷ In these particular circumstances, the court refuses to enforce the otherwise valid voetstoots clause on the basis that doing so would allow the seller to escape the consequences of his or her fraudulent actions, which would be “unfair” or “unreasonable” to the buyer. Therefore, it was only in this specific context that the courts could refuse to enforce a valid clause, and only in this specific context was a common-law rule established to that effect.

¹²⁵ C Miller “Judicia Bonae Fidei: A New Development in Contract?” (1980) 97 *SALJ* 531; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651E - F and 652C - G.

¹²⁶ See *Van der Merwe v Meades* 1991 (2) SA 1 (A); S van der Merwe et al *Contract: General Principles* (2003) 144; Glover (2007) *SALJ* 451. The “fraud exception” is expressed by the principle that invoking an otherwise valid clause in order to attain fraud will not be accepted.

¹²⁷ *Van Der Merwe* 8E – 11B.

2.3.5 Focus shifts back to the doctrine of public policy

After the *Magna Alloys* and *Bank of Lisbon* judgments, public policy gradually became recognised as an alternative mechanism for judicial control over the enforcement of contracts, and continued to be used to test the objective validity of contracts. However, the courts had not yet formally recognised and accepted it as the central legal device for determining the enforceability of valid contracts in unfair circumstances. In *Sasfin (Pty) Ltd v Beukes*¹²⁸ a case considered to be “the foremost decision dealing with contractual fairness prior to the Constitution”,¹²⁹ Smalberger JA finally took this step. He confirmed the general principle that our courts would not recognise agreements that were contrary to public policy¹³⁰ and thus formally recognised public policy as the appropriate device to deal with the validity and enforcement of contracts.¹³¹ However, Smalberger JA held that a judge ought not to find that a contract was contrary to public policy based on his or her personal views on what was fair in the circumstances.¹³²

The salient facts of the case were that a clause in a contract (a deed of cession), if enforced, would have given the company complete control over a doctor’s future earnings for an indefinite period, therefore depriving the doctor of his income and the means to support himself and his family.¹³³ The court held that the effect of the cession would place the doctor in the position of a “slave” working for the benefit of the company.¹³⁴ The effect of the clause, the court held, would thus be “unconscionable and incompatible with the public interest” and thus contrary to public policy.¹³⁵ The court found that the cession was so “grossly exploitative” that if enforced, would harm the public interest to such a grave extent that it could only be regarded as being contrary to public policy.¹³⁶

Smalberger JA began his analysis by recognising the two fundamental principles of public policy. Firstly, he recognised that public policy generally favoured the “utmost freedom of

¹²⁸ 1989 (1) SA 1 (A).

¹²⁹ Du Plessis 2019 *Constitutional Court Review* 429.

¹³⁰ *Sasfin* at 7I.

¹³¹ Du Plessis (LLD Unisa 2017) 143.

¹³² *Sasfin* at 9A – C.

¹³³ *Sasfin* at 13F – I.

¹³⁴ *ibid.*

¹³⁵ *Sasfin* at 13J – 14A.

¹³⁶ *Sasfin* at 15E – F.

contract”.¹³⁷ Secondly, he recognised that public policy required the doing of simple justice between persons.¹³⁸ Thirdly, he recognised that the court’s power to strike down contracts that were contrary to public policy must be used sparingly and only in the clearest of cases.¹³⁹ The purpose of this was to preserve contractual certainty. In applying the test of public policy to the facts, Smalberger JA held that the case required a balancing act between the policy considerations of freedom and sanctity of contract on the one hand and doing simple justice between individuals on other.¹⁴⁰ This balancing act aimed to achieve an outcome that was fair between the parties and that imported the notions of justice, equity and reasonableness into contracts.¹⁴¹ Smalberger JA emphasised that there were no specific types of contracts or no set *numerous clauses* of contracts that were generally contrary to public policy.¹⁴² This meant that “the flexible notion of public policy is the key criterion that will determine whether a contract is enforceable or not”.¹⁴³

It is evident that the facts in *Sasfin* concerned terms that were objectively contrary to public policy, so it was not made clear whether the principles in *Sasfin* extended to include cases involving the unfair enforcement of an objectively valid clause. It was thus generally accepted that the *Sasfin* stood as the authority dealing with cases where the clause in dispute was substantively unfair.¹⁴⁴ Du Plessis brings to attention the fact that Smalberger JA gave public policy a limited scope to determine the fairness of a contract, due to his focus on the objective terms of the contract.¹⁴⁵ As a result, the court could not consider the surrounding circumstances at the time the parties concluded the contract or at the time of its enforcement and thus could not make any pronouncements on the proper approach to determining the enforcement of an objectively valid contract. Du Plessis further acknowledged that the court could not consider the applicability and the role of good faith probably because of the uncertainty regarding “its specific role in promoting contractual fairness in the aftermath of *Bank of Lisbon*”.¹⁴⁶

¹³⁷ *Sasfin* at 9E - F.

¹³⁸ *Sasfin* at 9G - H.

¹³⁹ *Sasfin* at 17H – I; affirmed by Kriegler J in *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 381F.

¹⁴⁰ *Sasfin* para 9.

¹⁴¹ Du Plessis 2019 *Constitutional Court Review* 435; *Barkhuizen* paras 51 and 73.

¹⁴² *Sasfin* para 8E – G.

¹⁴³ G Glover *The Doctrine of Duress in the Law of Contract and Unjustified Enrichment in South Africa* (PhD Rhodes 2003) 131 – 132.

¹⁴⁴ Du Plessis 2018 *Stell LR* 417.

¹⁴⁵ Du Plessis 2019 *Constitutional Court Review* 431

¹⁴⁶ Du Plessis (LLD Unisa 2017) 135 - 141.

Nonetheless, the steps forward taken in *Sasfin* were accepted and adopted in later Appellate Division cases.¹⁴⁷

Although *Sasfin* took an important step forward in positioning public policy as the main criterion for the validity of the enforcement of contracts, it was unclear whether public policy could be used to determine the enforcement of valid contracts in subjective circumstances. Furthermore, it was not clear how public policy ought to be used to make this determination, and in particular, what role principles of equity and good faith played in the public policy analysis. As Glover said:

“While *Sasfin* promised a new era for contract in South African law, the decision was vague about what this new approach entailed. The two contrasting decisions in *Bank of Lisbon* and *Sasfin* therefore naturally awakened an extensive debate about contractual equity in South African law, and the direction that our law of contract might be taking. Of paramount importance was the need to define more closely what factors were going to be instrumental in determining legality or public policy in the modern era of contract. Of course, the *Sasfin* decision made it clear that the traditional values of freedom of contract and sanctity of promises were to remain fundamentally important factors. But what factors were going to be identified on the other side of the proverbial scales of justice, to balance out the potential harsh effects of the traditional factors, and promote a degree of equity and fairness in our law of contract?”¹⁴⁸

2.4 Public policy in the Constitutional Era

Various legal scholars and judges writing extra-curially have discussed the impact of the Constitution on the law of contract and how it changes the way courts should deal with issues concerning public policy.¹⁴⁹ In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*¹⁵⁰ Chaskalson P explained that we have one system of law, which is shaped by the Constitution, and therefore “all law, including the

¹⁴⁷ *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783A - B.

¹⁴⁸ Glover (PhD Rhodes 2003) 133 – 133.

¹⁴⁹ Bhana 2015 *Stell LR* 3; Barnard-Naude 2008 *Constitutional Court Review* 155 – 208; Bhana & Pieterse 2005 *SALJ* 865 – 895; Hawthorne 2006 *THRHR* 48 – 63; Hawthorne 2008 *SA Public Law* 80 – 93; Lewis 2003 *SALJ* 330 – 351; Lubbe 2004 *SALJ* 395 – 423; Sutherland 2008 *Stell LR* 390 – 414; Sutherland 2009 *Stell LR* 50 – 73; Woolman 2007 *SALJ* 762 – 794.

¹⁵⁰ 2000 (2) SA 674 (CC).

common law, derives its force from the Constitution and is subject to constitutional control”.¹⁵¹ This meant that the law of contract and the principles and doctrines that form it were now subject to the Constitution.¹⁵² This also meant that the Constitution and its values would inform public policy – the central device used for the determination of the enforceability of contractual clauses – as it is understood within the context of the law of contract.¹⁵³ In practical terms, this meant that there may have been a new set of policy factors that were relevant in the public policy analysis.

2.4.1 *The role of good faith*

In the early years of the existence of the Constitution, academic writings and judgments focused on drawing links between the concept of good faith and public policy as open norms to determine the validity of contracts or their enforcement. The main question was how the courts should apply the principle of good faith to contractual disputes, particularly disputes relating to the enforcement of clauses.¹⁵⁴ The courts explored two possible options.¹⁵⁵ The first option was that good faith could be applied directly to such disputes by giving the court the power to refuse to enforce clauses if their enforcement would be in bad faith or unfair. The second option was that good faith could be used as an informing, controlling and legitimating concept, to develop substantive principles that would be used by the courts to refuse the enforcement of clauses in unfair or unreasonable circumstances.

Before the Constitution came into effect, Lubbe argued that good faith “could be developed to perform the same function as the policy consideration of simple justice between [persons]”.¹⁵⁶ Lubbe proposed that where a contract or its enforcement resulted in the one-sided promotion of one party’s interest at the expense of the other party’s interest, this may conflict with the principle of good faith and would also be contrary to public policy. After the Constitution came into effect, Lubbe’s proposition was supported by Olivier JA in his minority judgment in *Eerste*

¹⁵¹ *Pharmaceutical Manufacturers* para 44; This was recently confirmed by the Constitutional Court in *Beadica* para 71 where Theron J stated that “there is only one system of law in our constitutional democracy. As recognised by this court in *Pharmaceutical Manufacturers*, this system of law is shaped by the Constitution, which is the supreme law, and all law, including the common law. Derives its force from the Constitution and is subject to constitutional control.

¹⁵² *Barkhuizen* para 28;

¹⁵³ *Barkhuizen* paras 70 – 71; *Beadica* para 71.

¹⁵⁴ M Nortje “General Principles of Contract” (2002) *Annual Survey of South African Law* 254.

¹⁵⁵ *Brisley* para 71 – 73.

¹⁵⁶ Lubbe 1990 *Stell LR* 17 – 21; Du Plessis 2019 *Constitutional Court Review* 431.

Nasionale Bank van Suidelike Afrika Bpk v Saayman NO.¹⁵⁷ Olivier JA held in an *obiter dictum* that the courts should apply the principles of public policy, which include good faith, but in a manner that maintained contractual certainty, and so the application of good faith must occur cautiously.¹⁵⁸ Olivier JA held further that if a valid and enforceable contract fell foul of the requirements of good faith, public policy would not demand that the party be bound to its enforcement.¹⁵⁹

In contrast, Glover suggested that good faith should be dealt with cautiously because it was difficult to attach a precise definition to the concept. He cautioned that its application might tend to cause legal and commercial uncertainty, because judges may differ as to the precise meaning of concepts such as good faith or fairness.¹⁶⁰ Drawing links between Olivier JA's approach and the demands of the Constitution, Van der Merwe highlighted the value in applying good faith as it required parties to relate to each other with respect and promoted the idea that parties ought not to act in their own interest at the expense of others.¹⁶¹ The courts supported this approach because they understood it as giving effect to the aim, spirit and purport of the Constitution.¹⁶²

For example, Van Heerden DCJ in *NBS Boland Bank Ltd v One Berg River Drive CC & Others; Deeb & Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd*¹⁶³ held that he might have concluded his judgment through an application of the "modern concept" of the role of public policy, good faith and contractual equity as conceptualised by Olivier JA in *Saayman*.¹⁶⁴ Furthermore, in *Janse van Rensburg v Grieve Trust*,¹⁶⁵ Van Zyl J extended the application of the *actio quanti minoris* because it was "required by the principles of justice, equity, reasonableness and good faith" which was "inherent in our common law". Van Zyl J developed the law in this regard because public policy demanded "that the relevant law be extended and adapted to meet the needs of modern commercial practice".¹⁶⁶ The *Janse van Rensburg* case

¹⁵⁷ 1997 (4) SA 302 (SCA) para 318.

¹⁵⁸ *Saayman* para 324.

¹⁵⁹ *Saayman* para 331.

¹⁶⁰ Glover 1998 *THRHR* 334.

¹⁶¹ Van der Merwe 1998 *TSAR* 1.

¹⁶² See Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475 D – F.

¹⁶³ 1999 (4) SA 928 (SCA).

¹⁶⁴ Du Plessis 2019 *Constitutional Court Review* 432.

¹⁶⁵ 2000 (1) SA 315 (C) 316 – 317 and 325.

¹⁶⁶ In terms of sections 8(3), 39(2), and 173 of the Constitution.

appears to be the first contract law case which implemented the mandate to develop the common law in line with the Constitution.¹⁶⁷

In an *obiter dictum* in *Mort NO v Henry Shields-Chiat*¹⁶⁸ Davis J held that good faith (like the concept of wrongfulness in the law of delict) was “shaped by the legal convictions of the community” which consisted of the values of dignity, equality and freedom. Therefore, the court would have infringed the principle of good faith if it gave undue power to contractual autonomy at the expense of equity. Therefore, according to Davis J, the common-law must be developed to strike a balance between contractual autonomy and equity between contracting parties. In *Miller & Another NNO v Dannecker*¹⁶⁹ Ntsebeza AJ acknowledged the close link between the concepts of good faith, public policy and the public interest in contracting. He held that the link exists because “the function of good faith has always been to give expression in the law of contract to the community’s sense of what is fair, just and reasonable” and therefore “the principle of good faith is then a wider notion of public policy”. Accordingly, he said, “the courts invoke and apply the principle because the public interest so demands”.

2.4.2 Public policy, good faith and the Constitution

After *Sasfin* the Supreme Court of Appeal in *Brisley v Drotsky*¹⁷⁰ and *Afrox Healthcare v Strydom*¹⁷¹ had, for the first time, the opportunity to consider the role of the doctrine of public policy as a mechanism to control both the validity and enforceability of contracts in the post-constitutional era. In both cases, the Supreme Court of Appeal clarified the post-constitutional role of equitable values such as good faith, fairness and reasonableness in the assessment of contractual validity and enforcement.

2.4.2.1 *Brisley v Drotsky*

Brisley concerned the enforcement of a non-variation clause in a rental agreement between a lessor and a lessee. The salient facts were that two parties agreed, orally, that if the lessee failed to pay rent, the lessee could pay the lessor whenever she could afford to pay the rent. After

¹⁶⁷ G Glover “The Aediles Curules and the Constitution” (2001) 64 *THRHR* 156 – 165; Du Plessis (LLD Unisa 2017) 150.

¹⁶⁸ 2001 (1) SA 464 (C) at 474I – J.

¹⁶⁹ 2001 (1) SA 928 (C) para 19.

¹⁷⁰ 2002 (4) SA 1 (SCA) at 17.

¹⁷¹ 2002 (6) SA 21 (SCA) at 35.

failing to pay the rent on the time stipulated in the written contract, the lessor sought to evict the lessee. The lessee contended that the written agreement between them was “varied” orally in that the lessor allowed her to pay the rent after the due date. The lessor invoked the non-variation clause which invalidated any subsequent oral variation of the contract. According to the contract, the lessee failed to pay timeously, and the lessor was entitled to evict her.¹⁷² The lessee contended that enforcement of the non-variation clause was contrary to good faith or public policy because the lessor had waived reliance on the clause, and had effectively agreed to the variation. The lessee raised the defence of unfair enforcement in the following terms: that even though the non-variation clause was not objectionable in itself, the enforcement of the clause in the circumstances of the case would be *so inequitable* (in terms of the principles of good faith and public policy) that the court should refuse to enforce the clause.¹⁷³

The first question that the court had to determine was whether it could refuse to enforce the non-variation clause based on good faith.¹⁷⁴ The lessee relied on the statements in *Miller* as authority for the proposition that a court could rely on good faith to invalidate the enforcement of a clause.¹⁷⁵ The majority in *Brisley* rejected the notions in *Miller* and *Saayman* that a court could rely on good faith as an independent or self-standing ground to refuse the enforcement of a contract.¹⁷⁶ The majority held that to allow the courts to refuse the enforcement of contracts based on good faith would result in legal and commercial uncertainty, since judges may differ in what they regard as acts that are consistent with good faith.¹⁷⁷ Recognising good faith as a standalone requirement for the enforcement of a contract would lead to a state of uncertainty in our law that would not be sustainable.¹⁷⁸ The majority further rejected Davis J’s propositions

¹⁷² M Nortje “General Principles of Contract” (2002) *Annual Survey of South African Law* 232 at 253.

¹⁷³ M Nortje ‘General Principles of Contract’ (2002) *Annual Survey of South African Law* 232 at 256.

¹⁷⁴ *Brisley* para 15.

¹⁷⁵ See 2.4.1 on the statements made in *Miller*.

¹⁷⁶ *Brisley* para 14 and 22.

¹⁷⁷ *Brisley* para 21.

¹⁷⁸ Du Plessis 2019 *Constitutional Court Review* 433 considered *Brisley* as having “struck a damaging blow” to good faith by devaluing its role in contracts. This is because the court expressly found that good faith ought not to be considered as a substantive rule that can be used to refuse the enforcement of a *prima facie* valid contract, and that it ought to be considered as an abstract value underlying the substantive law of contract. This statement amounted to a rejection of Olivier JA’s approach in *Saayman* and a limitation of the role of good faith as a principle that can be used to challenge the enforceability of a contract. But, contrary to the proposition that public policy and good faith are similar, or that good faith is encompassed by public policy, the court recognised public policy as an open-ended concept that could be used to challenge the fairness of contracts and their enforcement. See Lubbe 2004 *SALJ* 397; Bhana & Pieterse 2005 *SALJ* 873; Barnard-Naude 2008 *Constitutional Court Review* 195; Barnard 2006 *Law and Critique* 155; Hawthorne 2003 *SA Merc LJ* 277. In applying public policy, the court dealt with the legality of the contract only in terms of the objective terms of the contract, and thus did not consider whether such a narrow approach would be viable in the light of the particular circumstances of the parties at the time the contract was concluded and at the time of its enforcement. See Du Plessis 2019 *Constitutional Court*

in *Mort NO*¹⁷⁹ that the concept of good faith equated to the legal convictions of the community as it applied in the law of delict.¹⁸⁰ The court held that the correct role of the concept of good faith was that it had a creative, controlling, legitimating and explanatory function.¹⁸¹ It thus gave content to the already existing substantive contract law rules and doctrines such as the doctrine of public policy.¹⁸²

Nortje illustrated the court's rationale behind this approach:

“One should not lose sight of the other fundamental tenet of our law of contract, namely that it is in the public interest to enforce contracts. If fundamental values come into conflict, it is the task of the court to weigh them up carefully, and to adapt the law gradually where necessary. Conferring a free discretion on judges to strike down contractual terms on the basis of equity and reasonableness would be contrary to such an approach, since such a discretion would undermine both the *pacta sunt servanda* principle and legal certainty”.¹⁸³

The second question that the court had to determine was whether it could refuse to enforce the non-variation clause on the basis that its enforcement would be contrary to public policy.¹⁸⁴ Relying on *Magna Alloys*¹⁸⁵ and *Sasfin*,¹⁸⁶ the lessee contended that even though the non-variation clause was objectively valid, its enforcement in the particular circumstances would be contrary to the public interest. The majority rejected this argument because the factual issues in those cases were not similar to the facts in *Brisley*, which would warrant an application of the principles in the same manner. In *Magna Alloys*, the court identified special policy considerations that warranted the court's refusal of enforcement (even though it was objectively valid).¹⁸⁷ *Sasfin* concerned a clause that was objectively unfair or harsh, whereas

Review 434. As a result, the court held that public policy favours the freedom and sanctity of contract, but came to this conclusion only in light of the public policy requirements as they relate to the objective terms of the contract and not with the broader context of the circumstances of the parties as a whole.

¹⁷⁹ See 2.4.1.

¹⁸⁰ *Brisley* para 21.

¹⁸¹ *Brisley* para 22.

¹⁸² *Ibid*; Hutchison (2001) *SALJ* 744.

¹⁸³ *Brisley* para 23 – 25; Nortje 2002 *Annual Survey of South African Law* 254.

¹⁸⁴ Nortje 2002 *Annual Survey of South African Law* 256.

¹⁸⁵ *Magna Alloys* paras 28 – 30.

¹⁸⁶ *Brisley* para 31.

¹⁸⁷ Discussed further in chapter 5.

the clause in *Brisley* was not contended to be objectively unfair or harsh.¹⁸⁸ The majority further held that there was no legal basis on which to extend the scope of the principles in *Sasfin* to include challenges against the enforcement of an objectively valid clause. On this reasoning, the court had to enforce the non-variation clause because it was not objectively inimical to the interests of the community. Various legal scholars criticised the approach adopted in the majority judgment because it adopted a formalistic approach by affording public policy a limited role and neglecting the Constitution's "commitment to social transformation" and development of the law in light of its values.¹⁸⁹

In his minority judgment, Olivier JA questioned whether good faith in fact performed the very limited function afforded to it by the majority, that it applied in these cases indirectly as an informative value, rather than directly in allowing the court to refuse the enforcement of a contract.¹⁹⁰ Olivier JA suggested that the courts should seek guidance from the approach in restraint of trade law.¹⁹¹ In that context, the legal convictions of the community (or public policy) played a central role in determining whether the court should enforce a restraint clause (which was objectively valid).¹⁹² This proposition was, however, not fully supported by the majority judgment,¹⁹³ which went on to suggest that there was limited scope for public policy to be relied on by the court to refuse the enforcement of an objectively valid clause.¹⁹⁴ Therefore, the position of the majority was that a court could only refuse to enforce a clause only if the clause was *objectively* and *manifestly* contrary to public policy. According to *Sasfin*, the principle did not extend to cases where the contract was objectively valid, but where its enforcement in the particular circumstances may have been in conflict with public policy.

The contrasting views in the majority judgment and Olivier JA's judgment shows an early example of the apparent divergent views (explained in 1.1) on what the correct approach was to follow in unfair enforcement cases.

In a judgment in which he concurred with the finding of the majority, Cameron JA examined the relationship between public policy and the Constitution. He stated that public policy was

¹⁸⁸ *Brisley* para 31.

¹⁸⁹ Barnard 2006 *Law and Critique* 155 - 156; Hawthorne 2003 *SA Merc LJ* 276 - 277.

¹⁹⁰ *Brisley* para 70 – 73.

¹⁹¹ *Brisley* para 74.

¹⁹² *Brisley* para 75.

¹⁹³ *Brisley* para 21.

¹⁹⁴ Nortje 2002 *Annual Survey of South African Law* 255.

rooted in our Constitution and its fundamental values.¹⁹⁵ Taking a more constitutional-law based approach to the question, Cameron JA held that constitutional principles, particularly those enunciated in the Bill of Rights, were part and parcel of the law of contract.¹⁹⁶ He held that public policy required the court should strike down contracts that offended against the constitutional values of dignity, equality, freedom, human rights and non-discrimination.¹⁹⁷ Importantly, Cameron JA held that commercial reliance and social certainty were important policy factors in determining whether the court should enforce a contract.¹⁹⁸ It was accordingly acknowledged in *Brisley* that the court must develop common-law principles according to the spirit, purport and objects of the Constitution.¹⁹⁹ However, the court stressed that constitutional values did not exist to overthrow common-law principles, but rather, common-law principles must be applied and preserved to the extent that they conformed with the values of the Constitution.²⁰⁰ Cameron JA therefore emphasised that the courts must develop the doctrine of public policy to meet the demands of the Constitution which informed and gave content to public policy.²⁰¹

2.4.2.2 *Afrox Healthcare v Strydom*

The *Afrox* case appears to have provided an early indication that an assessment of public policy considerations are central to the determination of the validity of the enforcement of a contract. *Afrox* concerned the enforcement of an exemption clause contained in a contract entered into between a private hospital and a patient who was receiving an operation and post-operative medical treatment. The exemption clause exempted the hospital from liability arising from any damages, harm or loss that may be suffered by the patient. The clause effectively

“absolved the hospital and/or its employees and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by

¹⁹⁵ *Brisley* para 91.

¹⁹⁶ *Brisley* para 91 - 92.

¹⁹⁷ *Brisley* para 91 – 92; Nortje 2002 *Annual Survey of South African Law* 259.

¹⁹⁸ *Brisley* para 90.

¹⁹⁹ In terms of s 39 (2).

²⁰⁰ *Brisley* para 24.

²⁰¹ *Brisley* paras 88 - 92.

the patient whatever the cause/causes are, except only with the exclusion of *intentional omission by the hospital, its employees or agents*”.²⁰²

After the operation, the patient was harmed due to the negligence of one of the nurses at the hospital. The patient thus sued the hospital for damages. The hospital challenged the patient’s claim on the basis that, by a strict reading of the exemption clause, the hospital was exempted from liability for the negligent conduct of its nurses. One of the many arguments raised by the patient was that, by exempting liability for the nurse’s negligent conduct through strict enforcement of the clause, and in these particular circumstances where the patient was receiving post-operative care, the outcome would be unfair. The patient argued that it would be in bad faith for the hospital to exempt itself from liability, where one of its employees caused harm. Therefore, one of the main issues the court had to decide on was whether enforcement of the exemption clause was contrary to public policy.²⁰³

Writing for the majority of the Supreme Court of Appeal, Brand JA held that the question remained whether the enforcement of the exemption clause would be inimical to the public interest, either because its enforcement was manifestly unfair or because of other policy considerations.²⁰⁴ Having found that exemption clauses of this nature were not objectively contrary to public policy,²⁰⁵ Brand JA cautioned that courts must only refuse to enforce a clause in cases where the unfairness arising out of its enforcement was clear. The court must not base its decision to refuse its enforcement on its subjective belief of what was fair or reasonable.²⁰⁶ By implication, therefore, Brand JA’s statements may be understood to mean that the decision to refuse enforcement must be based on an assessment of relevant public policy factors. These policy factors may include contractual values (such as freedom to and sanctity of contract), constitutional values and other values such as good faith. As Brand JA explained, the constitutional values that inform public policy are dignity, equality and freedom²⁰⁷ and these values require the court to be cautious when refusing to enforce contracts because contractual autonomy was a core tenet of the constitutional value of freedom and gave effect to the constitutional value of dignity.²⁰⁸ Brand JA held that the principle of *pacta sunt servanda* was

²⁰² *Afrox* 26I – 27C. Emphasis added.

²⁰³ *Afrox* paras 9 – 10.

²⁰⁴ *Afrox* para 10.

²⁰⁵ *Afrox* paras 9 – 10.

²⁰⁶ *Afrox* para 8.

²⁰⁷ *Afrox* para 18.

²⁰⁸ *Afrox* para 22.

given effect to by the constitutional value of freedom of contract. This value required that the courts must enforce contracts that parties have freely and seriously concluded.²⁰⁹ As a result, the courts must be cautious when directly relying on equitable concepts such as fairness and good faith as grounds to refuse enforcement of agreements. If a court sought to rely on public policy to invalidate the enforcement of a contract that was otherwise freely and seriously entered into, it must do so with “perceptive restraint”.²¹⁰ Furthermore, the court recognised the unequal bargaining position of the parties as a relevant policy factor in determining whether a contract was contrary to public policy. However, the court stated that even though it was a relevant factor, the court ought not to rely on it as a standalone principle to determine whether the contract accorded with public policy.²¹¹

2.4.2.3 After *Brisley* and *Afrox*

Some legal scholars criticised *Brisley* and *Afrox* for interpreting the Constitution as importing economic liberal notions of contractual autonomy and *pacta sunt servanda* into contract law.²¹² *Brisley* and *Afrox* were viewed as giving constitutional legitimacy to notions that were rooted in 19th-century contract law. This limited view of the Constitution’s contribution would appear to have been inconsistent with the transformative demands of the Constitution and its values, which sought to balance common-law doctrines with current normative values. In both *Brisley* and *Afrox*, the Supreme Court of Appeal maintained that abstract values, particularly the notion of good faith, did not amount to grounds upon which a court may refuse to enforce a contract.²¹³ Instead, the Supreme Court of Appeal maintained that the Constitution required the courts to exercise their powers to refuse the enforcement of a clause with perceptive restraint²¹⁴ because enforcement of a clause freely and voluntarily agreed to gave effect to the constitutional values of dignity, equality and freedom. Therefore, when a court refused to enforce a contract, that decision implicated the aforementioned constitutional values. As Brand JA explained in *South African Forestry Co Ltd v York Timbers Ltd*:²¹⁵

²⁰⁹ *Afrox* paras 22 - 23.

²¹⁰ *ibid.*

²¹¹ *Afrox* para 12.

²¹² Davis and Klare 2010 *South African Journal on Human Rights* 473 - 474; Botha 2009 *Stell LR* 212; Davis 2008 *South African Journal on Human Rights* 325; Bhana & Pieterse 2005 *SALJ* 882; Lubbe 2004 *SALJ* 421; Du Plessis 2019 *Constitutional Court Review* 434; Bhana & Pieterse 2005 *SALJ* 878; Lubbe 2004 *SALJ* 415.

²¹³ Bradfield *Christie’s Law of Contract* 17.

²¹⁴ Bradfield *Christie’s Law of Contract* 18.

²¹⁵ 2005 (3) SA 323 (SCA).

“In addition, it was held in *Brisley and Afrox Healthcare* that – within the protective limit of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement – constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint”.²¹⁶

In *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*²¹⁷ Heher JA, writing for the majority of the Supreme Court of Appeal, held that the court might refuse to enforce a valid clause if the person seeking to implement it, did so in a manner that was contrary to public policy.²¹⁸ Heher JA explained that a court would only refuse to give effect to a valid clause if a party invoked it in a manner that was unconscionable, illegal or immoral, even though the party may have regarded its enforcement as valid.²¹⁹ However, this did not mean that a party could rely on fairness alone to escape the enforcement of a valid clause.²²⁰ In *York Timbers* Brand JA recognised the informing, controlling and legitimating function of abstract values such as good faith and fairness in giving effect to common law principles such as those relating to the doctrine of public policy.²²¹ Therefore the court held that “to say that terms can be implied if dictated by fairness and good faith does not mean that these abstract values themselves will be imposed as terms of the contract”.²²² The Supreme Court of Appeal

²¹⁶ *York Timbers* para 27.

²¹⁷ 2004 (5) SA 248 (SCA).

²¹⁸ *Juglal* para 12.

²¹⁹ Heher JA stated that: “Because the Courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect it follows that the tendency of a proposed transaction towards such a conflict can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency). If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such an event the creditor *who implements the contract in a manner which is unconscionable, illegal or immoral* will find that a Court refuses to give effect to his conduct but the contract itself will stand”. Emphasis added.

²²⁰ *Bradfield Christie’s Law of Contract* 17.

²²¹ *York Timbers* para 27 the Supreme Court of Appeal stated that ‘although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract rules perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty’. Supported by the Constitutional Court in *Beadica* para 31.

²²² *York Timbers* para 29.

thus confirmed the principles in *Brisley* and *Afrox* that abstract values ought not to be used as substantive legal principles to invalidate the enforcement of a contract.²²³

2.5 Conclusion

Before *Barkhuizen*, the Supreme Court of Appeal established a clear link between the Constitution and public policy by stating that the Constitution and its values informed public policy. It emphasised that values such as good faith, fairness and reasonableness could not be relied on directly as self-standing legal principles or grounds to challenge the enforcement of a contract. These values informed, and gave content to public policy. They were further given effect through the application of public policy. The Supreme Court of Appeal emphasised that a party could not directly invoke good faith or fairness as grounds for the non-enforcement of a valid clause. This implied that the correct approach was to determine public policy by identifying and assessing policy factors that were implicated by the enforcement of the clause. The focus, however, was on the objective validity of a clause in light of public policy. And so it was not clear whether the same principles applied to contracts that were objectively valid but where their enforcement, in the particular circumstances of the case, might be contrary to public policy. This changed in 2007 when a claim regarding the unfair enforcement of an objectively valid clause was brought all the way to the Constitutional Court in *Barkhuizen*, where the court re-evaluated the legal position at the time and officially established a public policy test for determining the enforcement of a valid clause. The establishment of the *Barkhuizen* test and its subsequent interpretation and application is discussed in the next chapter.

²²³ *York Timbers* para 27.

Chapter Three – The second-leg of the public policy test (*Barkhuizen 2*)

3.1 The establishment of *Barkhuizen 2*

The question as to precisely how a court should determine the enforceability of a valid contract (a possibility suggested in *Juglal*), was for the first time addressed by the Constitutional Court in *Barkhuizen v Napier*.¹ Below is a discussion on the background to the judgment and the principles established in the matter.

3.1.1 Factual background

The *Barkhuizen* case involved the enforcement of a time-limitation clause contained in a short-term insurance contract. The clause required the appellant to institute legal proceedings within 90 days if the respondent repudiated a claim filed by the appellant.² After the vehicle was involved in a collision, the appellant filed a claim under the insurance contract within the 90-day time-limit for instituting claims under the insurance contract. However, the respondent repudiated the claim. The appellant did not respond to the repudiation for two years, hence well after the 90-day time period had elapsed for issuing summons against the respondent.

The respondent challenged the summons by issuing a special plea. In his special plea, the respondent claimed that he was released from liability under the contract because the appellants failed to issue the summons within the 90 days after being notified of the repudiation of the claim, as stipulated in the time-limitation clause.³ The respondent therefore argued that the appellant's claim was terminated by a failure to comply with the time-limitation clause. In response, the appellant argued that the time-limitation clause was contrary to public policy and unconstitutional because it infringed on his constitutional right to access to court in terms of s 34 of the Constitution.⁴ The court thus had the opportunity to decide whether time-limitation clauses were constitutional, even though various authors had pointed out that time-limitation clauses may be *prima facie* unconstitutional.⁵

¹ 2007 (5) SA 323 (CC).

² *Barkhuizen* para 1.

³ *Barkhuizen* para 3.

⁴ *Barkhuizen* paras 5 and 8.

⁵ Sutherland 2008 *Stell LR* 391; Hopkins "Insurance Policies and the Bill of Rights: rethinking the Sanctity of Contract Paradigm" (2002) *SALJ* 155; Hopkins "The Influence of the Bill of Rights on the enforcement of Contracts" (2003) *De Rebus* 22; Reinecke *et al General Principles of Insurance Law* para 318.

3.1.2 *Barkhuizen in the High Court*

In the Transvaal Provincial Division of the High Court,⁶ the appellant advanced only the constitutional argument; that the time-limitation clause was unconstitutional for conflicting with s 34 of the Constitution.⁷ Here, the appellant relied on a direct application of the Constitution to challenge the validity and enforceability of the clause. The appellant did not raise the argument that the clause was contrary to public policy.⁸ After applying s 34 directly to the facts of the case, De Villiers J held that the time limitation clause infringed on the appellant's s 34 rights. De Villiers J was provided with a slim set of agreed facts to which his decision was based. These were, among other things, the existence of the insurance contract, the occurrence of the accident and the submission of the written claim to the respondent, the repudiation of the claim and the institution of the legal action. Significantly, the appellant did not provide in evidence, any reasons as to why he failed to comply with the 90-day time limit. The reasons for his failure to comply with the clause would later become a crucial factor in determining the enforceability of the clause, as will be discussed further below.

In justifying his approach (testing the clause directly against s 34 of the Constitution), De Villiers J first accepted that he did not regard the clause in and of itself as a law of general application that was subject to a constitutional limitations analysis within the meaning of section 36 of the Constitution.⁹ However, De Villiers J stated that “the law of general application in this case was the common law rule that agreements are binding and must be enforced” under the maxim *pacta sunt servanda*. In other words, the contract was subject to direct constitutional control, and was thus subject to s 36, because the fundamental principle that governed it (*pacta sunt servanda*) was a law of general application. Therefore, according to De Villiers J, the clause was not reasonable and justifiable under s 36 of the Constitution, failing to meet the s 36 limitations test, and was thus invalid and unconstitutional.

⁶ *Barkhuizen v Napier* [2005] JOL 15446 (T).

⁷ Section 34 provides that: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

⁸ *ibid.*

⁹ *Barkhuizen* para 10.

3.1.3 *Barkhuizen in the Supreme Court of Appeal*

On appeal, Cameron JA, writing for the majority of the Supreme Court of Appeal¹⁰ stated that the primary question was whether time-limitation clauses in short-term insurance contracts were unconstitutional.¹¹ Cameron JA held that, generally speaking, contractual terms were subject to constitutional control.¹² However, this meant that the court should consider constitutional rights and values only when developing the law according to the Constitution and not to construe a contractual clause directly against these rights and values.¹³ Cameron JA acknowledged that contract terms that were contrary to public policy were unenforceable.¹⁴ He held that public policy derived “from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism”.¹⁵ However, Cameron JA stressed that these values did not provide a “general all-embracing touchstone for invalidating a contract”.¹⁶ He therefore stressed that constitutional values should only be relied on to strike down the “unacceptable excesses of freedom of contract”.¹⁷ The general presumption was that the application of the Constitution on contracts occurred through public policy. Although not stated expressly, it appears Cameron JA disagreed with De Villiers J’s direct application of the Constitution to determine the enforceability of the clause. The Supreme Court of Appeal thus followed the approach in its previous judgments, *Brisley* and *Afrox*.¹⁸

On the facts, Cameron JA dismissed the appellant’s case on the basis that he did not provide enough evidence to show that the clause infringed his constitutional rights or that the clause was contrary to constitutional values. More importantly, he held that just because a term may be regarded as unfair “or may operate harshly” did not by itself mean that it was offensive to the Constitution.¹⁹ He held that the Constitution required our courts to balance the constitutional interests between the parties with the value of freedom to contract while giving

¹⁰ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

¹¹ *Napier* para 17.

¹² *Napier* para 6.

¹³ *Napier* para 10.

¹⁴ *Napier* para 12.

¹⁵ *ibid.*

¹⁶ *Napier* para 11.

¹⁷ *Napier* para 13.

¹⁸ See 2.4.2.

¹⁹ *ibid.*

the parties the ability to regulate their own affairs.²⁰ Since the record of the High Court proceedings did not show why the clause was unfair, Cameron JA held that the evidence presented did not warrant such a finding.²¹ The focus in both the High Court and Supreme Court of Appeal judgments was on the objective validity of the clause in light of the Constitution.

3.1.4 Barkhuizen in the Constitutional Court

Writing for the majority of the Constitutional Court, Ngcobo J said that the first question he had to decide was how our courts ought to deal with constitutional challenges to contractual terms.²² In doing so, Ngcobo J needed to clarify the impact on the Constitution on the principles for determining the unfair enforcement of a contract, mainly in cases where the unfair enforcement claim was brought on the basis that the enforcement would infringe on a constitutional right or value. Ngcobo J first investigated whether a contractual clause could be tested directly against a provision in the Constitution, or more particularly, the Bill of Rights.²³ He did not accept De Villiers J's approach, which tested the clause directly against the Constitution on the basis that *pacta sunt servanda* was a law of general application.²⁴ Ngcobo J emphasised that it was not clear from previous case law whether constitutional rights were directly applicable between private persons, and could form the basis for regulating private relationships.²⁵ Ngcobo J accepted that some contracts may limit constitutionally protected rights. However, this did not necessarily mean that the clause, or its enforcement, was contrary to public policy.²⁶ He held that the limitation on the right or value caused by the enforcement of the clause was acceptable and within the bounds of the law if it was reasonable and fair.²⁷ He therefore held that what must be determined instead was whether the contract or its enforcement was unreasonable or unfair, by application of public policy.

Ngcobo J held that in order to determine constitutional challenges to contractual terms, one must test those terms against public policy, which was informed by the Constitution and its

²⁰ *Napier* para 13.

²¹ *Napier* para 10.

²² *Barkhuizen CC* para 22.

²³ *Barkhuizen CC* para 24.

²⁴ *Barkhuizen CC* paras 24 - 26.

²⁵ *Barkhuizen* para 23.

²⁶ *Barkhuizen CC* para 45.

²⁷ *Barkhuizen CC* para 48.

values of freedom, dignity, equality and the rule of law.²⁸ He held that a contract or term that was contrary to these constitutional values was contrary to public policy and unenforceable. More importantly, the court rejected the proposition that the fact that a term was unfair or might operate harshly could not lead to a conclusion that the term was contrary to constitutional values and principles.²⁹ Ngcobo J explained that, since the doctrine of public policy imported the Constitution and its values into contract law, public policy should be relied on to challenge the validity of a contract or its enforcement.³⁰ Therefore, because public policy included in its content, constitutional rights and values,³¹ it seemed correct to state that the courts must use public policy as a standard to test the enforcement of a contract.³² Ngcobo J's findings thus suggested that a court could not refuse to enforce a valid contract if a party merely alleged that its enforcement would infringe on his or her constitutional rights, or that its enforcement was contrary to a constitutional value. The party must invoke public policy in his or her claim against the enforcement of the clause.

3.1.5 *Barkhuizen and public policy*

As mentioned above, it was held in *Barkhuizen* that the proper approach to constitutional challenges to contractual terms was to ask first whether the disputed contract or clause or its enforcement, was contrary to public policy in terms of the common law, the Constitution and the Bill of Rights.³³ This approach gave the courts the power to uphold *pacta sunt servanda* while also giving them the power to refuse the enforcement of a clause if it conflicted with the public interest and constitutional values.³⁴ Referring to *Sasfin*,³⁵ Ngcobo J held that public policy generally favoured that all contracts should be honoured. However, it also recognised the need to do simple justice between the contracting parties. It thus imported the notions of fairness, justice, equity and reasonableness into the contractual relationship between the

²⁸ *Barkhuizen* paras 28 - 29.

²⁹ *Barkhuizen* para 72.

³⁰ *Barkhuizen* paras 28 – 29.

³¹ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) paras 54-6; *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) BCLR 930 (SCA) para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) para 18; *Brisley v Drotzky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA) para 11.

³² *Barkhuizen CC* para 28; Brand 2009 *SALJ* 84; Hawthorne 2014 *PELJ* 827 – 828; Du Plessis (LLD Unisa 2017) 165; Hawthorne 2010 *De Jure* 395; Du Bois 2015 *Acta Juridica* 282;

³³ *Barkhuizen CC* para 28.

³⁴ *Ibid.*

³⁵ See Chapter 2 for the outline of this test.

parties.³⁶ Therefore, the court must strike a balance³⁷ between these two sets of competing policy factors, namely *pacta sunt servanda* on the one hand, and simple justice between individuals, on the other.³⁸ The court must therefore determine the enforcement of the clause by applying public policy, and this application must commence with a balancing exercise between *pacta sunt servanda* and equitable principles such as justice and fairness.

3.1.6 The public policy test

Ngcobo J held that when determining whether the contract or its enforcement was fair, the court must ask the following questions:

“The first is whether the clause itself is unreasonable. Secondly, if the clause is unreasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause”.³⁹

3.1.6.1 The ‘first-leg’ of the test – *Barkhuizen 1: Is the clause itself unreasonable?*

In this leg of the test, Ngcobo J held that courts must determine whether the objective terms of the contract, on their face, conflicted with public policy. In this context, no further information apart from the words of the clause is required to show that it conflicts with public policy.⁴⁰ Ngcobo J described this unreasonableness as “manifest”, meaning that the clause is “in and of itself” unreasonable.⁴¹ This leg of the test requires a balancing act between contractual autonomy (which gives effect to the constitutional values of freedom and dignity) which

³⁶ The Court’s statement that the constitutional values of freedom and dignity are upheld where each individual retains their ability to regulate their own affairs, even to their own detriment, was criticized by a number of legal scholars. Du Plessis (LLD Unisa 2017) 165; see Hawthorne 2014 *PELJ* 822; Hawthorne 2012 *THRHR* 347; Davis 2011 *Stell LR*; Davis & Klare 2010 *SAJHR* 478; Davis 2010 *SAJHR* 93; Brand 2009 *SALJ* 85 – 86; Bhana 2008 *SAJHR* 315; Lubbe 2004 *SALJ* 420 – 421. The statement was criticized on the basis that it was an attempt by the Court to give constitutional legitimacy to this conception (Which is described by scholars as a ‘classical liberal conception’) of freedom and sanctity of contract, in the aims to justify its place within our current constitutional framework. It was suggested that, instead, the Court ought to have determined how the values of freedom and sanctity of contract should be defined in light of the values of the Constitution and the “greater transformative constitutional project”. Du Plessis (LLD Unisa 2017) 165.

³⁷ *Barkhuizen* para 70.

³⁸ *Barkhuizen* para 50.

³⁹ *Barkhuizen* para 56.

⁴⁰ *Barkhuizen CC* paras 59 – 62; It has been suggested that there is a second part to this first enquiry. See Kruger 2011 *SALJ* 717; Sutherland 2009 *Stell LR* 55 - 57. This part asks whether there is a significant disparity in bargaining positions between the parties. *Barkhuizen CC* para 59. If there is, then the contract or term may be contrary to public policy. In order to determine whether there is such a disparity, the court must assess the circumstances of the parties. *Barkhuizen CC* para 64.

⁴¹ Sutherland 2009 *Stell LR* 55.

supports the enforcement of the clause and any other policy factor (that gives effect to another constitutional right or value) which supports the non-enforcement of the clause.⁴² Du Plessis, Hawthorne and Botha characterised this leg of the test as objective in nature because it balances competing values and interests in the light of the objective terms of the contract. As Du Plessis puts it, “it deals with these values on an abstract level as reflected in the terms of the contract itself”.⁴³

3.1.6.2 The ‘second-leg’ of the test – *Barkhuizen 2*: Even though the clause is objectively reasonable, should it be enforced in the particular circumstances?

In this second part of the test, what has to be determined was whether, in all the circumstances of the case, and in particular, *the reasons for why the clause was not complied with*, it would be contrary to public policy for the court to enforce a clause which is objectively valid.⁴⁴ This part of the test asks the court to determine whether it would be fair to enforce the clause, even if the clause itself does not conflict with public policy objectively, in light of the circumstances which prevented compliance with it.⁴⁵

The facts of *Barkhuizen* was a scenario that would give rise to an application of this leg of the test. The clause at the centre of this case was a 90-day time-limitation clause contained in a short-term insurance contract which required the insured to institute legal proceedings within 90-days if a claim that he filed with the insurer was repudiated.⁴⁶ Ngcobo J acknowledged that the clause was objectively valid and was a common type of clause found in many insurance agreements. However, Ngcobo J acknowledged further that there might be a *peculiar or particular set of circumstances* where its enforcement may be contrary to public policy. By way of example, Ngcobo J illustrates a scenario where the insured is hospitalised and “lapses into a coma” for six months.⁴⁷ In these circumstances, the insured would not be able to comply with the clause and would have an adequate reason for not complying with it.⁴⁸ He held that it would be inconceivable to enforce the clause against a party who was unable to comply with

⁴² *Barkhuizen* para 57; Bhana and Meerkotter 2015 *SALJ* 507; Hawthorne 2010 *De Jure* 398; Brand 2009 *SALJ* 84 - 85; Barnard-Naude 2008 *Constitutional Court Review* 198; Bhana 2008 *South African Journal on Human Rights* 314.

⁴³ Du Plessis 2019 *Constitutional Court Review* 436; Hawthorne 2010 *De Jure* 398; Botha 2009 *Stell LR* 212.

⁴⁴ *Barkhuizen CC* para 69.

⁴⁵ *Barkhuizen* par 56.

⁴⁶ *Barkhuizen* para 1.

⁴⁷ *Barkhuizen* para 69.

⁴⁸ *Barkhuizen* para 69.

it.⁴⁹ Therefore, enforcing the clause in these circumstances would be contrary to public policy, and the court will not enforce the clause.

In light of the example above, Ngcobo J held that if a party sought to escape the enforcement of a valid contract, based on the second leg of the test, the party should demonstrate why, in the particular circumstances of the case, he or she was unable to comply with the clause.⁵⁰ In other words, the party should provide adequate reasons for failing to comply with the clause in question. Some legal authors have noted that this leg of the test is subjective⁵¹ and effectively extends the limited public policy test outlined in *Sasfin* which only focused on determining the enforceability of a contract in light of the objective terms of the contract. Various legal scholars further noted that the value of ubuntu demanded its extension and that it showed the Constitutional Court's commitment to promoting socio-economic rights and substantive equality in light of the goals of the Constitution.⁵² This was consistent with the court's statement in *Barkhuizen*, where it held that public policy ought to be "informed by the concept of ubuntu".⁵³

3.1.7 *Barkhuizen and good faith*

Ngcobo J stated in an *obiter dictum* that the "limited role" that had been afforded to good faith as having only a legitimating, controlling and explanatory function may not be appropriate under the Constitution.⁵⁴ This suggested that, firstly, our courts ought to have revisited the limited role afforded to good faith.⁵⁵ Secondly, he suggested that our courts might recognise good faith as playing a substantive role in the law of contract, possibly that it could be used as a stand-alone principle to test the validity of a contract or its enforcement. However, Ngcobo J expressly left this issue "open for another day".⁵⁶ In her concurring judgment, O'Regan J found that the court did not need to consider the issue of "in what circumstances a court may, in terms of the principles of contract, decline to enforce a time limitation clause against a particular

⁴⁹ *Barkhuizen* para 72.

⁵⁰ *Barkhuizen* para 70.

⁵¹ Du Plessis 2019 *Constitutional Court Review* 436; Wallis 2016 *SALJ* 552 - 553; Hawthorne 2010 *De Jure* 400; Bhana and Meerkotter 2015 *SALJ* 504; Bhana 2014 *South African Public Law* 509.

⁵² Du Plessis 2019 *Constitutional Court Review* 436; Bhana and Broeders 2014 *THRHR* 175; Cornell and Muvangua *Ubuntu and The Law* 24; Hawthorne 2010 *De Jure* 400.

⁵³ *Barkhuizen* para 51.

⁵⁴ *Barkhuizen* para 81.

⁵⁵ See 2.4.

⁵⁶ *Ibid.*

applicant based on the defences of impossibility or good faith”.⁵⁷ This was because there were no facts which indicated that the enforcement of the clause would infringe on the principles of good faith or that it would be unfair to enforce the clause against the appellant. O’Regan J thus declined to consider the question of good faith, but agreed with the remainder of Ngcobo J’s judgment.

3.1.8 Conclusion

The Constitutional Court in *Barkhuizen* officially established the principle that a court could refuse to enforce a valid clause if that clause was contrary to public policy as informed by the Constitution and its values. The court further established that if a party sought to avoid the enforcement of a valid clause, the party must provide adequate reasons for why he or she failed to comply with the clause. *Barkhuizen* therefore set out the rules which allowed our courts to test the enforcement of a valid clause.

3.2 The application and development of *Barkhuizen 2*

In the cases which considered the application of the second leg of the public policy test after *Barkhuizen*, the focus was on the precise extent and scope of the test.⁵⁸ The burning question became how exactly should the court apply *Barkhuizen 2* to determine whether a valid clause was enforceable or not? The courts that considered the issue interpreted the second-leg of the *Barkhuizen* test in varying ways.⁵⁹ In some of the Supreme Court of Appeal cases, the court held that judges could not use fairness and reasonableness as freestanding requirements for the enforcement of a valid contract.⁶⁰ In the Constitutional Court cases, the court appeared to give more weight to the concepts of fairness and ubuntu, thus creating the impression that concepts such as “ubuntu”, “fairness” and “reasonableness” could be used as grounds to refuse the enforcement of a valid clause. In 2020, the Constitutional Court in *Beadica* expressly stated that this apparent difference in approach was a matter of perception and not reality. The Constitutional Court held that it must not be understood to have endorsed an approach which allowed the court to refuse the enforcement of a valid clause merely based on “ubuntu” or

⁵⁷ *Barkhuizen* para 120.

⁵⁸ Boonzaier 2020 *SALJ* 5.

⁵⁹ Hutchison Contract 32.

⁶⁰ That the refusal of the enforcement of a contract must occur through the application of the unfair enforcement principles that accord with previous decisions such as *Sasfin*. As opposed to refusing the enforcement of a contract based merely on constitutional values such as reasonableness and fairness. See *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) paras 22 – 25.

“fairness”. The court held that in reality, therefore, the two highest courts were *ad idem* on the correct approach to determining the enforcement of a valid clause.

To provide the relevant legal background behind the aforementioned findings in *Beadica*, the remainder of 3.2 examines the interpretation and application on the second leg of the public policy test in the *Barkhuizen 2*-type cases after *Barkhuizen*. Due to the numerous cases that have interpreted the principles established in *Barkhuizen*,⁶¹ 3.2 focuses only on those cases that, through their interpretation and application of the second leg of the public policy test, developed the principles for determining the enforceability of valid clauses. Section 3.2 also discusses the cases that took what may seem to have been a “conflicting approach” in comparison to the approaches adopted in the leading cases.

3.2.1 Method 1: “Balancing” of policy factors to determine public policy

3.2.1.1 Case study: the *Nyandeni Judgment*

The second-leg of the *Barkhuizen* test was considered first in *Nyandeni Local Municipality v Hlazo*,⁶² which concerned the enforcement of a non-variation clause and the *Shifren* principle.⁶³ A non-variation clause is a clause which has the effect that a variation of the contract that is not put in writing and signed by the parties will have no force or effect. The *Shifren* principle, established in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*,⁶⁴ provides that a non-variation clause is valid and that it does not only apply to itself, but to other terms of the contract that accompany it.⁶⁵ The effect of the *Shifren* principle had been the subject of academic criticism in the 1960s,⁶⁶ and by a judge a decade later,⁶⁷ because it seemed to limit the contractual freedom of parties by preventing them from varying their contracts (thus

⁶¹ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA); *Maphango; Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA); on the relationship between good faith and public policy see *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Absa Bank v Coe Family Trust and Others* 2012 (3) SA 184 (WCC); *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC); *Botha v Rich NO* 2014 (4) SA 124 (CC).

⁶² 2010 (4) SA 261 (ECM).

⁶³ The principle established in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) 760 (A) at 766B – 767B which provides that a non-variation clause is valid and that, if included in a contract, has the effect that it, and other terms of the contract that accompany it, cannot be varied unless the variation of the clause is put in writing.

⁶⁴ 1964 (4) 760 (A).

⁶⁵ *Shifren* at 766B – 767B.

⁶⁶ L Tager “The Effect of Non-Variation Clauses in Contracts” (1976) 93 *SALJ* 423.

⁶⁷ *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 275.

constituting an infringement of their fundamental contractual rights and therefore, contrary to public policy).⁶⁸ However, Tager explained that, on a correct interpretation of *Shifren*, the effect of the non-variation clause (or its extent and scope) was limited.⁶⁹ For example, it did not prevent the parties from orally or tacitly waiving its rights in terms of the clause.

Although the principle was consistently applied in numerous judgments,⁷⁰ its strict enforcement was considered as problematic because it effectively allowed a party to go back on his or her word.⁷¹ For example, where a landlord and tenant orally agree that the tenant will pay a lower amount for rent due to financial limitations caused by the COVID-19⁷² pandemic,⁷³ and then the landlord later sues the tenant for the original rental amount, invoking the non-variation clause, on the basis that the oral agreement was invalid.⁷⁴ Hutchison describes such instances as “all too common”⁷⁵ and may be loosely described as “unfair” or “contrary to good faith”. Dealing with a similar scenario in *Miller & Another NNO v Dannecker*⁷⁶ Ntsebeza AJ held that a party could not be bound by a non-variation clause in instances where it would be contrary to good faith.⁷⁷ This was because good faith, as he described it, was closely related to public policy, and so “the dictates of public policy and the views of the community would never be served by a slavish adherence to a non-variation clause in the face of an agreement in the form of a *pactum [de non petendo]*”.⁷⁸

⁶⁸ MFB Reinecke and SWJ van der Merwe “SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere 1964 (4) SA 760 (A)” (1965) 28 *THRHR* 154 at 155; HR Hahlo “Non-variation Clauses” (1965) 82 *SALJ* 4 at 5.

⁶⁹ Tager 1976 93 *SALJ* 424.

⁷⁰ *Randcoal Services Lid v Randgold and Exploration Co Lid* 1998 (4) SA 825 (SCA) at 841 F; *Barclays Western Bank Ltd v Ernst* 1988 (1) SA 243 (A) at 253; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) 84; S van der Merwe *et al Contract: General Principles* 117-18; Christie *Contract* 534.

⁷¹ D Hutchison “Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket” (2001) 118(4) *SALJ* 720.

⁷² The short-hand term for the “Coronavirus Disease of 2019”. See <https://sacoronavirus.co.za/>.

⁷³ The COVID-19 pandemic is referred to as an on-going pandemic of the Coronavirus Disease of 2019 which has forced citizens to avoid going into workplaces or social gatherings. During this time, many businesses have retrenched employees or closed down, leaving many without jobs or a source of income. L Omarjee “Covid-19 cuts SA employment figures by three million, women worst affected – study” (2020) *Fin24* [website] <https://www.news24.com/fin24/economy/covid-19-cuts-sa-employment-figures-by-three-million-women-worst-affected-study-20200715>.

⁷⁴ Case examples where similar instances occurred were in *Shifren* and *Miller & Another NNO v Dannecker* 2001 (1) SA 928 (C).

⁷⁵ Hutchison 2001 *SALJ* 721.

⁷⁶ 2001 (1) SA 928 (C).

⁷⁷ *Miller* at 938F – H.

⁷⁸ *Miller* at 938D – 939B.

Hutchison supported this approach, but expressed his uncertainty as to whether a direct application of good faith was the answer to solving the harshness arising out of a strict enforcement of a non-variation clause.⁷⁹ He therefore stated that:

“The more widely accepted view is that good faith operates indirectly, in that it is always mediated by other, more concrete rules or doctrines. In terms of the latter view, the courts would be justified, even obliged, to develop the technical rules of the common law to ensure that the *Shifren* principle is applied in a way that is consistent with the dictates of good faith”.⁸⁰

As discussed in 3.1, the development of the common law indeed occurred 6 years after Hutchison’s article was published in *Barkhuizen* where the Constitutional Court provided that public policy, which included the principle of good faith, could be invoked to challenge the harsh effects of the strict enforcement of valid clauses such as the non-variation clause.

It is within this context that the *Nyandeni* judgment was decided. The salient facts of the case were that a municipal manager was made subject to disciplinary proceedings for serious misconduct. The hearings were attended to by the municipal manager, and it was common cause that the hearings were conducted in a just and fair manner. After the conclusion of the hearings, the chairperson of the municipality handed down a guilty verdict and in terms of a resolution by the municipal council, it was held that the municipal manager be permanently dismissed. The municipal manager then claimed that the procedure was null and void because it conflicted with clauses 16 and 14 of the employment contract between the municipal manager and the municipality. Clause 16 provided that disciplinary proceedings had to be conducted through arbitration proceedings. Clause 14 was the non-variation clause, which provided that no variation, modification or waiver in the employment contract will be valid unless it is put in writing and signed by the parties. Read together, strict enforcement of clauses 14 and 16 meant that the procedure adopted by the municipality amounted to a variation of the procedure demanded by the employment contract. Accordingly, the municipal manager invoked the *Shifren* principle so that the outcome of the disciplinary hearings would be nullified, ultimately giving him time to tender his resignation and avoid the consequences of dismissal.

⁷⁹ Hutchison 2001 *SALJ* 740 - 746.

⁸⁰ *Ibid.*

The main question was whether the enforcement of the non-variation clause in these particular circumstances was contrary to public policy.⁸¹ In dealing with this question, Alkema J interpreted, applied and developed the second leg of the *Barkhuizen* test.⁸² Alkema J explained the statement in *Barkhuizen* that public policy must be determined only by constitutional norms and values.⁸³ Alkema J held that although constitutional norms and values informed public policy and provided it with a broader scope of application, public policy constituted much more than constitutional norms and values.⁸⁴ Furthermore, Alkema J held that when applying the second leg of the test, the court should determine public policy *at the time the court is asked to enforce the clause* “having regard to the prevailing circumstances and the effect of the order at that time”.⁸⁵ Alkema J linked fairness as articulated in *Barkhuizen* with reasonableness, and noted that the second leg of the test required an objective approach to applying public policy to determine the enforcement of the clause.⁸⁶ He thus framed the test as follows: “if the operation of the clause in the prevailing circumstances and on the facts of the case, at the time the court is asked to enforce it, ‘is so manifestly unreasonable that it offends public policy, then it is voidable on the ground of unfairness.’”⁸⁷ Applying the *Barkhuizen* test to the facts,⁸⁸ Alkema J sought to determine whether the clause should be enforced in the circumstances.⁸⁹ Alkema J held that what was required was a balancing of the competing policy considerations that arose in the particular circumstances of the case.⁹⁰

3.2.1.1.1 Factors in favour of enforcement

The first public policy factor Alkema J had to consider was that, in terms of *Shifren*, it was trite law that non-variation clauses were valid and enforceable.⁹¹ Therefore, the enforcement of the non-variation clause could only be refused if there was another policy factor sourced in the common law or the Constitution which demanded that the contract not be enforced. Alkema J

⁸¹ *Nyandeni* para 73.

⁸² L Kohn “Escaping the ‘Shifren Shackle’ Through The Application of Public Policy: An Analysis Of Three Recent Cases Shows Shifren Is Not So Immutable After All” (2014) *Speculum Juris* 74 at 92.

⁸³ *Nyandeni* para 79.

⁸⁴ *Ibid.*

⁸⁵ *Nyandeni* para 83; Kohn 2014 *Speculum Juris* 95 – 96.

⁸⁶ *Nyandeni* para 87.

⁸⁷ *Nyandeni* para 89; Kohn 2014 *Speculum Juris* 96.

⁸⁸ In terms of *Barkhuizen*. *Nyandeni* paras 73 – 101.

⁸⁹ *Nyandeni* para 102.

⁹⁰ Kohn 2014 *Speculum Juris* 97

⁹¹ *Shifren* at 766B – 767B; Tager 1976 *SALJ* 423; Hutchison 2001 *SALJ* 720.

held that the courts did not have the discretion to decide whether or not to enforce contractual rights with reference only to considerations of fairness, equity and good faith.⁹² This was so mainly because the enforcement of contracts did not depend on the judges view on what was fair and equitable in the circumstances.⁹³ A discretion of this nature would not only undermine *pacta sunt servanda* but would result in contractual uncertainty. Alkema J held that *pacta sunt servanda* gave effect to the constitutional values of freedom and dignity,⁹⁴ and “ensures commercial certainty and plays a vital role in a stable economic environment”.⁹⁵ It further gave effect to expedience and predictability in commerce. In the context of non-variation clauses, the courts established the *Shifren* principle to give effect to *pacta sunt servanda*. Therefore, *pacta sunt servanda* constituted the main policy factor in support of enforcement.

3.2.1.1.2 Factors in favour of non-enforcement

Alkema J held that a court would not enforce a contract in terms of *pacta sunt servanda* if it conflicted with public policy, as informed by other policy considerations.⁹⁶ Alkema J identified the constitutional duty to ensure protection against the abuse of the process of law⁹⁷ as the public policy factor against the enforcement of the clause.⁹⁸ This duty required the court to avoid the endorsement of conduct that amounted to an abuse of process of the law. In these particular circumstances, the conduct of the municipal manager amounted to an abuse of process because he refused to comply with the outcome of a disciplinary hearing which he had already subjected himself to, and then sought to avoid the result, and restart the proceedings by claiming that the initial proceedings were invalid.

Alkema J found that enforcing the clause would nullify the disciplinary process and the decision to dismiss the municipal manager. There would have to be a new process conducted in terms of clause 16, thus allowing the municipality to escape the consequences of the findings

⁹² *Nyandeni* para 61.

⁹³ *Nyandeni* para 62.

⁹⁴ See *Barkhuizen* para 57.

⁹⁵ *Nyandeni* para 92.

⁹⁶ *Nyandeni* para 95.

⁹⁷ This duty arises from an interpretation of the right of access to courts in terms of section 34 of the Constitution by the Constitutional Court in *Beinash v Ernst and Young* 1999 (2) SA 116 (CC). It was held there that section 34 imposes a duty on the courts to protect bona fide litigants, the due process of the courts and the administration of justice. It was held that this duty extends to all processes of law, including hearings before an informal tribunal and that the duty to ensure the due process of law entails the duty to ensure protection against the abuse of the process of law; *Nyandeni* para 115 – 117; Kohn 2014 *Speculum Juris* 98.

⁹⁸ *Nyandeni* para 115 - 117.

of the municipal chairperson and council.⁹⁹ This would come at the expense of the public, because the municipality has to rely on public funds to conduct such hearings. Alkema J further found that the municipal manager was well aware of the fact that invoking the *Shifren* principle would delay his dismissal while awaiting new proceedings and that he would be able to avoid the consequences of the concluded proceedings.

3.2.1.1.3 Findings

After balancing the policy factors against one another to determine enforcement, Alkema J held that public policy did not condone the abuse of the process of law and so this policy factor had to outweigh *pacta sunt servanda* and the *Shifren* principle.¹⁰⁰ Alkema J thus held that a departure from the *Shifren* principle was justified in the particular circumstances of this case.¹⁰¹ Accordingly, Alkema J refused to enforce the non-variation clause on the grounds of public policy, and in particular, the second leg of the public policy test in *Barkhuizen*.

3.2.1.1.4 The “Balancing” method applied in later non-variation cases

In the context of non-variation clauses and the application of the *Shifren* principle in unfair circumstances, the High Court on two separate occasions adopted the approach in *Nyandeni*. These were *GF v SH and Others*¹⁰² and *Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another*.¹⁰³ In *GF* Kollapen J applied the second leg of the public policy test to refuse the enforcement of a non-variation clause where its enforcement, in terms of the *Shifren* principle, would infringe on the best interests of the child standard.¹⁰⁴ The *GF* case, therefore, extended the application of the second leg of the public policy test to contracts within the context of family law. In *Steyn* Peter AJ, applying the second leg of the public policy test, identified and

⁹⁹ *Nyandeni* para 104.

¹⁰⁰ *Nyandeni* para 125 – 126.

¹⁰¹ *Nyandeni* para 126.

¹⁰² 2011 (3) SA 25 (GNP).

¹⁰³ [2011] ZAGPJHC 228.

¹⁰⁴ *GF* paras 18 – 30; Kohn 2014 *Speculum Juris* 101 – 102.

applied three policy considerations,¹⁰⁵ two of which were not constitutional,¹⁰⁶ which led to the conclusion that the non-variation clause ought not to be enforced.¹⁰⁷

The approach adopted in the above two cases was similar to the approach adopted in *Nyandeni*.¹⁰⁸ In *GF* the court weighed the constitutional principle that the best interests of the child is paramount as a countervailing policy factor against *pacta sunt servanda*¹⁰⁹ and found that the best-interests-of-the-child principle must take precedence over the *Shifren* principle.¹¹⁰ In *Steyn*, the court highlighted three policy factors that supported the non-enforcement of the contract.¹¹¹ The first was the principle that there should be an end to litigation.¹¹² The second was that parties to disputes are encouraged as best as possible to avoid litigation.¹¹³ Thirdly, *pacta sunt servanda* concerning the subsequent settlement agreement (not the original agreement giving rise to the non-variation clause) provided that the settlement agreement should be respected and the original agreement not be enforced.¹¹⁴ The court weighed these three factors against the principle *pacta sunt servanda*, ultimately refusing to enforce the non-variation clause because the factors for non-enforcement outweighed the factors for enforcement.

¹⁰⁵ Kohn 2014 *Speculum Juris* 105; The first was the consideration that there needs to be an end to litigation. The second was that public policy demands that parties to disputes ought to avoid litigation and resolve their differences amicably. The third, being the only one that was centred in constitutional values, was that of *pacta sunt servanda* in relation to the subsequent agreements that would be invalidated by the application of the *Shifren* principle.

¹⁰⁶ *GF* para 48; As emphasised by Alkema J in *Nyandeni* para 79 the Constitution and its values are not exhaustive of public policy considerations, which can be found “elsewhere”.

¹⁰⁷ *GF* para 58.

¹⁰⁸ Kohn 2014 *Speculum Juris* 106 illustrates how the High Court in the abovementioned judgments have applied the second leg of the public policy test to allow litigants to escape what is referred to as the ‘*Shifren* shackle’ [A term used to describe the effect of the *Shifren* principle which had previously required the courts to strictly enforce non-variation clauses even in circumstances where doing so would be manifestly harsh or unfair to the party seeking to avoid its enforcement through the application of public policy]. The three cases discussed above illustrate how, in terms of the second leg of the public policy test, the enforcement of contractual terms, especially when enforcement is demanded by established principles of contract law, may be refused on the basis that its enforcement may be contrary to public policy.

¹⁰⁹ *GF* para 18.

¹¹⁰ *GF* para 20-22.

¹¹¹ *Steyn* para 53.

¹¹² *Steyn* para 54; *African National Congress v United Democratic Movement and Others (Krog and others intervening)* 2003 (1) SA 533 (CC) para 14.

¹¹³ *Steyn* para 55; *Naidoo v Marine & Insurance CO Ltd* 1978 (3) SA 666 (A) at 677 C – D.

¹¹⁴ *Steyn* para 57.

3.2.2 Case Study: the Bredenkamp judgment

In *Bredenkamp v Standard Bank of South Africa Ltd*,¹¹⁵ the Supreme Court of Appeal interpreted the ambit of *Barkhuizen 2* in circumstances where a contracting party sought to avoid the enforcement of a cancellation clause. The salient facts were that a bank sought to close the bank accounts of one of its client's (Mr Bredenkamp) by invoking a cancellation clause contained in an agreement between itself and Mr Bredenkamp. Mr Bredenkamp argued that the bank could only invoke the cancellation clause for adequate reasons and that cancelling the contract on grounds not provided for in the contract was unfair.¹¹⁶ Mr Bredenkamp argued that *Barkhuizen* required fairness on contracts and their enforcement.¹¹⁷ He argued that the cancellation of the contract without adequate reasons was thus unfair, and therefore, unconstitutional and contrary to public policy.

3.2.2.1 *Barkhuizen 2* does not amount to a revival of the *exceptio doli generalis*

One of the issues Harms DP had to decide was whether *Barkhuizen 2* amounted to a revival of the *exceptio doli generalis*. This issue arose in light of the main argument put forward by the client in *Bredenkamp* that the enforcement of the cancellation clause was “unfair” and it should not be enforced. The client raised the argument on the backdrop of several academic articles which reconsidered the existence of the *exceptio doli generalis*¹¹⁸ – in dealing with unfair enforcement cases – and a Constitutional Court case¹¹⁹ decided shortly after *Barkhuizen*, where the revival of the *exceptio doli generalis* was raised by one of the parties. For example, Glover proposed that, even though the *exceptio doli generalis* was not received into South African law, *Barkhuizen 2* may have laid the foundation for us to re-evaluate its existence.¹²⁰ However, Glover acknowledged that this was unlikely since the Constitutional Court in *Barkhuizen* expressly favoured the public policy test, and not the *exceptio doli generalis*, as the appropriate device to determine the enforcement of a contract. Accordingly, Glover proposed that the

¹¹⁵ 2010 (4) SA 468 (SCA).

¹¹⁶ *Bredenkamp* para 25.

¹¹⁷ *Bredenkamp* para 26.

¹¹⁸ This function relates to the fact that the *exceptio doli generalis* appeared to have allowed the court to refuse the enforcement of a contract in circumstances where its enforcement would be contrary to good faith, equity and fairness.

¹¹⁹ *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC).

¹²⁰ G Glover “Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?” (2007) 124 (3) *SALJ* 458 – 449.

public policy test would have to be developed more fully to deal with cases that might otherwise have fallen to be decided in terms of the *exceptio doli generalis* before *Bank of Lisbon*.

Kerr proposed a different view, which was that the *exceptio doli generalis* and *Barkhuizen 2* may co-exist because the court may use both to deal with similar but distinct scenarios.¹²¹ This was because the *exceptio doli generalis* would allow the court to refuse a plaintiff's claim merely on the basis that his or her conduct was unfair. In contrast, *Barkhuizen 2* only allowed refusal where public policy considerations were implicated. Therefore, by having the *exceptio doli generalis* at their disposal, courts would be able to overcome the difficulties in identifying the relevant policy considerations in unfair enforcement cases. In other words, the courts would have a broader discretion to either (a) make an equitable order or (b) refuse the enforcement of the valid clause even where its enforcement implicated no other policy factors. For example, the courts could suggest that the parties adjust the terms of the clause in the particular situation to remedy the unfairness of its enforcement as opposed to refusing its enforcement outright, as would be the case by an application of *Barkhuizen 2*. This leaves room for an approach which allowed the court to make a finding based on what was equitable in the circumstances of the particular case.¹²²

Notwithstanding the suggestions above, Harms DP expressly found that *Barkhuizen 2* could not be interpreted to have revived the *exceptio doli generalis*.¹²³ This further suggested that *Barkhuizen 2* could not be regarded as giving the courts the power to (a) make an equitable order or (b) refuse the enforcement of the valid clause even where its enforcement implicated no other policy factors. Despite the above propositions, what remained was that the *Barkhuizen* test required the determination of the enforcement of the clause to be done by an application of public policy.

3.2.2.1 “Balancing” method affirmed by the Supreme Court of Appeal

On the issue of whether “fairness” could be relied upon as a basis for the court to refuse the enforcement of a valid contract, Harms DP held that it could not because fairness was not a

¹²¹ AJ Kerr “The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* and the *replicatio doli* in modern law” (2008) 125(2) *SALJ* 241 at 257 – 248.

¹²² See also Christie *The Law of Contract* (2006) at 13; C Howie “Alistair Kerr: A tribute from the Bench” in G Glover (ed) *Essays in Honour of A J Kerr* (2006) 13 at 14; PJ Sutherland “Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Part 1” (2008) 19(3) *Stell LR* 390 and Part 2 (2009) 20(1) *Stell LR* 50.

¹²³ *Bredenkamp* para 32.

freestanding substantive principle for determining the enforceability of a valid clause.¹²⁴ Harms DP held that fairness was only a relevant consideration when the court was asked to determine the reasonableness of the enforcement of a clause which limited an implicated constitutional value.¹²⁵ Therefore, Harms DP pointed out that *Barkhuizen's* formulation of the “test for fairness” must not be interpreted as meaning that fairness was an overarching requirement for contractual validity.¹²⁶ Instead, a court must determine the fairness of the enforcement of a contract by determining whether it accorded with public policy, with reference to identified policy factors.¹²⁷ The policy factors that must be assessed include, but are not limited to,¹²⁸ constitutional rights and values. Therefore, in applying *Barkhuizen 2*, the court must identify the policy considerations that were relevant to the matter and weigh them against one another to determine whether the clause should be enforced or not. As will be highlighted later in this thesis, this approach reflects the approach to determining the reasonableness of the enforcement of restraint of trade clauses.¹²⁹ Furthermore, Harms DP held that the policy considerations that must be assessed when analysing the enforcement of a valid clause were not different from the factors that must be assessed when analysing the clause itself.¹³⁰ Finally, Harms DP held that where the enforcement of a valid clause limited a constitutional value, it must be determined whether the limitation was “fair and reasonable”.¹³¹

The argument raised by Mr Bredenkamp was dismissed because fairness alone could not be relied on as an argument or a ground for refusal of the enforcement of the clause. Harms DP found that the termination of the banking contract, according to the cancellation clause, “did not offend any identifiable constitutional value and was not otherwise contrary to any public policy consideration”.¹³² Furthermore, due to the limited evidence provided to the court, there were no policy considerations that Harms DP could balance to determine the fairness of the

¹²⁴ *Bredenkamp* para 50.

¹²⁵ Paras 26 and 47 – 51; S Thompson “Beadica 231 CC: An End to the Trilogy?” (2020) 4 *SALJ* 641 at 645.

¹²⁶ *Bredenkamp* para 32; In his interpretation of *Bredenkamp*, Davis in D Davis “Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution” (2011) 22(3) *Stell LR* 845 at 857 Davis states that the judgment should be understood as stating that courts must not decide unfair enforcement cases based purely on value judgments and should only do so in terms of established principles. Davis argues that this approach limits the scope of *Barkhuizen*, which emphasises that constitutional values must be referred to when deciding unfair enforcement cases. A similar view was held by Hutchison 2019 *Acta Juridica* 115 who regarded Harms DP’s interpretation of *Barkhuizen* as a reading down of the principles enunciated there.

¹²⁷ *Bredenkamp* para 33 – 34.

¹²⁸ *Bredenkamp* para 39.

¹²⁹ *Bredenkamp* para 45.

¹³⁰ *Bredenkamp* para 56.

¹³¹ *Bredenkamp* para 44 and 46.

¹³² *Bredenkamp* para 64.

enforcement of the cancellation clause. Harms DP was given no policy factors to consider as countervailing factors against *pacta sunt servanda* and the enforcement of the cancellation clause. The case was, therefore, an unsuitable case to test the efficacy of the approach requiring the courts to balance the competing public policy factors. Despite this, Harms DP still emphasised the significance of weighing out the relevant policy factors in determining whether a valid clause should be enforced. Therefore, it is submitted that the Supreme Court of Appeal in *Bredenkamp* supported the approach in *Nyandeni*.

The approach in *Bredenkamp* was followed in two subsequent Supreme Court of Appeal judgments. In *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*¹³³ Brand JA held that a party could not challenge the enforcement of a clause simply because its enforcement in the circumstances would be unreasonable or unfair.¹³⁴ In other words, values such as fairness and reasonableness could not be used directly to determine whether the clause should be enforced or not. Brand JA maintained the same in *Potgieter and Another v Potgieter NO and Others*,¹³⁵ where he emphasised that decisions on whether a contract should be enforced could not be based merely on what the judge believed to be fair.¹³⁶ These judgments suggested that a party seeking to avoid the enforcement of a valid clause needed to provide the court with more reasons, perhaps in the form of policy factors, for why the valid clause should not be enforced. Therefore, according to the Supreme Court of Appeal, merely stating that its enforcement would be unreasonable or unfair in the particular circumstances was not a sufficient ground for the court to refuse its enforcement.

3.2.3 *The apparently conflicting approaches*

After *Bredenkamp*, several cases applied the *Barkhuizen* principles to decide unfair enforcement claims brought in various contractual contexts.¹³⁷ The second leg of the public

¹³³ 2011 (5) SA 19 (SCA).

¹³⁴ *Maphango* para 25.

¹³⁵ 2012 (1) SA 637 (SCA).

¹³⁶ *Potgieter* paras 34 – 35.

¹³⁷ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC); *W v H* 2017 (1) SA 196 (WCC); *Roazar CC v The Falls Supermarket CC* [2017] 2 All SA 665 (GJ); *Bondev Midrand (Pty) Ltd v Madzhe and Others* 2017 (4) SA 166 (GP); *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ); *Bondev Midrand (Pty) Ltd v Puling and Another and a Similar Case* 2017 (6) SA 373 (SCA); *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP); *Mohamed's Leisure Holdings (Pty) Ltd* 2018 (2) SA 314 (SCA); *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA).

policy test was applied in several High Court judgments.¹³⁸ Some adopted the approach in *Bredenkamp*, and others appeared to have taken a different approach, directly applying fairness and reasonableness against the enforcement of the contract. This was done to obtain a substantively fair result.¹³⁹ Even though it was repeatedly emphasised that fairness was not a requirement or ground for enforcement and that any enquiry into fairness could only take place through the prism of public policy as mediated by the values of the Constitution.¹⁴⁰

An example where this apparent dichotomy in approach occurred is illustrated in two High Court judgments handed down soon after *Bredenkamp*. In the South Gauteng High Court in *Naidoo v Birchwood Hotel*,¹⁴¹ Heaton-Nicholls J had to consider whether a valid exemption clause should not be enforced in the particular circumstances of the case.¹⁴² In doing so, Heaton-Nicholls J refused to enforce the clause on the basis that its enforcement would deny the plaintiff's right to judicial redress, which would be unfair and unjust.¹⁴³ Heaton-Nicholls J thus relied on the right to judicial redress as a policy factor against the enforcement of the exemption clause. In contrast, in the Western Cape High Court in *Absa Bank v Coe Family Trust and Others*,¹⁴⁴ which concerned an application for summary judgment, Davis J rejected the notion adopted in *Bredenkamp* that fairness could not be considered when applying *Barkhuizen 2*.¹⁴⁵ Davis J proposed that, upon a proper interpretation of *Barkhuizen*, the validity or enforcement of a contract could be tested directly against constitutional values such as reasonableness and fairness.¹⁴⁶ This suggested that it was not necessary for the refusal of the enforcement of a valid clause to be based on concrete policy factors and the refusal to enforce a valid clause could be based on other grounds apart from those based on concrete principles.

¹³⁸ As discussed later in this chapter.

¹³⁹ *Absa Bank* at pg 15.

¹⁴⁰ In *Uniting Reformed Church* para 33 – 35 Zondi J emphasised the quality of bargaining powers between the parties as an important policy consideration that may be weighed against *pacta sunt servanda* when applying public policy. It was held that parties who seek to avoid the enforcement of a contract due to being in a weaker bargaining position must establish the facts which indicate that at the time of the conclusion of the agreement, the party was in a weaker bargaining position and therefore, to enforce the contract in these circumstances would be harmful to the public.

¹⁴¹ 2012 (6) SA 170 (GSJ).

¹⁴² *Birchwood Hotel* para 52.

¹⁴³ *Birchwood Hotel* para 52 - 54.

¹⁴⁴ 2012 (3) SA 184 (WCC).

¹⁴⁵ *Absa Bank* at 190D – F.

¹⁴⁶ *Absa Bank* at 191A – E.

The apparent dichotomy is illustrated further in two Constitutional Court judgments, namely *Botha v Rich*¹⁴⁷ and *Malan v City of Cape Town*.¹⁴⁸ These judgments appeared to have adopted slightly different approaches to applying the second leg of the public policy test. In *Botha*, the Constitutional Court considered the enforcement of a cancellation clause in the context of an instalment sale agreement for immovable property, which brought s 27 of the Alienation of Land Act¹⁴⁹ into application.¹⁵⁰ As an alternative issue, Nkabinde J considered whether the enforcement of the cancellation clause would be contrary to public policy.¹⁵¹ Nkabinde J framed the issue as whether the cancellation of the contract was “fair and thus constitutionally compliant”.¹⁵² In deciding this issue, Nkabinde J’s primary focus was on the proper interpretation of s 27 and its demands in the particular circumstances of the case.¹⁵³ However, the judge recognised and adopted the principles established in *Barkhuizen* for applying public policy to determine the enforceability of a valid contractual clause.¹⁵⁴ Since the *ratio* was focused on the impact of s 27 on the contract between the parties, it seems that the statements made regarding the *Barkhuizen* principles were made *obiter*. However, the following concluding statements by Nkabinde J raised an important question:

“granting cancellation – and therefore, in this case, forfeiture – in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach”.¹⁵⁵

¹⁴⁷ 2014 (4) SA 124 (CC).

¹⁴⁸ 2014 (6) SA 315 (CC).

¹⁴⁹ 68 of 1981.

¹⁵⁰ s 27 of the Act provides that any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land. In *Botha* the trustees sought to cancel the agreement between itself and Ms Botha as a result of her defaulting on her monthly payments after she had already paid over 50% of the purchase price. The cancellation clause contained a forfeiture clause which required Ms Botha to forfeit the money she had already paid towards the property upon cancellation. In effect, by enforcement of the clause, she would be evicted from the property and would forfeit the money she already paid towards it. Accordingly, she filed a counterclaim for the property to be transferred in her name.

¹⁵¹ *Botha* para 21.

¹⁵² *Botha* para 24.

¹⁵³ *Botha* paras 33 – 40; Hutchison 2019 *Acta Juridica* 118.

¹⁵⁴ *Botha* paras 23 – 24 and 51; See R Sharrock “The General Principles of The Law of Contract” (2014) *Annual Survey of South African Law* 470 at 486.

¹⁵⁵ *Botha* para 51.

The question was whether Nkabinde J recognised a “doctrine of proportionality”¹⁵⁶ which allowed the court to refuse the enforcement of a valid clause. Another question was whether “proportionality” ought to have been considered as a relevant consideration in unfair enforcement cases. The conclusion mentioned above gave the impression that it did. It was therefore assumed that the *Botha* judgment was authority for the proposition that a party who breaches a valid clause could avoid the consequences for the breach by claiming that the consequences would be disproportionate or unfair in the circumstances.¹⁵⁷ The approach in *Botha* was thus viewed as conflicting with the approach in *Bredenkamp*, which stressed that fairness was not a ground for non-enforcement, and the decision must be based on the outcome of a public policy enquiry. The judgment was also viewed as creating uncertainty regarding the exercise of a party’s right to cancellation in that the decision appears to allow the defaulting party to escape cancellation on the basis that it would be a disproportionate penalty for the breach.¹⁵⁸ However, in *Beadica*, the Constitutional Court held that this would be an incorrect interpretation of the judgment, which must be understood within its unique statutory context.¹⁵⁹ The case concerned the question “whether the seller’s contractual right to cancel for breach could be enforced within the statutory scheme created by s 27(1) of the Act”.¹⁶⁰

Although the *Botha* judgment may have been viewed as adopting an approach which allowed a court to refuse enforcement purely on the basis of abstract concepts, Boonzaier argued that *Botha* ought to be interpreted as a *Barkhuizen 2*-type case, calling for an application of the second leg of the public policy test.¹⁶¹ He argued that the case was not only about the purchaser’s rights in terms of s 27 of the Act. It was also about whether the court should endorse the effect on those rights by the enforcement of the cancellation clause.¹⁶² Boonzaier explained that Nkabinde J invoked s 27 of the Act and its objectives as policy factors in determining the validity of the enforcement of the cancellation clause. Therefore, even though *Botha* was interpreted as endorsing an approach which gives the court the power to refuse enforcement based on fairness, Boonzaier explained that a correct interpretation of *Botha* showed that

¹⁵⁶ Du Plessis 2019 *Constitutional Court Review* 438; Hawthorne 2016 *THRHR* 286; Wallis 2016 *SALJ* 554 – 557; Boonzaier 2020 *SALJ* 4; Hutchison 2019 *Acta Juridica* 117 – 120; Sharrock 2015 *SA Mercantile Law Journal* 174; Brand 2016 *Stell LR* 247.

¹⁵⁷ Hutchison 2019 *Acta Juridica* 117 – 120; Wallis 2016 *SALJ* 554 – 557; Sharrock 2015 *SA Mercantile Law Journal* 174.

¹⁵⁸ Bradfield *Christie’s Law of Contract* 17.

¹⁵⁹ *Beadica* para 59.

¹⁶⁰ *Ibid.*

¹⁶¹ Boonzaier 2020 *SALJ* 10.

¹⁶² *Ibid.*

Nkabinde adopted a similar approach to the one adopted in *Bredenkamp*. This approach being that the unfair enforcement arises from the fact that enforcing the cancellation clause would be contrary to s 27 of the Act (a policy factor) and thus contrary to public policy. Thus, according to Boonzaier, the Constitutional Court in *Botha* did not deviate from the approach of the Supreme Court of Appeal on how best to deal with challenges against the enforcement of a valid clause.

This interpretation of *Botha* would bring it in line with the Constitutional Court judgment in *Malan* handed down in the same year. In *Malan*, the Constitutional Court considered the enforcement of a valid cancellation clause in circumstances where its enforcement would result in eviction and thus an infringement on the tenant's right to security of tenure.¹⁶³ The court held that the circumstances called for an application of the second leg of the public policy test.¹⁶⁴ It was held that cancellation would only be endorsed if the landlord provided proper reasons for cancellation.¹⁶⁵ These would be, for example, continuous breaches of the lease agreement or "the necessity to secure vacant premises for pressing public reasons".¹⁶⁶ The failure to provide reasons for non-compliance was also recognised as a policy factor against the enforcement of the cancellation clause. As will be shown in chapter 4, the Constitutional Court would later recognise this as a crucial factor in determining the enforceability of a valid clause. Therefore, in *Malan*, the existence of a policy factor (in this case, one grounded in the constitutional right to security of tenure) weighing against the enforcement of the clause was necessary for the court to decide whether to refuse its enforcement or not. The court found itself unable to make the decision based purely on what it regarded as reasonable or fair in the circumstances.

Despite the Constitutional Court's approach in *Malan*, some courts adopted an approach which appeared to be in conflict with the approach envisaged in *Bredenkamp*. In the Western Cape High Court in *Combined Developers v Arun Holdings & Others*,¹⁶⁷ Davis J had to consider whether an acceleration clause¹⁶⁸ should be enforced in circumstances where the amount that the debtor failed to pay was negligible compared to the full debt that was owed under the

¹⁶³ *Malan* para 63.

¹⁶⁴ *Malan* para 62.

¹⁶⁵ *Malan* para 64.

¹⁶⁶ *Ibid.*

¹⁶⁷ 2015 (3) SA 215 (WCC).

¹⁶⁸ An acceleration clause is a clause which requires the debtor to pay the full amount owing on a loan if the debtor defaults on a payment.

contract.¹⁶⁹ Davis J held that when applying the second leg of the public policy test, the court must test the enforcement of the contract against an objective standard sourced from the normative framework of the Constitution.¹⁷⁰ Davis J then held that “public policy embraces the concept of good faith and reasonableness”.¹⁷¹ Davis J adopted the principle in *Juglal*, which provided that a court may refuse to enforce a valid clause if the party seeking to avoid the clause aimed to do so in an immoral or unconscionable manner. Based on his understanding of *Juglal*, Davis J thus held that a court could refuse to enforce a valid clause if it was implemented in a manner that was “so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy”.¹⁷² Davis J based his decision on what the equitable values of good faith and fairness required, which provided that these values would be violated if there was a discrepancy between the interests pursued by the creditor in enforcing the clause “compared to those of the debtor being harmed”.¹⁷³ On this approach, public policy, informed by the values of good faith and fairness, required that the clause not be enforced.

The Gauteng High Court, Johannesburg adopted a similar approach to Davis J in *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*.¹⁷⁴ Van Oosten J held that, when deciding whether to enforce a valid clause, the court must make a value judgment based on the constitutional concepts of ubuntu and fairness.¹⁷⁵ The court must do so by adopting an objective approach whereby all the relevant facts and circumstances are weighed together with principles such as *pacta sunt servanda* and freedom to contract. With all the considerations taken into account, including the notion that ubuntu and fairness are paramount, the court must test whether the circumstances of the case constitute sufficient cause for the relaxation of *pacta sunt servanda* and thus, non-enforcement of the contract.¹⁷⁶

¹⁶⁹ *Combined Developers* paras 26 – 30.

¹⁷⁰ *Combined Developers* paras 37.

¹⁷¹ *Combined Developers* paras 40.

¹⁷² *Combined Developers* paras 36.

¹⁷³ Du Plessis 2018 *Stell LR* 404.

¹⁷⁴ 2017 (4) SA 243 (GJ).

¹⁷⁵ *Mohamed’s HC* para 28.

¹⁷⁶ *Ibid.*

In both *Arun* and *Mohamed's HC Davis J* and Van Oosten J referred to significant statements by Yacoob J¹⁷⁷ and Moseneke DCJ¹⁷⁸ in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹⁷⁹ to support the proposition that ubuntu and fairness should regulate the enforcement of a valid clause. The statements emphasise that the law of contract should be developed in light of the normative values of the Constitution, such as the value of ubuntu. This suggested that a contract law infused with the spirit of good faith, ubuntu and fairness would require that valid clauses should only be enforced in a manner that was consistent with these values. It must be noted that in his majority judgment, Moseneke DCJ declined to deal with the particular issue of the role of good faith in contract law since *Everfresh* concerned the validity of a good faith *clause* and not the concept of good faith in general, and because the matter had not been appropriately argued in a court of first instance. As shown above, the Supreme Court of Appeal cases consistently applied the approach in *Bredenkamp*.¹⁸⁰ The court maintained the view that the principle *pacta sunt servanda* was paramount in the context of

¹⁷⁷ In *Everfresh* Yacoob J stated the following in his minority judgment paras 22 – 24: “Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country. The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country places a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone. It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu”.

¹⁷⁸ Moseneke DCJ stated the following in a separate judgment paras 71 – 72: “Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”. Were a court to entertain *Everfresh's* argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.

¹⁷⁹ 2012 (1) SA 256 (CC).

¹⁸⁰ *Maphango SCA* paras 22, 28 and 53; *Potgieter* paras 32 – 34.

unfair enforcement cases, and that abstract values such as ubuntu and fairness could not be relied on to refuse the enforcement of a valid clause. The court thus criticised the approach adopted in some of the High Court judgments, which seemed to have not only undermined the jurisprudence of the Supreme Court of Appeal but in that court's view had also undermined legal certainty.

This occurred in the appeal from the High Court judgment in *Mohamed's Leisure Holdings*. Mathopo JA held that the proper approach when deciding unfair enforcement cases was to balance and weigh-up two principal considerations, namely *pacta sunt servanda* and public policy considerations, which included "constitutional imperatives".¹⁸¹ This statement suggested that *pacta sunt servanda* was a stand-alone doctrine which equated to, or must be balanced with, the doctrine of public policy, as opposed to a policy factor forming a component of public policy. Mathopo JA's statement thus appeared to have elevated the status of *pacta sunt servanda* from a policy factor forming part of public policy to a separate doctrine which acted as a counterweight to public policy. It is submitted that this would not be a proper interpretation of Mathopo JA's statement. A proper interpretation would be that *pacta sunt servanda* is a policy factor and that the proper approach is to begin the enquiry by balancing *pacta sunt servanda* against any other *policy factor* that required that the clause not be enforced. This is supported by the fact that Mathopo JA expressly mentions "*pacta sunt servanda*" and "public policy considerations" as the primary *factors* that ought to be balanced in this context. This understanding of Mathopo JA's statements would be consistent with the approach envisaged in *Bredenkamp*.

On an application of the *Bredenkamp* approach to the facts, Mathopo JA found that there were no policy factors that weighed against an upholding of *pacta sunt servanda* and a refusal of the enforcement of the clause.¹⁸² Finally, Mathopo JA found that a court could not refuse to enforce a valid clause merely on the basis that its enforcement would be unfair, or that it may operate harshly.¹⁸³ Mathopo J stressed that the *Barkhuizen* test not only evaluated the clause itself, but

¹⁸¹ *Mohamed's Leisure Holdings SCA* para 21.

¹⁸² *Mohamed's Leisure Holdings SCA* para 29.

¹⁸³ *Mohamed's Leisure Holdings SCA* para 30.

also the effect of the enforcement of the clause, and thus created a more purposive approach to evaluating contracts to “ensure a more substantively fair outcome”.¹⁸⁴

The same approach was adopted in another Supreme Court of Appeal judgment in *AB and Another v Pridwin Preparatory School and Others*,¹⁸⁵ which concerned the enforcement of a cancellation clause, contained in a parent contract between a private school and the parents of two pupils. The issue was whether the enforcement of the clause was contrary to public policy if it resulted in the dismissal of the pupils from the School without a fair hearing, and thus an infringement on the children’s constitutional rights to basic education.¹⁸⁶ Cachalia JA held that the judicial control over contracts occurred through the principle of public policy, informed by the Constitution and its values.¹⁸⁷ Cachalia JA then set out “the most important principles to be gleaned” from the jurisprudence on the judicial control of private contracts:

- a) Public policy demands that contracts freely and consciously entered into must be honoured;¹⁸⁸
- b) A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy;¹⁸⁹
- c) Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;¹⁹⁰
- d) The party who attacks the contract or its enforcement bears the onus to establish the facts;¹⁹¹
- e) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;¹⁹²

¹⁸⁴ A Hutchison “Good Faith In Contract: A Uniquely South African Perspective” (2019) 1(1) *The Journal of Commonwealth Law* 1 at 12; *Mohamed’s Leisure Holdings SCA* para 15.

¹⁸⁵ 2019 (1) SA 327 (SCA).

¹⁸⁶ The facts are discussed further in the following analysis of the Constitutional Court judgment in *Pridwin*.

¹⁸⁷ *Pridwin Preparatory School* para 27.

¹⁸⁸ *Barkhuizen* paras 57 and 87.

¹⁸⁹ *Barkhuizen* para 28; *Bredenkamp* paras 46 and 47.

¹⁹⁰ *Bredenkamp* para 47.

¹⁹¹ *Bredenkamp* para 49.

¹⁹² *Sasfin* at 9C – D.

- f) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.¹⁹³

This formulation later found support in the Constitutional Court in *Beadica*.¹⁹⁴

Applying the principles set out above, Cachalia JA had to assess whether any policy considerations demanded that the parent contract not be enforced.¹⁹⁵ Cachalia JA found that there was no duty on the School to provide the parents with a reasonable and fair hearing before terminating the contract. Furthermore, the parents could not provide any facts to support the argument that the enforcement of the clause offended public policy in the particular circumstances of the case. There was accordingly no basis for the refusal of the enforcement of the cancellation clause. Accordingly, *pacta sunt servanda* had to prevail, and the enforcement of the clause was upheld by Cachalia J.¹⁹⁶ The *Pridwin SCA* judgment illustrates the stance maintained by the Supreme Court of Appeal that the decision to refuse the enforcement of a valid clause must be based on concrete policy factors, which have been identified and balanced in light of the facts of the case.

The parents took the matter on appeal to the Constitutional Court in *AB and Another v Pridwin Preparatory School and Others*¹⁹⁷ on similar grounds. Theron J held that because the parents challenged the constitutionality of the decision to cancel the parent contract, the primary issue, in that case, was not whether the enforcement of the clause was contrary to public policy, but rather, whether the decision to cancel the contract in the circumstances infringed on ss 28(2) and 29(1) of the Constitution.¹⁹⁸ The challenge was thus based on the failure of the School's negative constitutional obligation not to infringe on the children's rights to basic education, an obligation which arose from the Constitution and not from the parent contract.¹⁹⁹ Theron J held that the matter could not be decided on the public policy principles set out in *Barkhuizen*, but rather, on a direct horizontal application of the right to basic education. Theron J thus held that

¹⁹³ *Potgieter* paras 32 – 34.

¹⁹⁴ *Beadica* para 82.

¹⁹⁵ *Pridwin* para 78.

¹⁹⁶ *Pridwin* paras 79 – 81.

¹⁹⁷ 2020 (5) SA 327 (CC).

¹⁹⁸ *Pridwin* paras 100 – 107.

¹⁹⁹ M Finn “Befriending The Bogeyman: Direct Horizontal Application in *AB v Pridwin*” (2020) 137 *SALJ* 591 at 592.

“a decision in respect of the public policy challenge is rendered superfluous’ and a challenge based on the direct application of constitutional rights to the decision of the School is discernible from the pleadings”.²⁰⁰ Theron J did not refute Cachalia JA’s formulation of the test, suggesting that Cachalia JA’s conception of the test was correct, even though the principles were held by Theron J not to be relevant in deciding the issue in *Pridwin*.

Finn criticised Theron J’s direct application of the Constitution in *Pridwin* and disagreed with the proposition that *Pridwin* could not be decided in terms of the *Barkhuizen* principles.²⁰¹ She argued that Theron J’s approach was based on the false notion that issues concerning a direct horizontal application of the Constitution could not be decided in terms of the common law. In other words, it was incorrect to assume that the matter could not be decided in terms of public policy simply because the contract directly implicated a constitutional right. In summary, Theron J held that the issue in *Pridwin* was not contractual and thus did not warrant an application of *Barkhuizen 2*. In contrast, Finn argued that the issue was contractual because it was the *contract* which gave effect to the constitutional right in question.

Finn cited the following paragraph in Theron J’s judgment in *Beadica*, which was handed down on the same day, in support of her argument:

“There is only one system of law in our constitutional democracy. As recognised by this Court in *Pharmaceutical Manufacturers*, this system of law is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. The determination of public policy is now rooted in the Constitution and the objective, normative value system it embodies. *Constitutional rights apply through a process of indirect horizontality to contracts. The impact of the Constitution on the enforcement of contractual terms through the determination of public policy is profound. A careful balancing exercise is required to determine whether a contractual term or its enforcement, would be contrary to public policy*”.²⁰²

Finn suggested that even if a dispute called for a direct horizontal application of constitutional provisions, if that dispute arose out of a contract between the parties, then the common law

²⁰⁰ *Pridwin SCA* para 107.

²⁰¹ Finn 2020 *SALJ* 599 – 601.

²⁰² *Beadica CC* para 71; Finn 2020 *SALJ* 599. Emphasis added.

principles of contract should apply before the court relies directly on the Constitution. This was because (a) the subsidiarity rule required that the common law be relied on before the Constitution is invoked and (b) the common law is constitutional in nature and so constitutional rights (such as the right to basic education) can be vindicated by application of the common law, in this case, in terms of the *Barkhuizen* test.²⁰³ Finn's suggestion, therefore, appeared to be that a challenge against the infringement of a constitutional right, where the enforcement of a contract caused that infringement, should be dealt with through the *Barkhuizen* test, and not through a direct application of the Constitution, as was the case in *Pridwin CC*. Therefore, according to Finn's approach, in cases where the enforcement of a valid clause is argued to implicate a provision of the Constitution directly, the court should normally apply the *Barkhuizen* test to determine whether its enforcement in the particular circumstances should be upheld or refused.

It is submitted that Finn's view should be welcomed, as it is consistent with earlier judgments that have considered and applied the *Barkhuizen* test even where constitutional rights were implicated.²⁰⁴ This means, with respect, that the approach adopted in *Pridwin CC* may be subject to criticism. To explain this submission further would require a full analysis of *Pridwin CC*, which would fall outside the scope of this thesis. However, the following chapter provides a detailed analysis on *Beadica*, which discusses the relevance of constitutional rights within the public policy analysis.

3.3 Conclusion

Barkhuizen established a method for precisely when and how a party can challenge the enforcement of a valid clause. This must be done by application of the second leg of the public policy test outlined in *Barkhuizen*.²⁰⁵ Since then, legal practitioners and academics have tried to make sense of how exactly courts should apply *Barkhuizen 2* to determine the enforceability of a valid clause. The question was whether *Barkhuizen 2* allowed the court to refuse the enforcement of a valid clause based on equitable values such as reasonableness, good faith, ubuntu and fairness, or whether the enforcement of a valid clause could only be done with reference to concrete principles of law. The varying views on the answer to this question appeared to have caused a conflict between the courts, which highlighted the need for clarity

²⁰³ *Barkhuizen* paras 56 – 59.

²⁰⁴ Such as *Malan* and *Pridwin SCA*.

²⁰⁵ See 3.1.4.2.

on how exactly the test should be applied.²⁰⁶ After many years of uncertainty, the issue was addressed recently in the Constitutional Court judgment of *Beadica*, which is discussed in the next chapter.

²⁰⁶ Thompson 2020 *SALJ* 652.

Chapter Four – The current legal position in terms of *Beadica*

For the first time since *Barkhuizen*, the Constitutional Court in *Beadica* had the opportunity to clarify the precise extent and scope of *Barkhuizen 2*, and the correct approach courts should follow when determining the enforceability of a valid clause. This chapter examines the judgment of the Constitutional Court. Furthermore, it investigates the court's interpretation of *Barkhuizen 2* and its pronouncements on how precisely a court should engage with the public policy enquiry to determine whether or not to enforce a valid clause.

4.1 Background and Context

4.1.1 Factual Background

Beadica concerned the fairness of the enforcement of valid renewal clauses contained in various lease agreements. The salient facts were as follows.¹ Sales Hire CC, a close corporation which rents and sells building equipment and tools, wanted to franchise its business to historically disadvantaged black employees. Sales Hire CC was the second respondent. The second respondent entered into franchise agreements with four close corporations which were established by four of its former black employees as members of the close corporations. The members, on behalf of the close corporations, were the applicants. The parties entered into franchise agreements in terms of a black economic empowerment initiative funded by the National Empowerment Fund ('NEF'). The Fund was the third respondent. In terms of a cooperation agreement between the second and third respondents, the third respondent would finance the applicant's businesses if the second respondent agreed to train and assist the applicants in setting up and maintaining the businesses. The franchise agreements between the applicants and the second respondent provided that the applicants had to operate their businesses from approved premises. According to the franchise agreements, the applicants entered into various lease agreements with the Oregon Trust, the lessor and owner of the approved premises. The Trust was the first respondent. The leases were for five years, and included a renewal clause, in terms of which the applicants could exercise an option to renew

¹ *Beadica HC* paras 1 – 5; and 17 – 29; *Beadica SCA* paras 1 – 13; *Beadica* paras 2 – 10; Thompson 2020 *SALJ* 646 – 647; G Glover "Renewal options, public policy, and consensus: The *Beadica* and *Oregon Trust* cases" in Monray Botha, Jacolien Barnard & Jani van Wyk (eds) *De Serie Legenda* vol 2 (2019) 65 at 67 - 69. The parties will be cited as they were in the Constitutional Court judgment.

their leases for a further five years provided that they gave notice of renewal at least six months before the termination date of the lease. The renewal clause read as follows:

“The lessee shall have the right to extend the lease provided by a further period as set out in section 13 of the Schedule [a further period of five years] on the same terms and conditions as set out herein, save as to rental, *provided that the lessee gives the lessor written notice of its exercising of the option of renewal at least six months prior to the termination date*”.²

The enforcement of this objectively valid clause in the particular circumstances of this case was in dispute. Having been aware of the commencement date of the lease, it was clear to the applicants during which period they had to exercise their option to renew. Upon a strict reading of the clause, it was clear that if the applicants did not exercise their option to renew in terms of the clause, the lease would lapse through effluxion of time, resulting in the termination of the lease – in which case the applicants would have to vacate the property. The applicants failed to provide such notice to renew within the six months. Three of the four applicants sent their notices to renew their leases shortly after the six month notice period had expired. Accordingly, the first respondent sought to evict the applicants from the premises. Upon a strict reading of the clause, the first respondent had the right to evict the applicants from the premises.

In response to the first respondent’s eviction claim, the applicants contended that, even though they had filed their notices after the notice period had expired, the first respondent should accept the renewal option as having been validly exercised. This was because termination of their leases and eviction would result in their failure to meet a requirement contained in the franchise agreement that the applicants must operate from approved premises. A failure to meet this requirement would result in a lapsing of the franchise agreements and would put the franchised businesses to an end. Such a result would impair the objectives of the black economic empowerment initiative, given effect by the NEF, which would implicate the right to equality. However, it was common cause that, under the franchise agreements, the second respondent had the discretion to allow the applicants to continue running their businesses at other approved premises.³ In other words, even if the first respondent evicted the applicants, and the second respondent did not terminate the franchise agreements, the applicants could

² *Beadica SCA* para 8. Emphasis added.

³ *Beadica* para 9.

continue running their businesses from another location. Nevertheless, the applicants argued that eviction through enforcement of the renewal clause would be contrary to public policy because enforcement would infringe on the constitutional right to equality which the black economic empowerment initiative sought to advance and promote. The applicants further contended that it would be consistent with the equitable values of fairness, reasonableness, good faith and ubuntu if the first respondent forgave the applicants and accepted their late notices to renew.

4.1.2 Conflicting approaches play out in the High Court and Supreme Court of Appeal

In the High Court judgment,⁴ Davis J expressed his view on the correct approach to deciding unfair enforcement cases. Davis J highlighted the tension within South African contract law that existed between “*pacta sunt servanda* and legal certainty, on the one hand, and communitarian conceptions of fairness and ubuntu on the other hand”.⁵ According to Davis J, our Constitution required that fairness and ubuntu play an equal role in comparison to *pacta sunt servanda* and legal certainty, and that the courts should not regard *pacta sunt servanda* as a decisive trump over equitable values. Davis J thus disagreed with the conservative approach to dealing with questions of unfair enforcement, which cautioned against deciding such cases in terms of reasonableness and fairness at the expense of legal certainty.⁶ Davis J proposed that “honouring a contract is not merely a matter of each side pursuing his or her own self-interest” and that *pacta sunt servanda* was not the “exclusive lens through which our contract law should be evaluated”.⁷ He believed that the normative framework of the Constitution gave judges the power to examine the substance of the agreement in light of the particular circumstances of the case and then make a value judgment on whether the agreement should be enforced or not.⁸ Davis J thus adopted similar views to those he expressed a number of years earlier in *Coe Family Trust and Arun*.⁹

⁴ *Beadica 231 CC v Trustees, Oregon Unit Trust* 2018 (1) SA 549 (WCC); Thompson 2020 *SALJ* 647 – 648; Glover *De Serie Legenda* 67 – 73.

⁵ *Beadica HC* paras 1 and 7 – 16; Thompson 2020 *SALJ* 647.

⁶ *Beadica HC* para 14.

⁷ *Beadica HC* para 40.

⁸ *Beadica HC* paras 43.

⁹ See 3.2.3.

Davis J proposed that an equitable and just approach should be adopted, which, in his view, would not undermine legal certainty.¹⁰ In doing so, he argued that the enforcement of the clause ought only to be endorsed if its enforcement would promote fairness and good faith. Davis J, however, appeared to have based his propositions not on *Barkhuizen* as the leading authority on the non-enforcement of valid contracts. Instead, Davis J appeared to base them on propositions made about the *exceptio doli generalis*.¹¹ These were: that our law recognised the court's power to make an equitable finding where the strict enforcement of the law would lead to harsh consequences – and that even though the *exceptio doli generalis* was never received into our law, this power may now be provided by the Constitution.¹² Davis J's suggestions in this regard were similar to those made by Kerr. Kerr had suggested that our law, through the *exceptio doli generalis*, gave courts an inherent equitable jurisdiction that included the power to refuse the enforcement of a clause in inequitable circumstances.¹³ Davis J suggested that this equitable power was now given to the courts in terms of the Constitution and its values, and should not be unduly limited by principles of *pacta sunt servanda* or legal certainty.

Davis J followed his analysis with the *obiter dicta* in *Everfresh* and findings in *Mohamed's Leisure Holdings HC* that public policy promoted the ideas of ubuntu and required that parties relate to each other in good faith.¹⁴ According to Davis J, this meant that a court could refuse to enforce a contract if its enforcement would undermine the value of ubuntu or would be contrary to the value of good faith.¹⁵ Davis J then relied mainly on the decision in *Botha*, which he found required the court to look at the substance of the effect of the clause rather than assessing its fairness with reference only to its wording. According to Davis J, the court in *Botha* refused the enforcement of a cancellation clause on the basis that it imposed a sanction that was disproportionate to the consequences for the breach.¹⁶ On the facts before him, Davis J thus held that:

¹⁰ *Beadica HC* para 16 Davis J stated that legal certainty ought not to be regarded as a decisive trump over other values.

¹¹ See 2.3.1 and 2.3.3.

¹² Glover *De Serie Legenda* 70.

¹³ See 3.2.2.1.

¹⁴ *Everfresh* paras 24 and 71 – 72; *Mohameds Leisure Holdings HC* paras 27 – 28.

¹⁵ *Beadica HC* para 31.

¹⁶ *Beadica HC* para 35.

“[t]he case really turns on the question as to whether they complied strictly with the provisions of the lease or whether *in substance* they did comply”.¹⁷

Applying the principle of proportionality,¹⁸ Davis J considered the subjective factual circumstances of the case to determine whether the clause should be strictly enforced. Davis J held that the termination of the lease agreements would have been a “disproportionate penalty” for failing to exercise the renewal option timeously.¹⁹ Davis J interpreted *Botha* as authority for the principle that “the sanction of cancellation for breach must be proportionate to the consequences of the breach”.²⁰ Applying this approach, Davis J held that imposing the penalty in the present circumstances would be disproportionate, unfair, and contrary to public policy.²¹ He thus found that the franchise agreements had been validly renewed and refused to enforce the renewal clauses.²² Davis J followed a similar approach to the one adopted in *Arun*, where he refused to enforce an acceleration clause on the basis that in those circumstances the default giving rise to the enforcement of the clause was too negligible to warrant its enforcement.²³ In *Arun*, it could be said that the penalty of paying the full balance was “disproportionate” to the breach of failing to pay the negligible interest amount. Despite him following a similar approach, Davis J did not refer to his judgment in *Arun* to support his application of the principle of proportionality in *Beadica HC*, even though the outcome in both cases was based on similar reasons.²⁴

In *Beadica SCA*,²⁵ Lewis ADP found that Davis J did not adequately explain why principles of equity should be applied in these matters.²⁶ Lewis ADP suggested that Davis J should have described precisely how, in practical terms, equity and justice ought to be applied to decide unfair enforcement cases. Lewis ADP disagreed with the suggestion that the spirit of the *exceptio doli generalis* was given effect by the Constitution and its values.²⁷ Furthermore, Lewis ADP disagreed with Davis J’s identification of the issue as one concerning the

¹⁷ *Beadica HC* para 39. Emphasis added.

¹⁸ *Beadica SCA* para 18.

¹⁹ *Beadica HC* paras 35, 39 and 42.

²⁰ *Beadica* para 11; *Beadica HC* para 35.

²¹ *Beadica HC* paras 42.

²² *Beadica HC* paras 42 - 45.

²³ See 3.2.3 above for Davis J’s application of ‘proportionality’ in *Arun*.

²⁴ Glover *De Serie Legenda* 83.

²⁵ Thompson 2020 *SALJ* 648 - 650; Glover *De Serie Legenda* 73 - 79.

²⁶ *Beadica SCA* para 19.

²⁷ *Beadica SCA* para 19; Glover *De Serie Legenda* 74.

cancellation of the contract through enforcement of a cancellation clause.²⁸ Lewis ADP held that the leases expired through the effluxion of time. The issue concerned the strict upholding of the renewal provisions, as opposed to a challenge against the enforcement of a termination clause. This distinction thus meant that the principles in *Botha* were simply not applicable to the facts in *Beadica*.

Lewis ADP further criticised Davis J's approach because it determined enforcement of the clause with reference only to the principle of proportionality, which was "entirely alien" to our law of contract.²⁹ Following the Supreme Court of Appeal's approach in *Mohamed's Leisure Holdings SCA*, Lewis ADP emphasised that, as a starting point, the principle of *pacta sunt servanda* must be upheld, to ensure legal certainty in the law of contract. Only then could a court consider competing policy factors and whether the principle of *pacta sunt servanda* should be limited in favour of those factors. Lewis ADP acknowledged, however, that legal certainty and *pacta sunt servanda* were not in themselves decisive of public policy, and there may be circumstances where countervailing policy factors that require that the contract not be enforced.³⁰ Therefore, according to Lewis ADP, a balance must be struck between factors that require enforcement (such as *pacta sunt servanda* and legal certainty) and any other factors that may require non-enforcement.

Lewis ADP stressed that, although the policy factors used must be informed by the objective normative values of the Constitution, normative values were not in themselves policy factors that could be used as self-standing principles against the enforcement of the clause. Even though the strict enforcement of a clause may lead to a harsh outcome, this did not "by itself lead to the conclusion that it offends the values of the Constitution or is against public policy".³¹ Therefore, the fact that enforcement would be unfair was not a ground upon which a court could refuse to enforce a clause. In Lewis ADP's view, Davis J's judgment was based on the notion that disproportionality and manifest unfairness were grounds for refusing the enforcement of a valid clause, as opposed to policy factors that may be weighed against *pacta sunt servanda*.³² Lewis ADP held that a court could not refuse to enforce a contract on the basis that its enforcement would be unfair or disproportionate to the harm suffered by the breach.

²⁸ *Beadica SCA* para 46.

²⁹ *Beadica SCA* para 25.

³⁰ *Beadica SCA* para 26; *Glover De Serie Legenda* 75.

³¹ *Beadica SCA* para 30.

³² *Beadica SCA* paras 25 – 38.

Accordingly, Lewis ADP held that the enforcement of a valid contract could only be refused on the basis of public policy with reference to identified public policy factors grounded in the common-law or the Constitution.³³ Lewis ADP thus framed the legal enquiry as follows:³⁴

“The question is really one that centres on policy – the legal convictions of the community, rooted now in the Constitution. What policy considerations were at play in this matter?”³⁵

In considering the relevant public policy factors, Lewis ADP ultimately found that there were no policy factors grounded in the common-law or the Constitution that weighed against the enforcement of the renewal clauses.³⁶ Additionally, the lessees failed to provide adequate reasons for failing to comply with their clauses.³⁷ Only if adequate reasons were provided could they have amounted to relevant factors calling for the non-enforcement of the contract. Therefore, no policy factors weighed against the enforcement of the clauses and their enforcement was thus not contrary to public policy. Accordingly, the Supreme Court of Appeal upheld the appeal and replaced the High Court’s order with an order for the eviction of the franchisees from the property.

In an analysis of the judgments of Davis J and Lewis ADP, Glover highlighted the challenge in discerning from *Beadica SCA* and *Pridwin SCA*³⁸ the precise role of the concepts of fairness and reasonableness, and in particular, how they operate within the public policy enquiry.³⁹ This issue became a central point of discussion in the Constitution Court judgments that followed a while after Glover’s article was published. Both the High Court and Supreme Court of Appeal acknowledged the importance of normative values when they were asked to engage in a public policy enquiry. However, as Glover suggested, it was not clear, at least from a methodological perspective, how these values ought to be applied within the course of contractual enforcement determination. It is submitted that a clear understanding of the correct role of fairness and reasonableness would have helped resolve the conflict in approach between the two judgments. Glover brought attention to a suggestion made by Hutchison and Pretorius that reasonableness

³³ *Beadica SCA* paras 33 – 34.

³⁴ Glover *De Serie Legenda* 77.

³⁵ *Beadica SCA* para 38.

³⁶ *Beadica SCA* para 39.

³⁷ *Beadica SCA* para 39.

³⁸ See 3.2.3.

³⁹ Glover *De Serie Legenda* 80.

and fairness may operate as *policy factors* to be balanced against other factors within the overall public policy enquiry, as opposed to standalone doctrines that by themselves decide on matters of contractual enforcement.⁴⁰ Furthermore, Glover suggested that a similar role could be afforded to the concept of “proportionality” as there is merit in recognising it specifically as a *policy factor*, as opposed to a standalone principle.⁴¹ It is submitted that this approach would provide a fair middle ground between the conflicting views of Davis J and Lewis ADP.

4.2 Beadica in the Constitutional Court

In the Constitutional Court, three judgments were handed down, the first being one by Theron J, who wrote for the majority of the Constitutional Court; the second by Froneman J, who wrote a dissenting judgment; and a final dissenting judgment by Victor AJ.⁴² In the majority judgment, Theron J considered, as the broad issues, the scope of application of the *Botha* judgment to unfair enforcement cases, the role of abstract values in the public policy enquiry and how courts generally ought to engage in the public policy enquiry.⁴³ The abovementioned broad issues and the relevant sub-issues are discussed in 4.2.1. In his dissenting judgment, Froneman J disagreed with the reasoning and outcome in the majority judgment. Froneman J differed with the majority on the correct approach to engaging in the public policy enquiry to determine unfair enforcement cases. Victor AJ agreed with Froneman J’s reasoning and conclusion in her minority judgment, and set out additional reasons for supporting Froneman J’s dissenting judgment. Victor AJ’s reasons centred on the value of ubuntu and how it should be afforded a more significant role in the public policy enquiry; in particular, the application of the second leg of the public policy test.⁴⁴ The approach adopted in the minority judgments fall outside the scope of this thesis and will thus not be discussed.

4.2.1 The legal position in terms of Theron J (majority)

4.2.1.1 The scope of *Botha*

Theron J held that *Botha* applied only in specific, and limited, circumstances because it dealt specifically with a contract that was governed by statute, particularly section 27 of the

⁴⁰ Hutchison *Contract* 2017 32 – 34; Glover *De Serie Legenda* 81.

⁴¹ Glover *De Serie Legenda* 81.

⁴² Thompson 2020 *SALJ* 650.

⁴³ Thompson 2020 *SALJ* 643.

⁴⁴ *Beadica* paras 226 – 232.

Alienation of Land Act.⁴⁵ Theron J held that a court could not refuse to enforce a contract on the basis that it would be a disproportionate sanction for the breach.⁴⁶ The reasons for the decision in *Botha* were not generally applicable to all unfair enforcement cases. The reasons were based on the peculiar facts of *Botha*, which involved the application of section 27 and its purpose as a policy factor in light of the facts of the case. Theron J thus confirmed Boonzaier's analysis of *Botha*⁴⁷ and the view that *Botha* formulated a separate standard for determining the enforceability of a valid clause. Furthermore, Theron J stated "categorically" that *Botha* did not revise the *Barkhuizen* test for determining the enforcement of a contract⁴⁸ and thus found that there were no separate tests (one based on "proportionality" and another based on "public policy") for determining the enforcement of a valid clause. *Barkhuizen* remained the leading authority that the determination of the enforceability of a clause must occur through public policy.⁴⁹ It is submitted that Theron J's findings should be welcomed, as they reflect *Barkhuizen*: that public policy is the central legal device for determining the enforceability of a valid clause, and that disproportionality was not a ground for refusing the enforcement of a valid clause.

4.2.1.2 *The precise role of equitable values*

Theron J discussed the role of equitable values in the policy enquiry.⁵⁰ There were, however, certain findings made by Theron J that, when read together, may appear to be contradictory. Theron J held that equitable values play the following roles:

- a) They form "important considerations" in the balancing exercise required to determine whether the enforcement of a clause is contrary to public policy (i.e., they are "policy factors").⁵¹
- b) They create, inform, control and regulate substantive legal rules and principles, including the doctrine of public policy.⁵²

⁴⁵ *Beadica* para 49.

⁴⁶ See 3.2.3 for a discussion on *Botha* and its apparent application of a principle of proportionality.

⁴⁷ See 3.2.3.

⁴⁸ *Beadica* para 58.

⁴⁹ *Beadica* para 58.

⁵⁰ Thompson 2020 *SALJ* 658.

⁵¹ *Beadica* para 72.

⁵² *Beadica* para 73.

At first glance, (a) and (b) seem to be contradictory. The statement (a) suggests that equitable values are policy factors themselves, that are balanced against other policy factors (like *pacta sunt servanda* for example) and they could therefore form the basis for the non-enforcement of a valid clause. This is bolstered by Theron J's statement that public policy required a careful balancing between a wide range of constitutional values *which include principles of equity*,⁵³ and that it was trite that our law had always recognised equity as a relevant *factor* in determining whether a contract should be enforced.⁵⁴ This would suggest that, where equitable values such as fairness, reasonableness and good faith “win” in the policy factor balancing exercise, they themselves would form the basis for the refusal of enforcement of the valid clause in question. This is arguably the approach adopted by Davis J in *Arun and Beadica HC* who found that the enforcement of the renewal clauses would have been manifestly unfair, that in those circumstances they should not be enforced.

This approach further suggested a greater role of the principle of good faith in the public policy enquiry. If this suggestion was correct, it would be consistent with the role most civil-law systems have accorded to good faith – that good faith was not only an underlying value in the law of contract, but also a general rule that the courts could apply directly to cases.⁵⁵ However, South African courts have not elevated the status of good faith to a substantive rule like in other civil-law jurisdictions.⁵⁶ So even though all contracts were based on good faith, a fact so trite that “it goes without saying”,⁵⁷ it could not by itself form the basis for the enforcement or non-enforcement of a contract.⁵⁸ Furthermore, interpreting (a) as an implicit elevation of equitable values as rules to be weighed in the public policy analysis would contradict Theron J's clear findings that our courts could not:

⁵³ *Beadica* para 87.

⁵⁴ *Beadica* para 80.

⁵⁵ See eg L Hawthorne “Abuse of a Right to Dismiss not Contrary to Good Faith” (2005) 17 *SA Merc LJ* 214 at 217 - 219; Louw 2013 *PELJ* 81; South African Law Commission Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 Report (1998) 140 P du Plessis “Good Faith and Equity in the Law of Contract in the Civilian Tradition” (2002) 65 *THRHR* 397 at 406 – 407 and 409; Lubbe 1990 *Stell LR* 19.

⁵⁶ J Du Plessis “Giving Practical Effect to Good Faith in the Law of Contract” (2018) 3 *Stell LR* 379 at 380.

⁵⁷ S Whittaker & R Zimmermann “Good faith in European contract law; surveying the legal landscape” in R. Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 7 at 18 – 32.

⁵⁸ *Brisley* para 22.

“[m]ake decisions regarding the enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness, fairness, but only on the basis of *established legal rules*”.⁵⁹

Theron J emphasised this point when she said that:

“a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the *rules* of contract law: including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it”.⁶⁰

So what would be a more suitable interpretation of (a)? Firstly, if (a) is read as it is, it would clearly contradict (b). However, if (a) is read together with (b), one could argue that by using the phrase “important considerations” what Theron J simply meant was that equitable values should always be in the mind of the judge when he or she engages in the public policy enquiry. These values form the philosophical basis for the application of substantive rules like the doctrine of public policy, or the principle of reciprocity.⁶¹ As Ngcobo J explained in *Barkhuizen*, “public policy is *informed* by the concept of ubuntu”.⁶²

Just because values such as good faith and ubuntu perform an informative role, this does not mean that they are weak in their own right. The concept of ubuntu was responsible for bringing into our law a subjective enquiry that promoted socio-economic rights and substantive equality, inspiring the creation of *Barkhuizen 2*.⁶³ This indicates the power equitable values may have in that they create and give content to substantive rules that regulate contractual relations. This understanding of the role of equitable values is reflected in Sachs J’s remark in his minority

⁵⁹ *Beadica* para 30; *Afrox* para 32. Emphasis added.

⁶⁰ See *Fourway Haulage* para 16 and *Potgieter* para 34. Emphasis added.

⁶¹ *Botha* 45 – 46.

⁶² *Barkhuizen* 51.

⁶³ Du Plessis 2019 *PELJ* 18.

judgment in *Barkhuizen* about good faith, which includes traces of the philosophical ideas that underscore the concept of ubuntu:

“Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community – a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected... But the principles of equality and dignity direct... that parties to a contract must adhere to a minimum threshold of mutual respect in which the "unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts ... oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*”.⁶⁴

Du Plessis proposed that although our courts do not recognise the principle of good faith as a principle that can be relied on directly to refuse the enforcement of a valid clause, it still plays an important role by indirectly helping courts limit the enforcement of a valid clause on grounds of public policy.⁶⁵ The question that one has to consider, Du Plessis argues, is thus *how* public policy should be applied to determine the enforceability of valid clauses in unfair circumstances, in a manner that allows good faith to fulfil its functions as an underlying value in our law of contract.⁶⁶ One way this can be done is by including in the public policy enquiry a step which requires the court to consider the individual interests of the parties to the contract. This step would be established in terms of the values that underlie both good faith and ubuntu, which require that contracting parties do not “pursue self-interest boundlessly, but to respect and consider each other’s interests”.⁶⁷ As will be shown in 5.3.2 below, this step is one expressly recognised within the context of the test for determining the reasonableness of the

⁶⁴ *Barkhuizen* para 140.

⁶⁵ Du Plessis 2018 *Stell LR* 417.

⁶⁶ *Ibid.*

⁶⁷ Du Plessis 2018 *Stell LR* 418.

enforcement of restraint clauses. It also gives effect to the value of ubuntu, which requires that parties respect one another and not see each other merely as a means to an end.⁶⁸

It is thus submitted that Theron J makes it clear that equitable values play an informative role in the public policy analysis. It is further submitted that one way our courts could give effect to these values is by expressly recognising a step in the enquiry that requires the courts to consider both the individual interests of the parties and community interests.⁶⁹ This submission will be discussed in more detail in chapter 6.

4.2.1.3 Perceptive restraint

Theron J held that the courts should exercise perceptive restraint before intervening in the enforcement of valid clauses, and should intervene only in “worthy cases”.⁷⁰ The previous position, as expressed in *Pridwin*, was that the court must refuse to enforce a clause in “the clearest of cases”. It may be argued that the use of the phrase “worthy cases” in place of “the clearest of cases” suggested that there was a lower standard that needed to be met before our courts could intervene in the enforcement of a valid clause. The “clearest of cases” rule was established to give effect to the principle of *pacta sunt servanda* since, according to *pacta sunt servanda*, the general rule was that valid clauses must be enforced, and only in exceptional cases should courts intervene in their enforcement. Theron J cited the following statement made in *Barkhuizen SCA* with support:

“[I]ntruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements”.⁷¹

However, the watering down of the rule from “clearest of cases” to “worthy cases” could be explained by the fact that the strength of *pacta sunt servanda* has been diminished in favour of constitutional and equitable values. The power to intervene in unfair enforcement cases must therefore be guided a little less by *pacta sunt servanda*⁷² and a little more by the fact that our courts have to promote constitutional values, which require that courts intervene in matters

⁶⁸ See Victor AJ’s minority judgment in *Beadica* paras 204 – 220.

⁶⁹ See 2.2.1.

⁷⁰ *Beadica* para 89.

⁷¹ *Barkhuizen SCA* para 13.

⁷² See Davis J in *Arun* and Ngcobo J in *Barkhuizen*.

where the interests of the public are at stake. Theron J held that the perceptive restraint principle must not prevent courts from fulfilling their constitutional duty to infuse public policy with constitutional values and to give due effect to the normative value system created by the Constitution.⁷³ Therefore, according to Theron J, courts must not restrain themselves from intervening in enforcement cases to an extent that they would fail to give effect to their constitutional duties. It is thus submitted that a correct interpretation of Theron J's statement in this regard provides that the courts must consider the refusal of the enforcement of a valid clause in cases where it is demonstrable that its enforcement *may*, on a balance of probabilities, be contrary to public policy. Not only if it is abundantly *clear* that its enforcement is contrary to public policy. Whether the enforcement of the valid clause is in fact contrary to public policy, and whether its enforcement must be refused, will thereafter be determined by application of the *Barkhuizen* test.

This approach should be welcomed because, as will be shown in chapter 6, this approach is consistent with the approach in restraint of trade cases. Our courts are always willing to assess the enforceability of a restraint clause, not only in extreme cases, where the unreasonableness of the enforcement of the restraint is absolutely clear, or obvious, but where, on an assessment of the relevant policy factors, it is demonstrable that on a balance of probabilities, the enforcement of the restraint may be unreasonable in the particular circumstances.

4.2.1.4 *Onus of proof*

Despite the lower standard set by Theron J on when courts should intervene in unfair enforcement cases, Theron J held that, at the least, the party must provide good reasons for why they failed to comply with the clause in order for a court to assess the fairness or otherwise of its enforcement. Furthermore, the party seeking to avoid the enforcement of the clause must establish the facts which show that its enforcement will be contrary to public policy.⁷⁴ Theron J expressly held that the onus is on the party seeking to avoid enforcement who must show that the enforcement of the valid clause is contrary to public policy.⁷⁵ She held that the party did not have to show that there was “substantial and incontestable harm to the public” before a

⁷³ *Beadica* para 90.

⁷⁴ See 5.2.4; *Beadica* para 82.

⁷⁵ Thompson 2020 *SALJ* 654.

court could refuse to enforce a valid clause.⁷⁶ Rather, the party was required to demonstrate good reasons for why he or she failed to comply with the term.⁷⁷ Whilst the reasons provided were not the only relevant factors that the court would take into account; they would be “critical in the overall assessment of whether enforcement would be contrary to public policy in all the particular facts and circumstances of a case”.⁷⁸ The party must successfully discharge this onus in order for the court to consider refusing the enforcement of the clause. The fact that the onus is on the party seeking to avoid enforcement suggests that the party enforcing the clause does *not* have to justify why it seeks to enforce the clause, and does not have the onus of proving that its enforcement is fair. As Thompson indicates, this is because the enforcing party cannot be required to prove a negative – ie that the enforcement of the clause is *not* contrary to public policy.⁷⁹

4.2.1.5 Bargaining position of the parties

Theron J did not consider whether the bargaining position of the parties was a factor in her application of the *Barkhuizen* test. Froneman J raised the unequal bargaining position as an important policy factor relevant to the question of whether the enforcement of the renewal clause was contrary to public policy.⁸⁰ In *Barkhuizen* the bargaining position of the parties was a relevant factor even though it “[was] relevant only as one of the multitude of factors to be taken into account in the enquiry as to the reasonableness” of the enforcement of the clause.⁸¹ It is submitted that because Theron J did not consider this policy factor in her enquiry into the fairness of the enforcement of the clause, this may raise questions as to whether the outcome in *Beadica* was satisfactory. Since *Barkhuizen* was the authority for the principle that the bargaining position of the parties was a relevant issue, it could be argued that not all the relevant policy factors were taken into account in Theron J’s majority judgment. But, as explained above, Theron J could not have considered the bargaining positions of the parties if it was not raised by the appellants. In other words, she could not have considered it if the appellants

⁷⁶ See the judgment of Froneman J at para 158 where he indicates that this principle is not consistent with the principles in *Barkhuizen* and *Bredenkamp*.

⁷⁷ *Beadica* para 91; The rationale for this principle was expressed in *Barkhuizen* paras 58, 69 and 85 where Ngcobo J said “for all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequences in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent”.

⁷⁸ *Beadica* para 92.

⁷⁹ Thompson 2020 *SALJ* 655.

⁸⁰ See 4.2.2.3.

⁸¹ *Barkhuizen* para 59; *Basson* at 777; Kruger 2011 *SALJ* 723.

themselves failed to argue that they were in a weaker bargaining position, which prevented them from invoking the renewal clause in time. It is thus submitted that Theron J's judgment should not raise doubts about whether the bargaining position of the parties is a relevant policy factor in determining the enforceability of a valid clause.

4.2.2 The application of Theron J's approach and the outcome

Theron J considered the reasons provided by the applicants for their failure to comply with the renewal clause, which were that they were not sophisticated businessmen and did not understand the precise implications for failing to comply with the clause.⁸² Theron J rejected this reason on the basis that the terms appeared in "simple, uncomplicated language, which an ordinary person could reasonably be expected to understand".⁸³ Theron J then considered whether the enforcement of the clause would be contrary to public policy for defeating the objectives of the black economic empowerment initiative. Theron J held that this harsh outcome alone without adequate reasons for non-compliance was not a sufficient ground for the enforcement of the clause to be refused.⁸⁴ Theron J further held that since section 9(2) of the Constitution required the courts to advance substantive equality between individuals,⁸⁵ the NEF achieved this by addressing the "economic inequality that resulted from unfair discrimination against historically disadvantaged persons".⁸⁶ Theron J thus rejected the claim that eviction, and thus termination, would violate the right to equality because the applicants failed to show that enforcement of the clause would undermine the right to equality, and substantive equality. It was thus not necessary to consider the infringement of the right to equality as a policy factor weighing against enforcement of the renewal clauses.

Theron J ultimately held that the enforcement of the renewal clauses was not contrary to public policy because, on the basis of the balancing exercise, there were no public policy factors showing that eviction from the property, in the particular circumstances, would have been contrary to public policy.⁸⁷ Theron J held that a court could not refuse to enforce a valid clause purely on the basis that its enforcement would be disproportionate or unfair in the particular

⁸² *Beadica* para 91.

⁸³ *Beadica* para 94.

⁸⁴ *Beadica* para 96.

⁸⁵ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 27; *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) para 20.

⁸⁶ *Beadica* para 101; Sections 2 and 3 of the National Empowerment Fund Act 105 of 1998.

⁸⁷ *Beadica* paras 93 – 102.

circumstances of the case. The main reason for the conclusion arrived at by Theron J was that, even though the franchisees provided reasons for failing to comply with the clause, those reasons were not adequate to justify a refusal of the enforcement of the clause. Accordingly, the reasons provided by the franchisees would need to have amounted to legitimate reasons, and only then would these have led to their recognition as policy factors against *pacta sunt servanda* and ultimately against the enforcement of the clause. Accordingly, the majority of the Constitutional Court upheld the decision of the Supreme Court of Appeal ordering the eviction of the franchisees from the leased property.

4.2.3 Did Theron J adopt the “balancing” method?

Theron J expressly held, in two parts of her judgment, that a “balancing” exercise was required when a party brought an unfair enforcement claim:

“A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy”.⁸⁸

and

“[Equitable values] form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy”.⁸⁹

The “balancing” approach, such as the one employed in *Nyandeni*,⁹⁰ provides for a policy factor balancing exercise, where policy factors are put on either side of a public policy scale tipping for or against enforcement of the contract.⁹¹ Theron J did not express a particular method for applying the *Barkhuizen* test or engaging in the public policy enquiry, apart from the fact that it involves a balancing exercise. This could be explained by the fact that the appellants in *Beadica* did not clearly identify any policy factors which could have led to a compelling “balancing” exercise such as the one done in *Nyandeni*. If more public policy factors were raised by the appellants, perhaps Theron J could have formulated a guide or model outlining how judges should engage in the “balancing” exercise required by the doctrine of public policy. Kruger describes public policy as an “outcome of a process of identifying and balancing

⁸⁸ *Beadica* para 71.

⁸⁹ *Beadica* para 72.

⁹⁰ See 3.2.1.

⁹¹ Glover *De Serie Legenda* 81.

competing public policy factors that are relevant to the question of whether the terms of a contract should be enforced”.⁹²

Kruger further explains how public policy has little to no meaning outside the context of a particular set of factual circumstances. A possible understanding of the balancing exercise that must take place relates to the subjective factual circumstances of the case. It is argued that the unique factual circumstances will determine which public policy factors are relevant to the public policy enquiry, and how much weight should be afforded to each policy factor.⁹³ The use of the term “weight” supports the idea that a balancing exercise between various policy factors with relative degrees of weight must take place. The more weight afforded to each factor, the more likely a court's decision to enforce, or not enforce, a valid clause will be based on that factor.

This exercise can be seen on the facts of *Beadica*. In *Beadica*, Theron J recognised the right to equality as a policy factor that was relevant in determining whether the enforcement of the renewal clause was contrary to public policy. This would depend on how much weight the right to equality carried in the particular circumstances of the case, in that, the less weight it carried, the more likely it would be outweighed in the balancing exercise by other policy factors like *pacta sunt servanda*. This is indeed what happened in *Beadica*. Theron J found that, because the facts failed to indicate an infringement on the right to equality, or even substantive equality, by enforcement of the clause, there was no policy factor that outweighed *pacta sunt servanda* being upheld and therefore no policy factor which indicated that the renewal clause would have been contrary to public policy. The renewal clause thus had to be enforced. The factual circumstances of the case were critical to the weight afforded to each policy factor, which was critical to the “balancing” exercise between the right to equality and *pacta sunt servanda*. It is submitted that Theron J’s approach must be welcomed because it affirmed the principle that courts must determine public policy by balancing various policy factors. However, it is argued that more could have been said that explains how exactly this balancing exercise must take place.

⁹² Kruger 2011 *SALJ* 719.

⁹³ Kruger 2011 *SALJ* 721.

4.2.4 Could Theron J have considered the principles on options as policy factors?

Finally, there is another possible policy factor that Theron J could have considered in her enquiry into the enforcement of the renewal clause. This is the law on options⁹⁴ which is related to the rules on offer and acceptance and encapsulated by the contractual element of consensus.⁹⁵ Although an in-depth description on options is beyond the scope of this thesis, it suffices for purposes of this section to outline some salient principles that may have been relevant on the facts in *Beadica*. It is considered trite that the exercise of an option to renew a lease is an acceptance of an offer. It is also trite that the acceptance must be communicated to the offeror, and that the offer cannot be accepted after the time period in which the option must be exercised.⁹⁶ It follows that the failure to inform the offeror, during the agreed time period, will constitute a failure of the exercise of the option to renew the contract.⁹⁷ On the facts of *Beadica*, the renewal clauses gave the applicants an option to renew their leases within a six month time period. The applicants failed to accept this offer within the agreed time period and so the option terminated once the time period had lapsed. Having missed this opportunity, the applicants had no legal entitlement to exercise the option, and thus renew their lease agreements after the option had terminated. It followed that the only natural course was for the lease agreements to terminate by effluxion of time.

It is possible to argue that *Beadica* could have been decided solely on this basis – that the law on options prevented the applicants from exercising an option that had already lapsed – and so there was no need to rely on public policy to determine whether the leases were validly renewed.⁹⁸ If this proposition were met with criticism, an alternative could be proposed: that the law on options briefly described above could have constituted a public policy factor in the “balancing” exercise to determine whether the renewal clauses should be enforced. In the sense that because the applicants failed to timeously exercise the option to renew, this would have tipped the scales in favour of the enforcement of the renewal clause – and thus the termination of the leases through effluxion of time. This is indeed the result reached in Theron J’s judgment, although for different reasons.

⁹⁴ Hutchison *Contract* 64 – 69.

⁹⁵ See Glover *De Serie Legenda* at 4.2 for a detailed discussion on this submission; a general discussion on this area of law can be found in Bradfield *Christie’s Contract* 66 and Hutchison *Contract* 64.

⁹⁶ *Pick ‘n Pay Retailers (Pty) Ltd v Eayrs and others NNO* [2012] 1 All SA 522 (SCA) para 21.

⁹⁷ *Boerne v Harris* 1949 (1) SA 973 (A) 801.

⁹⁸ Glover *De Serie Legenda* at 4.2.

Despite the aforementioned submissions, one could argue that Theron J could not have been expected to consider this policy factor, and its effect on enforcement, if it was not raised by the parties as one weighing for or against the enforcement of the clause. It is thus submitted that the respective parties to an unfair enforcement claim should be proactive in raising any policy factors that may be relevant in determining public policy because they could have an impact on the outcome of the “balancing” exercise, and thus on the decision on whether a clause should, or should not, be enforced.

4.3 Conclusion

After the Constitutional Court in *Barkhuizen* set a blueprint on how to test the validity of the enforcement of contractual clauses,⁹⁹ the court in *Beadica* added a layer to this when it clarified how it should be applied. It clarified that a party could only challenge the enforcement of a valid clause if the party could provide adequate reasons for failing to comply with the clause. It further clarified the role of equitable values in the public policy enquiry. It is submitted that the majority judgment in *Beadica* must be welcomed for providing guidance on issues that were debated for decades,¹⁰⁰ and effectively dispelling the idea that the Constitutional Court and the Supreme Court of Appeal differed on how unfair enforcement cases should be dealt with. More significantly, Theron J adopted the “balancing” exercise that must take place when applying public policy to determine the enforceability of a valid clause. However, it is further submitted that the judgment could have provided an additional layer of clarity by describing how courts should methodologically engage in the public policy enquiry. It is not suggested that the judgment ought to have provided a complete and detailed guide on how to deal with unfair enforcement cases. However, an affirmation of a clear approach may have been useful to future courts called on to deal with unfair enforcement claims. This study proposes that, because the courts have already developed a guide to determining the enforceability of restraint clauses, later courts could learn from this approach to determine how the approach in general cases could be developed. To support this argument, the approach in restraint clauses is examined in the next chapter.

⁹⁹ Hutchison 2019 *The Journal of Commonwealth Law* 7.

¹⁰⁰ Thompson 2020 *SALJ* 658.

Chapter Five – Unreasonable Enforcement of Restraint of Trade Clauses

5.1 Introduction

This chapter examines the approach to determining the reasonableness of the enforcement of restraint of trade clauses. In the context of restraint clauses, the courts have developed a set of guidelines that have been applied in the majority of cases concerning the enforcement of restraint clauses. The guidelines were established in the *Basson* test, which required a balancing of competing interests such as the interests of the individual parties, and the public interest (or interests of the community) when deciding whether a restraint clause should be enforced or not. This chapter aims to provide a detailed description of the guidelines, and in reference to them, suggests that judges could refer to the method adopted in restraint cases when dealing with unfair enforcement claims.

Understanding how the courts dealing with restraint clauses succeeded in closely following the test established in *Magna Alloys* and thus giving the courts the necessary foundation to develop a consistent approach, could provide a general model for how unfair enforcement cases should be adjudicated in the future. Alternatively, it could provide a benchmark for the development of the approach expressed in *Beadica* to determining the enforcement of valid clauses. It may be argued that formulating a precise model would be an impossible task, simply because there are a countless number of types of clauses that could be challenged by a potential unfair enforcement claim. It is submitted that even though there are a vast array of types of valid clauses which come with their own unique set of factors that would need to be balanced in terms of the public policy enquiry, a general methodological approach could be developed, with reference to the approach in restraint cases, for how courts ought generally to approach all unfair or unreasonable enforcement cases.

5.2 General Principles and Context

It has long been accepted that the majority of litigation concerning restraint of trade agreements involved whether the restraint or its enforcement, is reasonable.¹ Although there is no all-encompassing definition of restraint of trade agreements,² and there is no *numerus clausus* of

¹ Heydon *Restraint of Trade* 48; Saner *Agreements in Restraint of Trade* at 4.1.

² Saner *Restraint of Trade* 1.1.3.

agreements that are classified as restraints of trade agreements,³ a restraint of trade agreement has been loosely defined as an agreement in which a party (the covenantor) agrees with another party (the covenantee) to restrict his freedom in future to carry on trade with other persons who are not parties to the contract.⁴

The primary characteristic of a restraint of trade agreement is that it limits the covenantor's freedom to carry on in his or her profession, trade or business.⁵ Restraint of trade agreements have been a standard part of the commercial and business world for centuries. This is arguably due to their effectiveness as a legal device that can be used to protect particular business interests, such as confidential information or trade secrets. The most common types of restraint of trade agreements are:⁶

- a) A restraint contained in an employment contract where the employee agrees not to compete with the employer after the employment contract has terminated.⁷
- b) A restraint contained in a contract for the sale of a goodwill of a business where the seller agrees with the buyer that the seller will not carry on a similar business in competition with the buyer.⁸
- c) A restraint contained in a partnership agreement where one or all of the partners agree not to compete with the partnership after he or she has left the partnership.

The legality of many restraint of trade agreements has been challenged in the courts. In many cases, the courts are asked by persons who seek to avoid the consequences of a restraint agreement (a "restraint denier") or persons who seek to enforce a restraint agreement (a "restraint enforcer"), to determine its enforceability. In determining whether a restraint agreement is enforceable or not, the court must apply the doctrine of public policy by applying a reasonableness test. In doing so, the court has to enquire whether, considering all the circumstances of the case, the enforcement of the restraint is reasonable. An enforcement of a

³ *Magna Alloys* 891N.

⁴ Per Diplock LJ in *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 at 180; confirmed by Lord Hodson in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 317; Van Huysteen *et al* 208.

⁵ *Hutchison Contract* 204.

⁶ *Ibid*; Kerr *The Principles of The Law of Contract* 204 – 205.

⁷ It is widely accepted though that parties cannot enter into a restraint purely for the purpose of prohibiting the covenantee from competing with the covenantor. See Kerr *Principles of the Law of Contract* 200; *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 771D.

⁸ For an example of a case where the court had to assess whether the covenantor's goodwill was infringed by the conduct of the covenantee see *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A).

restraint clause that is found to be contrary to public policy is unreasonable, and will thus not be enforced, even if the restraint clause itself is objectively valid. The approach adopted by the courts to test the reasonableness of a restraint has developed significantly in the past century. For a better understanding of the approach in restraint of trade agreements, the current legal position is briefly set out below.

The approach to determining the enforceability of a restraint was adopted in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁹ and then concretised in *Basson v Chilwan*.¹⁰ The Appellate Division in *Basson* formulated a “reasonableness test” that was based on the fundamental principles adopted in *Magna Alloys*. At its core, the test is expressed as follows. The reasonableness of a restraint must be assessed on two levels. First, the interests of the community must be taken into account, and second, the individual interests between the parties to the restraint must be taken into account.¹¹ After all the relevant interests have been identified, they must be weighed against one another to determine which of them should be favoured. Taking these interests into account, the court will then decide whether the restraint agreement is reasonable or not. It is submitted that these interests constitute “public policy factors” for purposes of the public policy enquiry that takes place in this context.

The interests of the community include the competing values of *pacta sunt servanda*, or the sanctity of contracts on the one hand, and the freedom of trade on the other hand.¹² The sanctity of contract provides that all agreements that are freely entered into, including agreements which limit a person's right to trade, must be honoured and will be enforced. In contrast, the freedom of trade provides that all individuals must be able to engage in economic activity without any restrictions freely. If a restraint unduly limits a person's freedom to trade, the restraint will not be enforced. In applying these public policy considerations to the particular circumstances of the case, the court must make a value judgment on which of these two interests must be favoured. These interests must then be balanced with, or weighed against, the individual interests of the parties to the restraint agreement.

The individual interests of the parties include the business or commercial interests that the restraint enforcer is aiming to protect and the interests that the restraint denier has in being able

⁹ 1984 (4) SA 874 (A).

¹⁰ 1993 (3) SA 742 (A).

¹¹ Hutchison *Contract* 205.

¹² Hutchison *Contract* 205 - 206.

to engage in economic activity freely. The interest that the restraint denier is aiming to protect must be worthy of protection.¹³ If the interest is worthy of protection, the court will regard the restraint as a valid means to protect the restraint enforcer's interests. The court will then weigh all the interests out against one another (that being, the individual interests and the interests of the community) to determine whether the restraint should be enforced. An interest that is worthy of protection is referred to as a "protectable interest" but has also commonly been referred to as a "proprietary interest".¹⁴

There are two general classes of protectable interests that the courts recognise. The first class is confidential information, such as, *inter alia*, trade secrets,¹⁵ know-how and commercial and technical information.¹⁶ The second class is goodwill, which includes the trade connections made by the restraint enforcer.¹⁷ There is no exhaustive list of interests that are worthy of protection, and an in-depth examination of protectable interests is beyond the scope of this research. It suffices to note that the presence of a protectable interest is crucial in determining where the individual interests of the parties stand and therefore, whether it would be reasonable to enforce a restraint against the party seeking to avoid its enforcement.

5.3 The development of the test for reasonableness

5.3.1 *Magna Alloys*

Before *Magna Alloys*, the South African courts treated restraint clauses as objectively contrary to public policy, and they could only be enforced if they were proven to be reasonable.¹⁸ This principle was imported into South African law from English law.¹⁹ Soon before *Magna Alloys* was decided, this approach was challenged because it did not reflect public policy as it was

¹³ *Basson* at 767.

¹⁴ *Basson* at 770.

¹⁵ Such trade secrets must in fact be a 'secret' and do not constitute trade secrets merely on the basis that the covenantee says it is so. A trade secret also does not automatically constitute a trade secret merely on the basis that it is regarded as 'confidential information'. See Kerr *The Principles of the Law of contract* 201 – 202; *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W); *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C) at 53H – 55E.

¹⁶ A Domanski 'Trade Secrets through the cases: A study of the basis and scope of protection' (1993) 56 *THRHR* 229.

¹⁷ *Hutchison Contract* 207.

¹⁸ *Saner Agreements in Restraint of Trade* 6 – 16; *Edgecombe v Hodgson* (1902) 19 SC 225 at 226; *New United Yeast Distributors (Proprietary) Ltd v Brooks* 1935 WLD 75 at 82 - 84.

¹⁹ *Dempsey v Shambo* 1936 EDL 330 at 333.

understood in South Africa,²⁰ and after the Appellate Division endorsed the English law,²¹ the decision to follow the English law was criticised by some of the lower courts.²² In support of the judgments that suggested a departure from the English principle,²³ Rabie CJ, writing for the majority of the Appellate Division in *Magna Alloys*, ultimately held that restraint clauses were objectively valid and enforceable.²⁴

Having found that the English law was inapplicable in South Africa, and that our common law had no noticeable aversion to restraint of trade agreements, Rabie CJ explained that the central question was whether, in the particular circumstances, the restraint was in compliance with public policy.²⁵ The court had to inquire into what public policy required at the time the enforcement of the restraint was sought, in light of the particular circumstances of the case.²⁶ In doing so, Rabie CJ held that judges must keep two principle considerations in mind when determining whether a restraint clause was reasonable and enforceable. The first was that public policy required contracting parties to comply with their contractual arrangements even if they were unreasonable or unfair.²⁷ Secondly, public policy required that contracting parties were free to engage in their trade or profession.²⁸ Rabie CJ then held that a judge must balance these competing policy factors together in light of the particular facts of the case. The approach Rabie CJ established in *Magna Alloys* reflected the approach established with respect to the circumstantial enforcement of clauses generally in *Barkhuizen*.

Furthermore, Rabie CJ made particular findings as to where the onus of proof lay. He held that the party seeking to avoid the enforcement of the restraint bore the onus of proving that the restraint was unreasonable, particularly because the general position was now that restraint clauses were objectively valid.²⁹ Rabie CJ's approach to onus in these cases, further reflected

²⁰ P Aronstam "Restraint of Trade Re-examined" (1978) 95(1) *SALJ* 21 at 22.

²¹ *Van De Pol v Silbermann and Another* 1952 (2) SA 561 (A); *Nachsteim v Overath* 1968 (2) SA 270 (C) at 271; *Brenda Hairstyler (Pty) Ltd v Marshall* 1968 (2) SA 277 (O); C Nathan "The Rules Relating to Contracts in Restraint of Trade - Whence and Whither - A Decade Later" (1979) 96 *SALJ* 35; *Super Safes (Pty) Ltd and Others v Voulgarides and Others* 1975 (2) SA 783 (W) 785C - F.

²² *Roffer v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N); *Poolquip Industries (Pty) Ltd v Griffin and Another* 1978 (4) SA 353 (W).

²³ *Saner Agreements in Restraint of Trade* at 6-17.

²⁴ *Magna Alloys* at 897F - 898E; *Experian South Africa v Haynes and Another* 2013 (1) SA 135 (GSJ) paras 12 - 18; Schoombee (1985) *THRHR* 127; *Saner Agreements in Restraint of Trade* at 3-6 and 3-7.

²⁵ *Magna Alloys* at 891H - I.

²⁶ *Magna Alloys* at 893 - 894.

²⁷ *Magna Alloys* at 893H.

²⁸ *Magna Alloys* at 894B - C.

²⁹ *Magna Alloys* at 898C - D. .

the approach adopted in general cases over 20 years later in *Barkhuizen* for determining the enforceability of a contract or term.³⁰ Rabie CJ thus established a unique approach to applying the doctrine of public policy to determining the enforceability of a clause that was objectively valid. As Wallis J stated in *Den Braven SA (Pty) Ltd v Pillay and Another*:³¹

“The importance of the decision in *Magna Alloys* is that it removed restraint of trade agreements from being a special and isolated type of contract looked upon with particular approbation by the courts and placed them squarely within the mainstream of the law of contract as agreements concluded and enforceable in the ordinary course, but unenforceable where their enforcement would be in conflict with public policy”.³²

Kerr interpreted the judgment in *Magna Alloys* as giving rise to two questions, namely whether the principles it established ought to be applied to all types of contractual terms and, secondly, whether it provided that restraint of trade agreements ought to be regarded as a general type of contractual clause (like non-variation clauses or time-limitation clauses) as opposed to a special type of contract.³³ Furthermore, academic scholars argued that the Appellate Division left open critical questions regarding when exactly the enforcement of a restraint ought to be regarded as reasonable. Some of these questions were:³⁴

- a) What specific characteristics would a restraint have to contain so that it would render it harmful to public interest?
- b) What role, exactly, does reasonableness in general, and the presence or absence of a protectable interest in particular, play in the process of determining the enforceability of a restraint?³⁵

These questions highlighted the need for clarity on the role of the individual interests of the parties, the concept of reasonableness, and the public interest in general within the overall public policy enquiry. As mentioned above, according to Rabie CJ, the only test to determine enforceability was the public interest.³⁶ This meant that only the interests of the broader

³⁰ See Chapter 4.4 for a full description of the *Barkhuizen* test for fairness.

³¹ 2008 (6) SA 229 (D).

³² *Den Braven* para 35.

³³ Kerr *Principles of the Law of Contract* 182.

³⁴ Pretorius 1997 *THRHR* 7.

³⁵ Schoombee 1985 *THRHR* 140-143; PJ Visser "*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A)" (1985) *De Jure* 194 at 199.

³⁶ Pretorius 1997 *THRHR* 8.

community in relation to the restraint were taken into account. Not much had yet been said about whether *Magna Alloys* took the individual interests of the parties into account. Due to this slight uncertainty restraint clauses continued to be a highly contentious area of law.³⁷ It is submitted that part of the reason why this occurred was because restraint clauses not only became increasingly common in the business world, but the reasonableness test, which was required to resolve restraint enforcement cases, was not fully and clearly developed yet.

Despite this uncertainty, the issue of the individual interests of the parties slowly gained attention as it became increasingly evident that the restraint denier had to prove that the restraint was being enforced for a legitimate economic reason to justify his or her need for the restraining the other party, such as, to protect some sort of proprietary interest. For example, the enforcement of a restraint of trade agreement was refused by the High Court in *Bonnet and Another v Scholfield*³⁸ because there were no

“[s]pecial techniques, methods or secrets to be protected, and when the only effect of the restraint was to prohibit the person restrained from using his stock of general knowledge, skill or experience”.³⁹

In the first Appellate Division case dealing with restraint agreements after *Magna Alloys*, *Sunshine Records v Frohling*,⁴⁰ Grosskopf JA adopted the principle that it would be contrary to public policy to enforce an unreasonable restriction on a person’s freedom to trade or to pursue a profession.⁴¹ The case involved a number of restraint provisions contained in a recording contract between a singing group and its manager that, if enforced as a whole, would result in an unreasonable infringement on the groups ability to pursue their profession.⁴² The key restraining provisions were as follows:⁴³

- a) The group would make themselves available to record the music whenever the manager asked them to do so;
- b) The recordings would become the property of the manager;

³⁷ *Saner Agreements in Restraint of Trade* at 4.1.

³⁸ 1989 (2) SA 158 (D).

³⁹ *Bonnet* at 160.

⁴⁰ 1990 (4) SA 782 (A).

⁴¹ *Sunshine Records* at 794C - E.

⁴² *Sunshine Records* at 794E - G.

⁴³ C Lewis “General Principles of Contract” (1990) *Annual Survey of South African Law* 33 at 45.

- c) The group was prohibited from recording music anywhere else during the three-year period of the contract;
- d) The prohibition would be extended for a period of seven years after the publication of any recording by the manager;
- e) The manager was obliged only to record the equivalent of one album per year for the group.

Cumulatively, the provisions prohibited the group from recording music or performing their music without the permission of their manager. Therefore, the manager held complete control over the groups ability to pursue their passion, or practise their trade. The manager conceded that the nature, extent and duration of the restraint and the obligations contained alongside the restraint were too wide to warrant the courts enforcement. So the central issue in the case was whether the court could enforce the contract in an altered, partial or amended form instead (by altering the ambit and duration of the restriction and by deleting or altering certain clauses). The court ultimately held that it was not in the public interest to enforce the contract in an amended form, or in part only.⁴⁴ Grosskopf JA arrived at this conclusion by assessing the enforcement of the clause against the interests of the broader community. Grosskopf JA refused to enforce the restraint because it would be detrimental to the interests of the public for the court to uphold a restraint which required “major plastic surgery” for it to become enforceable.⁴⁵

In cases where the broader interests of the community were not at stake, but rather the protectable proprietary interests of the party seeking to enforce the restraint, the courts refused the enforcement of some restraint clauses on the basis that there was no “practical legitimate interest” that the restraint sought to protect⁴⁶ or that the restraint did not serve any interest of the party who sought to enforce it.⁴⁷ Therefore, just before *Basson*, our courts had developed an approach whereby the court would balance the relevant individual and public interests against public policy, and with reference to the facts of the case, decide whether the restraint clause ought to be enforced or not.

⁴⁴ *Sunshine Records* at 796G - J.

⁴⁵ *Sunshine Records* at 796B - C.

⁴⁶ *Amalgamated Retail Ltd v Spark & Another* 1991 (2) SA 143 (SEC) at 151.

⁴⁷ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 485 (T).

5.3.2 *The Basson Test*

Three years after *Sunshine Records* was decided, the Appellate Division handed down what would be regarded as “one of the most important decisions on agreements in restraint of trade” to date.⁴⁸ This was the case of *Basson v Chilwan*,⁴⁹ where Nienaber JA, writing for the majority of the Appellate Division, developed the test for reasonableness by building upon the principles in *Magna Alloys* for determining the reasonableness of a restraint clause.⁵⁰ Nienaber JA held that there are two aspects that must be considered when evaluating the reasonableness of a restraint.⁵¹ The first aspect is the broad interests of the community, which means that the interests of the community must be assessed to determine if there is any public policy factor that requires that the contract be enforced (assessment at the “community interests” level). This reflects the primary approach adopted in *Barkhuizen* for determining the enforcement of a valid clause. As explained in chapter 4, this approach required the court to test the enforceability of the clause against the public interest, with reference to relevant and identified policy factors. Some examples of the public policy factors that are relevant at this stage of the test are discussed in 5.3.2.4.

The second is the individual interests of the contracting parties, which means that the interests of the individual parties must be assessed to determine if there is any interest that provides that the contract be enforced (assessment at the “individual interests” level). When evaluating the interests of the particular parties, the two considerations enunciated in *Magna Alloys* must be considered: that agreements should be honoured and there should not be an undue limitation on an individual’s freedom to trade. Nienaber JA concluded that, upon an evaluation of these interests of the parties, a court must hold that the restraint is unreasonable, after the termination of the contract, if it prevented the covenantor from pursuing his or her profession without a protectable interest serving the covenantee.⁵² In the words of Nienaber JA in *Basson*:

“In so far as the individual parties are concerned, a restriction on the freedom to trade is unreasonable if it prevents one of the parties from pursuing his trade or profession in the commercial or business world after the termination of a contract if it doesn't serve

⁴⁸ *Saner Agreements in Restraint of Trade* at 4-9.

⁴⁹ 1993 (2) SA 742 (A).

⁵⁰ *Basson* at 762B – H and 767F – H.

⁵¹ *Basson* at 767D - E.

⁵² *Basson* at 767E - F.

to protect the interests of the other party. A contract of this nature in itself is contrary to public policy”.⁵³

In order to clearly apply these principles, Nienaber JA formulated the above guidelines into a series of questions to determine, in the particular circumstances of the case, whether the enforcement of the restraint was reasonable. The reasonableness test as articulated by Nienaber JA is as follows:

- a) “Is there an interest of the one party which is deserving of protection at the termination of the restraint?
- b) Is the interest being prejudiced by the other party?
- c) If so, does the interest weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically active and unproductive? [assessment at individual interests’ level].
- d) Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?”⁵⁴ [assessment at community interests’ level].

As Kerr emphasised, it must be noted that the *Basson* test did not assess whether the restraint clause was objectively reasonable because objective reasonableness was determined by looking at the words of the clause and testing those words against public policy.⁵⁵ Rather, the test sought to determine whether the *enforcement* of an objectively reasonable restraint clause was reasonable. Below is a description of each leg of the *Basson* test and what each leg of the enquiry entailed.

5.3.2.1 Is there an interest of the one party which is deserving of protection at the termination of the restraint?

This question requires the court to compare what the restraint clause “seeks to protect and what it seeks to prevent”.⁵⁶ The restraint enforcer will argue that the restraint clause seeks to protect

⁵³ *Ibid.* This is my English translation of the original Afrikaans text which reads: “Wat die partye self betref, is ’n verbod onredelik as dit die een partye verhinder om hom, na beëindiging van hul kontraktuele verhouding, vrylik in die handels en beroepswêreld te laat geld, sonder dat ’n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is opsigself strydig met die openbare beleid”.

⁵⁴ *Basson* at 767F - I.

⁵⁵ Kerr *Principles of the Law of Contract* 214 – 215.

⁵⁶ Bradfield *Christie’s Contract* 427.

his or her proprietary interest and so the restraint should be enforced to prevent the restraint denier from infringing on this interest by their conduct. Accordingly the court must identify whether the restraint enforcer has an interest that is worthy of protection (a “protectable interest” or “proprietary interest”).⁵⁷ If the restraint enforcer has no proprietary interest, or the proprietary interest is not worthy of protection, then generally speaking, the enforcement of the restraint will be contrary to public policy and thus unenforceable. In other words, if the restraint has no *protective purpose* then the court will “consider it as unreasonable and therefore unenforceable as being against public policy”.⁵⁸ As Nienaber JA said in *CTP Ltd and others v Argus Holdings Ltd and another*:⁵⁹

“It would be unreasonable if and to the extent that it does not seek to protect a legitimate interest of the one party; or if it does purport to protect an interest, such interest is eclipsed by the interest of the other party not to be so restrained”.⁶⁰

Whether there is a proprietary interest and whether it was worthy of protection was a question that was determined by looking at the subjective factual circumstances of the case. It could not be determined simply by looking at the objective terms of the clause. This was thus one of the reasons why the reasonableness test was essentially a subjective test, strikingly similar to *Barkhuizen 2*.

There are a wide range of legitimate interests that the courts have recognised as worthy of protection.⁶¹ However, there is no exhaustive list of such protectible proprietary interests.⁶² Some of the common types or categories of protectable proprietary interests identified by the courts over the years include trade secrets or confidential information, goodwill and trade or customer connections. However, others have generally been regarded as not worthy of protection such as the restraint enforcers interest in not having a competitor. A brief description of these proprietary interests is provided below.

⁵⁷ *Hutchison Contract* 207.

⁵⁸ *Bradfield Christie’s Contract* 427; *Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A) at 428.

⁵⁹ 1995 (4) SA 774 (A).

⁶⁰ *CTP Ltd* at 784A – B.

⁶¹ *Basson* at 770.

⁶² *Basson* at 762E – H.

5.3.2.1.1 Competition

A restraint enforcer could argue that it is in his or her best interest that the restraint denier not compete with the restraint enforcer after the duration of the contract. However, the restraint clause will not be enforced if its sole purpose is to prevent the restraint denier from competing with the restraint enforcer. For example, in the context of employment restraints, an employer is not entitled by means of a restraint clause to protect himself or herself from competition *per se* after the employee has left the service of the employer.⁶³ In other words, an employer could not restrain an employee merely because the employee would be competing with the employer in a new position. Mere competition is thus not a protectible proprietary interest that alone justifies the enforcement of a restraint clause. This rule is not limited to employer and employee relationships, and thus generally applies in all restraint cases.⁶⁴ Accordingly, a court would refuse to enforce a restraint which seeks merely to prevent the restraint denier from competing with the restraint enforcer as enforcement in these circumstances would be contrary to public policy.

5.3.2.1.2 Goodwill

Restraint clauses that limit competition are only enforceable if they arise out of a contract for the sale of a business, which is accompanied by the “goodwill”⁶⁵ of the seller.⁶⁶ In these cases, the courts regard the enforcement of the restraint reasonably necessary to protect the goodwill of the business.⁶⁷ Goodwill is described as a benefit or advantage of the good name, reputation and connection of a business.⁶⁸ A party can protect itself against future competition by enforcement of a restraint clause if the interest that the restraint protects is the goodwill received by the restraint enforcer after purchasing the business.⁶⁹ The rationale behind this principle is that if a party sold their business, the business is sold together with the benefits arising out of the name of the business. Therefore, the party buying the business has a legitimate

⁶³ Kerr *Principles of the Law of Contract* 200 - 201; *Basson* at 771D; *Recycling Industries (Pty) Ltd v Mohammed and another* 1981 (3) SA 250 (SE) at 256B – E.

⁶⁴ *Vermeulen and another v Afrika Steel & Timber and others* 1998 (2) SA 543 (O) at 549D – F.

⁶⁵ See 5.3.4.1.3.

⁶⁶ Kerr *Principles of the Law of Contract* 218.

⁶⁷ *Bradfield Christie's Contract* 428.

⁶⁸ Kerr *Principles of the Law of Contract* 205; *Botha and another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 211I – 212G; *Hymie Tucker Co (Pty) Ltd v Alloyex (Pty)* 1981 (4) SA 175 (N) 180F; *The Commissioners of Inland Revenue v Muller and Co's Margarine Ltd* 1901 AC 217 (HL) at 223 – 224.

⁶⁹ *Amalgamated Retail Ltd v Spark and another* 1991 (2) SA 143 (SE) at 150A-H.

interest in these benefits and the party selling the business cannot interfere, by competing with the buying party, with the benefits arising out of the name of the business. It follows that a court will only refuse to enforce a restraint clause in circumstances where the purpose of the restraint is not to protect the goodwill held by the restraint enforcer.

5.3.2.1.3 Trade secrets or confidential information

Our law recognises trade secrets and confidential information as proprietary interests⁷⁰ that could be protected by the enforcement of a restraint clause.⁷¹ The rationale behind this policy factor was explained by Southwood J in *Alum-Phos (Pty) Ltd v Spatz and another*⁷² in the following terms:

“It is an implied term of every contract of service that an employee will not use confidential information acquired during his period of service for his own benefit or to the detriment of his employer and such term binds the employee even after he has left the service of the employer. This term applies to all confidential information whether acquired honestly or dishonestly.”⁷³

A restraint enforcer may argue that it is in his or her best interest that, by enforcement of the restraint, the restraint denier is prevented from divulging certain trade secrets or confidential information gained while in the employ of the restraint enforcer. This interest is not worthy of protection if it is, in fact, not a secret.⁷⁴ It follows that a trade secret is not a secret, and thus worthy of protection, merely because the restraint enforcer says that it is a secret. In order for a trade secret or confidential information to constitute as such, the following requirements have to be present:⁷⁵

- a) It must involve and be capable of application in trade or industry (must be useful);
- b) Objectively speaking, it must not be public knowledge or public property (must be known only to a restricted number of people or to a closed circle).

⁷⁰ Trade secrets and confidential information are synonymous; Bradfield *Christie's Contract* 429.

⁷¹ *Marshing* at 76A – B.

⁷² [1997] 1 All SA 616 (W).

⁷³ *Alum-Phos* at 623C.

⁷⁴ Kerr *Principles of the Law of Contract* 201; *Cansa (Pty) Ltd v Van der Nest* 1974 (2) SA 64 (C) at 69B.

⁷⁵ Kerr *Principles of the Law of Contract* 222; *Alum-Phos* at 623F – J.

c) Objectively speaking, it must be of economic value to the person seeking to protect it.

Therefore, a court will refuse to enforce a restraint if it does not seek to protect a trade secret or confidential information, or prevent the restraint denier from divulging such information. It is worth noting that, in order to avoid the enforcement of a restraint, the restraint denier can provide evidence which indicates that the information in his or her possession does not fall within the criteria listed above, or does not seek to use such information in the future.

5.3.2.1.4 Trade connections or customer connections

Our law recognises a party's trade or customer connections as a legitimate proprietary interest that is worthy of protection.⁷⁶ A party can enforce a restraint clause against another party to prevent the restraint denier from taking customers or clients which the restraint denier received while working for the restraint enforcer.⁷⁷ This applies even if the restraint denier met those customers before working for the restraint enforcer if the customer connections were strengthened once the restraint denier began working for the restraint enforcer.⁷⁸ It follows that the restraint will not be enforced if the restraint denier discharges the onus of proving that he or she did not receive any of the restraint enforcers customer contacts or does not intend to utilize the customer contacts that he or she made while employed by the restraint enforcer.

An example of the courts assessment of customer connections is seen in *Rawlins and Another v Caravantruck (Pty) Ltd*,⁷⁹ where a salesman sought to escape the enforcement of a restraint agreement between himself and his former employer, a distributor of various brands of car and industrial paints.⁸⁰ The court held that the proprietary interest may be worthy of protection by enforcement of a restraint clause where "the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business".⁸¹ The court accordingly enforced the restraint because the salesman failed to prove that he had not acquired any trade connections while employed by the former employer. In this case, the

⁷⁶ Kerr *Principles of the Law of Contract* 221.

⁷⁷ *Rawlins* at 541C, 541D – H and 542H.

⁷⁸ *Branco and another t/a Mr Cool v Gale* 1996 (1) SA 163 (E) at 177C – 179B.

⁷⁹ 1993 (1) SA 537 (A).

⁸⁰ *Rawlins* at 539E - J.

⁸¹ *Rawlins* at 541C - E; Joubert *General Principles of the Law of Contract* at 149; Heydon *The Restraint of Trade Doctrine* (1971) at 108.

court recognised the employer's trade connections as an interest that was worthy of protection and the enforcement of the restraint clause to protect this interest was justified.

5.3.2.2 Is the interest being prejudiced by the other party?

The question in (b) asks whether the protectable interest is threatened by the conduct of the restraint denier. If the restraint enforcers protectable interests are not infringed or threatened in any way by the restraint deniers conduct, the restraint will be contrary to public policy and unenforceable for being unreasonable. In *Rawlins* the salesman built relationships with the employer's customers. When the salesman left the employers business, his relationships with the employer's customers placed the employer's protectable interests at risk. This is because, by using his relationship with them, the salesman could easily convince the customers to follow him to a new business.⁸² After the salesman left the employer's business, the employer's interests in its customers were threatened by the employee's acquisition of the employer's trade connections. The court thus found that there was a legitimate purpose behind the restraint, to protect the employer from this threat, which would have prejudiced the employer's protectible proprietary interest. This was one of the factors that motivated the enforcement of the restraint in *Rawlins*.

5.3.2.3 Does the interest weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically active and unproductive?

The question in (c) encapsulates the reasonableness test at the individual interests' level. This question requires an assessment of the restraint enforcers' protectable interests and the restraint deniers' interests to freely engage in economic activity in the aims of determining whether the enforcement of the restraint clause is reasonable between the parties. In making this assessment, the court must determine whether the restraint goes further than is necessary to protect the restraint enforcer's proprietary interests. If the restraint deniers interest not to be economically active and unproductive outweighs the restraint enforcer's protectable interest, then as a general rule, the enforcement of the restraint may be contrary to public policy and unenforceable for being unreasonable. However, the reasonableness of the enforcement of the restraint between the parties is not decisive, and is only an indication of whether the restraint is *probably* against public policy or not.⁸³ The main determining factor as to whether the

⁸² *Rawlins* at 541.

⁸³ *Hutchison Contract* 208.

enforcement of the restraint is unreasonable is if it is contrary to the broader interests of the community in terms of the public interest. This is explained below in 5.3.4.4.

It was held in *Basson* that “the person seeking to enforce the restraint is required to prove that in all circumstances of the particular case that it will be unreasonable to enforce the restraint”.⁸⁴ The restraint denier would have to provide facts that point towards the unreasonableness of the enforcement of the restraint by showing. Additionally, the restraint denier can rely on other policy factors to give weight to his or her argument that the agreement should not be enforced. For example, the restraint denier can ask the court to assess the equality or otherwise of the bargaining powers of the respective parties.⁸⁵ In doing so, the restraint denier could argue that he or she was in a weaker bargaining position (perhaps as a prospective employee) when signing the agreement. Depending on how much weight the court gives to that policy factor (the weight would be determined by reference to the facts of the case which would indicate whether there was indeed unequal bargaining powers, for example), the court will decide whether the policy factor should be favoured or not, and thus whether the restraint should be enforced or not.

5.3.2.3.1 Time and area of the restraint

One of the main policy factors that a restraint denier could raise as a factor against enforcement is the fact that the extent and the scope of the restraint was too wide to protect the interests of the restraint enforcer.⁸⁶ In this regard, the court will assess the ambit, area and / or duration of the restraint. The general rule is that if the restraint applies in too wide of an area,⁸⁷ the ambit is too broad⁸⁸ or the duration is for too long a period⁸⁹ and applies to an extent that is not reasonably necessary to protect interests of the restraint enforcer, then the enforcement of the restraint will be contrary to public policy for unduly limiting the interests of the restraint denier

⁸⁴ *Basson* at 776I – J.

⁸⁵ *Basson* at 777C – D.

⁸⁶ This policy factor was considered as an important and relevant one before *Magna Alloys* and although not much emphasis was placed on it in *Magna Alloys* it began to develop as more attention was given on factors for non-enforcement arising from the public interest. See *Reddy* para 17 and *Plumlink SA (Pty) Ltd v Smith* 2018 JDR 2211 (GJ) para 20.

⁸⁷ For example, a restraint that prohibits a party from engaging in his or her trade or profession anywhere in the whole of South Africa, as opposed to a particular town or region.

⁸⁸ For example, restraining the party from exercising in *any* trade as opposed to the specific trade that the restraining party is involved in.

⁸⁹ For example, where the party is restrained for a period of 30 years instead of for a shorter period which is necessary to protect the restraining parties interests.

to practise in his or her trade or profession.⁹⁰ Saner explained the approach adopted in *Turner Morris (Pty) Ltd v Riddell*⁹¹ in the following terms:

“One of the decisive factors adjudicated by the court was the question of the geographical area of the restraint. And when it comes to the quantitative and qualitative weigh off to be conducted in determining the reasonableness or otherwise of the restraint is relevant, as a shorter restraint and properly limited geographical area would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it”.⁹²

Therefore, a restraint wide in extent and scope would unduly limit the individual interest of the restraint denier to be economically productive, and thus contrary to public policy. Furthermore, a restraint wide in extent and scope is also regarded as one concerning the public interest, as opposed to one which only relates to the interests of the individual parties, because it would be harmful to the members of the public (particularly those who would become subject to a restraint clause) if our common-law upheld restraints that operated to such a wide extent.⁹³

5.3.2.4 Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

The question in (d) encapsulates the reasonableness test at the community interests level. This is a similar enquiry to the enquiry discussed in chapter 3 and affirmed in *Beadica*. The question requires the court to consider any other relevant considerations or public policy factors, “other

⁹⁰ Saner *Restraint of Trade* 6.5.1.

⁹¹ 1996 (4) SA 397 (E).

⁹² Saner *Restraint of Trade* 6.5.1.

⁹³ Saner *Restraint of Trade* 6.5.1 provides helpful examples from the common-law of matters where the courts refused to enforce restraint on the basis of their extent. *Mozart* at 83B–C; *Random Logic t/a Nashua Cape v Dempster* unreported case no. A419/2007 CPD (Full Bench Appeal) para 32; *Dickinson Holdings Group v Du Plessis* 2008 4 SA 214 (N); *Van der Watt v Jonker* 2011 JDR 1162 (SCA); *GrainCo (Pty) Ltd v Van der Merwe* [2014] 3 All SA 683 (WCC); *GrainCo (Pty) Ltd v Van der Merwe* 2016 4 SA 303 (SCA); *CTP Ltd v Argus Holdings Ltd* 1995 4 SA 774 (A); *Estate Mathews v Redelinghuys* 1927 WLD 307; *African Theatres Trust Ltd v Johnson* 1921 CPD 25; *Savage and Pugh v Knox* 1955 3 SA 149 (N); *Muller v Harris* 1958 2 SA 344 (N); *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 1 SA 673 (O); *Gero v Linder* 1995 2 SA 132 (O); *Ntsanwisi v Mbombi* 2004 3 SA 58 (T) 63H–64B; *Mathewson’s Micro Finances BK v Lombard* [2004] 2 All SA 422 (NC); *Forwarding African Transport Services CC t/a FATS v Manica Africa (Pty) Ltd* [2004] 4 All SA 527 (D) 532g–h; *Arrow Altech Distributions (Pty) Ltd v Byrne* [2008] 1 All SA 356 (D) 373b and 373g; *Microsep (Pty) Ltd v Hanekom* unreported case no. 45272/09 (GSJ); *CCI Call Centres (Pty) Ltd v Sequeira* 2014 JDR 0777 (KZP) para 34; *Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd* 2014 JDR 0758 para 42.

than the reasonableness or unreasonableness of the restraint as between the parties”.⁹⁴ If there is an aspect of public policy that provides that the restraint should be enforced, then it should be enforced regardless of whether it is unreasonable between the parties. In other words, the outcome in (c) will weigh less compared to the outcome in (d) if there is a policy factor raised in the assessment in (d) that requires that the restraint clause be enforced or not enforced. However, if there is no aspect of public policy that requires its enforcement or non-enforcement, then the outcome in (c) will prevail.

5.3.2.4.1 *Bargaining positions of the parties*

Another policy factor that the court may consider as being relevant to the enforcement of the restraint is the equality of bargaining powers of the parties to the restraint.⁹⁵ The court may consider whether, at the time the parties agreed to the restraint, the parties were “on an equal footing”.⁹⁶ If the party seeking to avoid enforcement is able to establish that he or she was in a weaker bargaining position at the time the contract was concluded, this will give the court the impression that the enforcing party exerted his or her influence over the weaker party and the weaker party agreed to the terms in circumstances where he or she otherwise would not have if he or she were in a stronger bargaining position. Although not decisive, the court will balance this factor alongside other policy factors in determining whether the restraint should be enforced. That the courts consider the bargaining position of the parties has been considered as an established practice in restraint of trade cases,⁹⁷ and the practice has since found support by the Constitutional Court in *Barkhuizen*.⁹⁸

It is trite that a court is more likely to enforce a restraint clause if the parties’ to the restraint were in equal bargaining positions when they entered into the contract containing the restraint clause.⁹⁹ The courts have recognised that the question as to whether the parties were in equal bargaining positions is a question of fact, meaning that the court may assess the evidence and make a finding as to whether the parties bargained on an equal footing.¹⁰⁰ If the parties were in

⁹⁴ *Basson* at 777C – D.

⁹⁵ *Bradfield Christie’s Contract* 430.

⁹⁶ *Saner Restraint of Trade* 6.5.4; *Roffey* at 499H.

⁹⁷ *Du Plessis* 2018 *Stell LR* 390. Despite this, *Du Plessis* acknowledged that the bargaining position of the parties was rarely decisive on the issue of whether the clause should be enforced or not.

⁹⁸ *Barkhuizen* para 59.

⁹⁹ *Kerr Principles of the Law of Contract* 216 - 217; *Reeves and another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 776F.

¹⁰⁰ *Knox D’Arcy Ltd and another v Shaw and another* 1996 (2) SA 651 (W) at 659C – I.

an unequal bargaining position, the court will not look favourably upon its enforcement. There are no categories of instances where parties may be in an unequal bargaining relationship, such as in an employer-employee contract.¹⁰¹ Therefore, the question as to whether there was an unequal bargaining relationship has to be determined on a case by case basis. This is another reason as to why this public policy enquiry is a subjective one, reflective of *Barkhuizen 2*, because it relies mostly on the subjective factual circumstances of the case to determine enforceability. Accordingly, the court will consider, *as a starting point*, that the parties were on an equal footing when they entered into the contract containing the restraint clause.¹⁰² The party seeking to avoid the enforcement of the clause will have to provide the necessary facts if he or she wants to show that the parties were, in fact, contracting on an unequal basis.¹⁰³

As highlighted above, the courts in restraint of trade cases have expressly recognised the bargaining positions of the parties as a relevant policy factor in determining whether the enforcement of the restraint is reasonable or not. As explained in 4.3.1, the issue of bargaining position as a policy factor had not been expressly recognised by the majority judgment in *Beadica* but was given some attention in the minority judgment of Froneman J, who suggested that the bargaining position of the parties was a weighty consideration in determining whether the enforcement of a clause was fair or reasonable. Froneman J's suggestion was prompted by the current demands of the Constitution to develop the common-law in accordance with its spirit, purport and objects, which emphasise equality, equity, ubuntu and dignity between persons. These demands therefore require that more significance be placed on the bargaining powers of the parties to the contract. This goes to highlight one of the shortcomings in the majority judgment in *Beadica* – that it did not consider the relevance and scope of the bargaining position of the parties as a relevant policy factor in determining whether the enforcement of a clause would be contrary to public policy.

Although the majority judgment in *Beadica* did not address the bargaining positions of the parties as a relevant factor in the public policy enquiry, its confirmation of *Barkhuizen* as the ruling law on questions of unfair enforcement must mean that the position *Barkhuizen* took on the bargaining position of the parties still applied. As stated earlier¹⁰⁴ *Barkhuizen* recognises the bargaining position of the parties as a relevant factor in determining whether the

¹⁰¹ Kerr *Principles of the Law of Contract* 217.

¹⁰² Bradfield *Christie's Contract* 431.

¹⁰³ *Van de Pol* at 571.

¹⁰⁴ See 4.3.3.

enforcement of a valid clause is contrary to public policy. This same rule is expressed within the context of restraint of trade agreements in *Basson*.¹⁰⁵ It is therefore submitted that the bargaining positions of the parties is a relevant public policy factor in determining the reasonableness or fairness of the enforcement of contracts. The Constitutional impact of the principles in this context are discussed below in 5.4.

5.3.2.4.2 Reasonableness between the parties

A restraint clause cannot be challenged *exclusively* on the basis that the restraint is unreasonable *inter partes* or on the basis that it operates unfairly against one of the parties. Therefore, the parties' own views as to the reasonableness of the restraint, particularly in instances where the parties agree by inclusion in their contract that the restraint is reasonable, is not in itself decisive as to whether the restraint is in fact reasonable or not.¹⁰⁶

5.3.2.4.3 Onus of Proof

In stating the principles on where the onus of proof lay in restraint cases, the court in *Basson* held that the restraint enforcer needed to do no more than to simply invoke the restraint provisions.¹⁰⁷ The onus is thus on the restraint denier to prove, on a preponderance of probability, that it would be unreasonable to enforce the restraint in the light of the circumstances of the particular case. The court held that the burden is on the restraint denier simply because of the principle *pacta sunt servanda*, that public policy in general, requires persons to honour their agreements.¹⁰⁸ On an application of the test set out in the case, the restraint denier will not be bound if he or she is able to prove that the restraint is unreasonable. This position has now been affirmed by the Constitutional Court in *Beadica*.¹⁰⁹ There, it was made clear that the onus of proof was on the person seeking to avoid the enforcement of the clause to show that it is contrary to public policy, thus confirming the position in *Basson* on onus specifically in restraint of trade cases.

¹⁰⁵ See 5.3.4.4.2.

¹⁰⁶ *Basson* at 768A – C.

¹⁰⁷ *Basson* at 776I - 777B; *Bradfield Christie's Contract* 424.

¹⁰⁸ *Ibid.*

¹⁰⁹ See 4.2.1.4.

Kerr had suggested that the onus on the restraint denier increases or decreases depending on the scope and extent of the restraint.¹¹⁰ For example, the more stringent the restraint is in terms of time and area, the lower the burden of proving that the enforcement of the restraint clause will be. This is because it will be easier to show unreasonableness where the restraint applies in too wide of an area, the ambit is too broad or the duration is for too long a period. In these circumstances, it would be easier for a restraint denier to show that a restraint of the nature described above is not necessary to protect the interests that the restraint enforcer seeks to protect by enforcement of the restraint, and thus much easier to prove unreasonableness. Kerr's suggestion would mean that the restraint denier will have a much heavier burden of proving unreasonable enforcement where the court places high importance on the proprietary interest that the restraint seeks to protect. The party seeking to avoid the enforcement of the restraint would then have to provide greater reasons why the clause should not be enforced. The burden would even be higher when such a restraint is relatively short in time and area, because it would appear not to be too harsh a restraint. In these circumstances the restraint denier would have to provide reasons why the restraint should still not be enforced. Ultimately, the above approach suggested that the court will have to weigh the interests of the parties against the relevant policy factors (such as space and time) to determine the degree of onus placed on the party seeking to avoid the enforcement of the restraint. The restraint denier will then have to discharge that onus by providing the necessary evidence relative to the high or low degree of onus that the court has placed on the restraint denier to prove unreasonableness.

It is submitted that this approach to onus should be welcomed because it presents a clear method that courts could apply to determine the degree of the burden of proof that a person seeking to avoid the enforcement of a valid clause must discharge.

5.3.2.5 Analysis

It is widely accepted that the *Basson* judgment affirmed the reasonableness test established in *Magna Alloys* and developed it by refining the test in a manner that made it suitable for its clear and consistent application in later restraint enforcement cases. Marcus states that *Basson* could be viewed to have struck an appropriate balance between the principles of *pacta sunt servanda* and the principle that a restraint will only be enforced if it seeks to restrain a specific proprietary

¹¹⁰ Kerr *The Law of Contract* 225 – 226.

interest that is worthy of protection.¹¹¹ *Basson* thus established a solid guide, grounded in the common-law, for determining the reasonable enforcement of a restraint clause, an approach which adequately serves the fundamental doctrine of public policy as required by *Magna Alloys*.

In *Basson* it was emphasised that the focus of the reasonableness test should always be directed towards the factors arising out of public interest, and not exclusively on the factors arising out of the interests of the individual parties.¹¹² However, given the emphasis placed by the courts on the existence of protectable proprietary interests for the enforcement of a restraint, it appears that in practice, that factor will continue to play an important role in the determination of the enforceability of a restraint.¹¹³ This is evident in the extensive jurisprudence on protectable proprietary interests and how often they have been decisive in restraint enforcement cases. It is submitted that the *Basson* test aims at finding the appropriate balance between all the relevant factors of the case such as the competing interests of the individual parties and other policy factors arising from the public interest. It is submitted that the test envisages a balancing of all the factors on a “scale” which will tip for or against enforcement of the restraint, depending on the degree of weight that is afforded to each factor on the scale.

In simple terms, the test contains guidelines that allow for the identification of a number of important policy factors that must be considered in the enquiry into reasonableness. The test then guides the courts towards finding an appropriate balance between all the policy factors and to use the outcome of that balancing exercise to determine whether the restraint clause should be enforced or not. It is submitted that the policy factors forming the subject matter of the *Basson* test may only be determined on a case by case basis. In many cases not all the above factors will be relevant, and the court may only focus on one or two factors that it deems are most important in the matter (such as those where there is no protectible proprietary interest and so enforcement would on that basis alone be unreasonable). Finally, the subjective factual circumstances are crucial to determining whether certain interests or policy factors are favoured, and this highlights the subjective nature of the test. The *Basson* test therefore shares a resemblance to *Barkhuizen 2* and explains why they are both established to resolve the same

¹¹¹ R Marcus “Contracts in Restraint of Trade” (1994) 2 *Juta’s Business Law* 33 at 35 - 36.

¹¹² *Basson* at 762D.

¹¹³ Pretorius 1997 *THRHR* 10.

type of legal issue, the unfair or unreasonable enforcement of a valid clause in particular circumstances.

5.4 The test for reasonableness and the Constitution

Around the time the *Basson* case was handed down, the law of contract was facing a shift from being mainly common-law based, to being governed by the Constitution.¹¹⁴ All the principles that had already been established would become subject to a constitutional audit to determine whether, and to what extent, they were applicable in our reformed legal system.

5.4.1 The interim Constitution

In April of 1994, the interim Constitution¹¹⁵ came into force, which had a significant impact on the *Basson* test. Section 26(1) of the interim Constitution¹¹⁶ provided that every person shall have the right to freely engage in economic activity and to earn a livelihood anywhere in the country. In the light of this express provision, the question that gained attention in the courts was whether a restraint of trade was unconstitutional and unenforceable because it impeded on free economic activity and the right to work and earn a living.¹¹⁷ The general validity of the restraint clause was therefore under scrutiny. In *Waltons Stationery Co (Pty) Ltd v Fourie and Another*¹¹⁸ the court held that any law that was in conflict with s 26(1) would be invalid. However, this did not necessarily mean that parties were not free to agree to a contract that limited the rights provided in s 26(1). A contract that limited such rights was therefore not necessarily invalid. The validity and enforceability of a restraint agreement depended primarily on the public interest.¹¹⁹ Likewise, in *Kotze & Genis (Pty) Ltd and Another v Potgieter and*

¹¹⁴ Of the Republic of South Africa, 1996.

¹¹⁵ The Republic of South Africa Constitution Act 200 of 1993.

¹¹⁶ S 26 of the Republic of South Africa Constitution Act 200 of 1993 provides that: “(1) Every person shall have the right to freely engage in economic activity and to pursue a livelihood anywhere in the national territory and; (2) Subsection (1) shall not preclude measures designed to promote the protection or improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality”.

¹¹⁷ Kerr *Principles of the Law of Contract* 207; C Lewis “General Principles of Contract” (1994) *Annual Survey of South African Law* 127 at 144 - 145.

¹¹⁸ 1994 (4) SA 507 (O).

¹¹⁹ *Waltons Stationery* at 511D - E.

*Others*¹²⁰ the court held that s 26(1) did not affect the freedom of persons to conclude contracts that limited their constitutional right to trade.¹²¹

In *Knox D'Arcy Ltd v Shaw*,¹²² the party seeking to avoid the enforcement of the restraint clause argued that because s 26(1) gave constitutional protection to the right to engage freely in economic activity, the right was paramount to the principle of *pacta sunt servanda* and that restraint clauses should be enforced cautiously as a result.¹²³ Van Schalkwyk J held that if this argument was accepted, this would have the effect that all restraint of trade clauses were in conflict with the right to free economic activity and would all be, as a general rule, unenforceable. This would place restraint clauses back in the legal position they were in prior to *Magna Alloys*.¹²⁴ A general rule of this nature would have been untenable simply for the fact that parties exercised their contractual freedom to limit their right to freely trade in certain circumstances:

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

It is submitted that the courts view in this regard was that s 26(1) could not be relied on directly by a restraint denier. To show that the restraint was unreasonable, the restraint denier ought only to have shown that it was unreasonable by proving that it was contrary to public policy. Whether his or her s 26(1) rights were violated by means of the restraint was therefore, not relevant to the question of enforceability. This also meant, in regard to the incidence of onus, that s 26(1) did not require a reversal of the burden of proof.¹²⁶ The *Knox D'Arcy*, *Kotze* and *Waltons Stationery* cases were consistent with the 1996 decision of the Constitutional Court in *Du Plessis v De Klerk*,¹²⁷ which held that the Constitution did not have direct horizontal

¹²⁰ 1995 (3) SA 783 (C).

¹²¹ *Kotze & Genis* at 786D - I; see also *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 (2) SA 651 (W) at 659G - 661I.

¹²² 1996 (2) SA 651 (W)

¹²³ *Knox D'Arcy* at 658I - J.

¹²⁴ See 5.2 above.

¹²⁵ *Knox D'Arcy* at 660.

¹²⁶ *Knox D'Arcy* at 661.

¹²⁷ 1996 (3) SA 850 (CC) at 889.

application.¹²⁸ It was therefore correct to assume that s 26(1) could not directly be relied on to challenge the enforceability of a restraint agreement and neither did it place the onus on the restraint enforcer to prove that it was constitutionally compliant.

5.4.2 *The final Constitution*

In February of 1997, the final Constitution¹²⁹ came into force. Section 22 of the Constitution provides that every individual has the right to freely choose and take part in their trade, occupation or profession.¹³⁰ Although the replacement of s 26 of the interim Constitution by s 22 of the current Constitution did not alter its position in our law,¹³¹ the current Constitution had a significant impact on questions relating to the general validity of the *Magna Alloys* principles, particularly because it not only envisaged an indirect horizontal application of the Bill of Rights¹³² but also a direct horizontal application of a number of fundamental rights.¹³³ The regulatory effect of the Constitution on both public and private legal relationships meant that restraint agreements could possibly have become subject to direct constitutional scrutiny. So, even though the courts were required to adhere to the principles of *stare decisis*, the Constitution now imposed a duty on all courts to take its provisions into account when applying the common-law, and develop the common law if it fell short of the demands of the Constitution and its values.¹³⁴ Kerr suggested that this did not necessarily mean that restraint of trade agreements were inconsistent with s 22 of the Constitution and therefore invalid.¹³⁵ He pointed out that the law was clear that restraints were reasonable and valid and therefore, the constitutionality of a restraint could only be challenged on the basis that its enforcement would

¹²⁸ *Du Plessis* at 889.

¹²⁹ Of the Republic of South Africa, 1996.

¹³⁰ Section 22 states: “Every citizen has the right to choose their trade, occupation or profession freely. The practise of a trade, occupation or profession may be regulated by law”; see PJ Sutherland *The Restraint of Trade Doctrine in England, Scotland and South Africa* (PhD thesis Edinburgh (1997) 31) where he states that the essence of the rights afforded by section 22 is the freedom to earn a living by working; see also *Minister of Home Affairs v Watchenuka* 2004 (2) BCLR 120 (SCA) para 27 where the Supreme Court of Appeal held that ‘The freedom to engage in productive work, even where that is not required in order to survive, is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth, the fulfilment of what it is to be human is most often bound up with being accepted as socially useful’. This view was confirmed by the Constitutional Court in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 59.

¹³¹ *Fidelity Guards Holdings (Pty) Ltd v Pearmain* [1997] 5 All SA 650 (SE); *Bradfield Christie’s Contract* 423.

¹³² In terms of s 39(2).

¹³³ Ss 8(2) and (3).

¹³⁴ Section 39(2) provides that “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.”

¹³⁵ Kerr *The Principles of the Law of Contract* 208.

be contrary to the public interest or inconsistent with the Constitution.¹³⁶ This would later be confirmed by the Constitutional Court in *Barkhuizen*, where Ngcobo J confirmed that the constitutionality of the enforcement of a valid clause must be tested within the prism of public policy.

The inclusion in the Constitution of s 22 also began a further debate on the incidence of onus in the context of restraint clauses. Kerr pointed out that s 22 of the Constitution might have the effect that “the onus will be on the party wishing to enforce it to show that it complied with the provisions of the Constitution”.¹³⁷ The question therefore became whether the provisions in the Constitution allowing for direct horizontal application of rights (ss 8 and 39) provided that the *Knox D’Arcy*, *Kotze* and *Waltons Stationery* cases may not have been good in law any more, and that the onus of proof should have shifted back to a more English-style approach: that restraint enforcers may be compelled to show that the restraint agreement complied with s 22 of the Constitution.

In dealing with the question of the impact of s 22 on the question of onus, the court in *Coetzee v Comitis and Others*,¹³⁸ following the *Waltons* and *Kotze* cases with approval, found that s 22 did not necessitate a revision of the *Magna Alloys* principles.¹³⁹ In *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*¹⁴⁰ the court held that even though a restraint amounted to a limitation of the rights provided by s 22, the *Magna Alloys* principles embodied in the common-law complied with the requirements of s 36(1) of the Constitution.¹⁴¹ It was held that individuals were free to bind themselves to restraint agreements, and therefore, the common-law principle that all restraint agreements were valid unless they were contrary to public policy amounted to a law of general application which met the s 36(1) test. On the question of where the onus lay under the Constitution, the court pointed out that according to *Magna Alloys*, the onus was on the restraint denier to show that the restraint (or its enforcement) was unreasonable.¹⁴²

¹³⁶ *Ibid.*

¹³⁷ Kerr *Law of Contract* (1998) at 200.

¹³⁸ 2001 (1) SA 1254 (C).

¹³⁹ *Coetzee* para 30.

¹⁴⁰ 2001 (2) SA 853 (SE).

¹⁴¹ *Fidelity Guards* at 861F - 862C.

¹⁴² *Magna Alloys* 898C - D.

In *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another*,¹⁴³ after acknowledging the *Magna Alloys* principles,¹⁴⁴ Kondile J dealt mainly with the question whether s 22 of the Constitution altered the position on the incidence of the onus.¹⁴⁵ Kondile J held that it was inconsistent with the Constitution to require the restraint denier to prove that he or she was entitled to constitutional protection by means of s 22. Accordingly, Kondile J held that since the restraint enforcer sought to restrict the restraint denier's fundamental rights by means of the restraint agreement, the restraint enforcer had the duty to prove that the restraint denier “forfeited his (or her) right to constitutional protection”.¹⁴⁶ According to Kondile J, the restraint enforcer must not only invoke the restraint provision and prove that the restraint denier breached the restraint clause, the restraint enforcer must also prove that the restraint was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” in accordance with s 36 of the Constitution. Therefore, according to Kondile J, the restraint enforcer bore the onus of proving that the restraint conformed with s 22. The effect was to put the law on onus in restraint cases back to what it was under the pre-*Magna Alloys* approach, which required the restraint enforcer to prove that the restraint was reasonable *inter parties*.¹⁴⁷

In light of Kondile J’s shifting of the onus to the restraint enforcer in *Canon*, the Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Ltd*¹⁴⁸ was asked by counsel to consider the issue of where the onus of proof lay in restraint of trade cases.¹⁴⁹ Writing for the majority of the Court, Malan AJA held that the incidence of onus in a particular case depended on the substantive law on the issue.¹⁵⁰ Malan AJA expressly affirmed the *Magna Alloys* principle on onus as the correct one to follow, even in light of s 22 of the Constitution, and thus adopted the view that the *Magna Alloys* approach on the incidence of onus should be followed. According to the *Magna Alloys* principles, the onus was generally cast on the restraint denier to show that the restraint was contrary to public policy and thus unreasonable and

¹⁴³ 2005 (3) SA 205 (N).

¹⁴⁴ *Canon KwaZulu-Natal* at 209G - I.

¹⁴⁵ *Canon KwaZulu-Natal* at 209B - C.

¹⁴⁶ *Canon KwaZulu-Natal* at 209D - G.

¹⁴⁷ MA Du Plessis “*Stare Decisis: Is The Onus On Restraint of Trade Hanging on a Thread?*” 2006 *TSAR* 423 at 425.

¹⁴⁸ 2007 (2) SA 486 (SCA).

¹⁴⁹ *Reddy* para 14.

¹⁵⁰ See *Tregea and Another v Godart and Another* 1939 AD 16 at 32 - 3; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A.

unenforceable. Malan AJA went on to affirm the *Basson* test as the correct test to follow in determining the reasonableness of enforcement of a restraint. As shown in 5.2.4.4.3, *Basson* made it clear that the onus was on the restraint denier to prove unreasonableness. Malan AJA's affirmation of the *Magna Alloys* and *Basson* rules on onus must be understood as confirming that they did not generally violate s 22, and that the onus was on the restraint denier to prove the unreasonableness of the enforcement of the restraint.

Following its view that a restraint may limit the restraint denier's constitutional rights¹⁵¹ the court regarded the *Basson* test as an acceptable "limitations" test to determine whether such a limitation was acceptable in law.¹⁵² The court did so by not only identifying the reasonableness test as a balancing exercise, but by likening the *Basson* test to the limitations test embodied in s 36(1) of the Constitution and said:

"The common-law approach in balancing or reconciling the concurring interests in this manner gives effect to the precepts of s 36(1) of the Constitution".¹⁵³

In drawing the comparison between the constitutional limitations test and the *Basson* test, Malan AJA developed the *Basson* test by adding a fifth requirement, namely whether the restraint went further than was necessary to protect the interest alleged by the restraint enforcer.¹⁵⁴ This was one of the fundamental ways in which the Constitution had an impact on the test for determining the enforcement of a restraint clause. Saner provided an enlightening explanation of the approach adopted by the court in *Reddy*:

"[According to the court] it was not necessary to carry out a separate evaluation of the values contained in the Constitution when assessing the reasonableness of a restraint, by virtue of the fact that the value judgments made in assessing the reasonableness comprehended also the considerations referred to in section 36(1) of the Constitution. This was because this exercise necessarily required a determination as to whether the

¹⁵¹ *Reddy* paras 11 - 12.

¹⁵² *Reddy* para 17.

¹⁵³ *Ibid.*

¹⁵⁴ *Reddy* para 17; This fifth question was first formulated in *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) ([1998] 2 All SA 362) at 484D - E (SA); the question was then applied in *Rectron (Pty) Ltd v Govender* 2006 CLR 1 (D) in para [37] but see *De Klerk Vermaak en Vennote v Coetzer en 'n Ander* 1999 (4) SA 115 (W) at 125C and *Super Towing (Pty) Ltd v Thomas and Another* 2001 (2) SA 969 (W) in para [16].

restraint was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.¹⁵⁵

This resembles the approach adopted by Theron J in *Beadica*, who identified the public policy test as one which was informed, controlled and regulated by constitutional values.¹⁵⁶

The decision in *Reddy* was followed by two important restraint cases which appeared to have sparked a debate on the constitutionality of the test for reasonableness as it had been understood since *Basson*. These were *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another*¹⁵⁷ and *Den Braven SA (Pty) Ltd v Pillay and Another*.¹⁵⁸ In *Advtech* Davis J cautioned against the “uncritical use” of the concept of contractual autonomy “as a part of freedom informing the constitutional value of dignity” because it “may be incongruent with the principles” provided by s 8 and s 39(2) of the Constitution.¹⁵⁹ Given that the objective of s 8 and s 39(2) was to develop the law to bring it in line with the Constitution and its fundamental values, contractual autonomy would only be applicable insofar as it promoted, instead of prohibited, the advancement of Constitutional values. Contractual autonomy was “reflective of a libertarian view of the world” which was “in conflict with the spirit of the Constitution read as a whole, which promotes an entirely different vision of our society”.¹⁶⁰

Davis J suggested that when balancing contractual autonomy in the determination of the enforcement of a restraint, the court must be cautious not to add undue weight to it. Davis J supported the notion that a balance must be struck between freedom of trade, which was informed by s 22 of the Constitution, and contractual autonomy. Davis J stated that the position of contractual autonomy and its role in the balancing of competing interests in the context of restraint clauses must be revisited within the development requirements provided by s8 and s39(2).¹⁶¹ This suggested that the freedom of trade, due to it having been afforded constitutional force, must be afforded a greater role, and the roles of contractual autonomy and *pacta sunt servanda* must be limited due to the fact that they had historically been favoured amongst other contractual values. Davis J’s propositions affected his views on the incidence of onus. By

¹⁵⁵ *Saner Agreements in Restraint of Trade* at 4-27 and 4-28.

¹⁵⁶ See 4.2.1.2.

¹⁵⁷ 2008 (2) SA 375 (C).

¹⁵⁸ 2008 (6) SA 229 (D).

¹⁵⁹ *Advtech Resourcing* para 30.

¹⁶⁰ *Advtech Resourcing* para 30.

¹⁶¹ *Advtech Resourcing* para 32.

proposing a relaxation of *pacta sunt servanda* and a stricter emphasis on the restraint denier's constitutional rights, he suggested that there would, by necessity, be a reversal on the onus of proof. He suggested, as Kondile J had done in *Canon*, that the restraint enforcer should thus be compelled to show that the restraint complied with the Constitution.¹⁶² Referring to certain cases that emphasised the right to work as central to the constitutional right to dignity, Davis J said:

“These cases support the view that an employer must justify a limitation upon the right to work given the importance placed on the dignity of work and the concomitant limitation or eradication of that right when a restraint operates. Such a conclusion would entail no radical departure from our legal tradition. It would simply amount to a reversion to the law which operated prior to 1984 and cast the burden on the employer to justify the reasonableness of the restraint”.¹⁶³

In *Den Braven*, Wallis AJ examined whether s 22 of the Constitution had any direct application to restraint clauses.¹⁶⁴ Wallis AJ discovered a problem that persisted in judgments dealing with restraint clauses.¹⁶⁵ The problem appeared in cases where, under the interim Constitution, the courts in the respective cases were asked to consider the impact of s 26 of the interim Constitution on restraint clauses. In these cases, counsel for the party seeking to avoid the restraint argued that the *Magna Alloys* principles should be developed because restraint clauses inherently “constituted an infringement of the rights conferred upon the person bound thereby in terms of s 26(1) of the Interim Constitution”.¹⁶⁶

Wallis AJ did not agree with the view that a restraint clause automatically infringed on the right to choose a trade, occupation or profession freely in accordance with s22.¹⁶⁷ He reasoned that, if this were so, then a restraint enforcer would not be able to overcome the problem that the enforcement of the restraint would breach a constitutional right. He further reasoned that the

¹⁶² A suggestion supported by authors such as Mukheibir in A Mukheibir “A lone voice in the desert? *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE)” (2002) *Obiter* 207 at 214 - 216.

¹⁶³ *Advtech Resourcing* para 28..

¹⁶⁴ *Den Braven* para 30.

¹⁶⁵ *Den Braven* para 29.

¹⁶⁶ *Waltons Stationery CO (Edms) Bpk v Fourie en 'n Ander* 1994 (4) SA 507 (O) at 511B – E; *Kotze & Genis (Edms) Bp ken 'n Ander v Potgieter en Andere* 1995 (3) SA 783 (C); *Knox D'Arcy and Another v Shaw and Another* 1996 (2) SA 651 (W) at 660D.

¹⁶⁷ *Den Braven* para 30.

restraint enforcer, as a private party, did not have the powers to regulate the practice of a trade, occupation or profession by law, nor did that party have the power to limit rights under s 36(1) in terms of a law of general application. Wallis AJ thus said in regard to Davis J's decision in *Advtech*:

“To the extent that the learned judge was suggesting that contractual autonomy is not in appropriate circumstances reflective of freedom and gives effect to the central constitutional values of freedom and dignity, that approach is contrary to the views of both the Constitutional Court and the Supreme Court of Appeal”.¹⁶⁸

His view was therefore that s 22 could not be directly applicable against a contracting party to a restraint clause, particularly because, as Ngcobo J emphasised in *Barkhuizen*, “private citizens do not make law” and thus restraint clauses could not be subjected to the s 36 constitutional limitations test. Wallis AJ emphasised that a direct application of s 22 to restraint clauses would effectively nullify all restraint clauses in South African law. Even though s 22 was not directly applicable to restraint of trade cases did not mean that it was entirely irrelevant. Referring to Ngcobo J's judgment in *Barkhuizen*,¹⁶⁹ Wallis AJ confirmed that the reasonableness test must “be discerned from the values embodied in the Constitution and in particular in the Bill of Rights”.¹⁷⁰ Given that s 22 formed part of these values, and was a constitutional right in itself, a restraint would be contrary to public policy if it unreasonably or unfairly infringed on the restraint denier's right to practise his or her trade, occupation or profession.

Wallis AJ thus understood Ngcobo J's judgment in *Barkhuizen* as authority for the proposition that, when determining the enforceability of a clause, *pacta sunt servanda* would always be paramount, however, an upholding of *pacta sunt servanda* would be contrary to public policy if the enforcement of the clause would somehow result in an unjustifiable limitation of s 22. Wallis AJ thus advocated for an indirect application of the s 22 on restraint clauses through public policy. Wallis AJ's views in *Den Braven* are said to reflect the same philosophical foundations that underpinned the decisions in *Roffey*, *Magna Alloys* and *Knox D'Arcy*.¹⁷¹ Having affirmed the principles in *Magna Alloys* and *Basson* in light of *Barkhuizen*, Wallis AJ

¹⁶⁸ *Den Braven* para 33.

¹⁶⁹ 2007 (5) SA 323 (CC) paras 27 – 30.

¹⁷⁰ *Den Braven* para 32.

¹⁷¹ Calitz (2011) *Stell LR* 59.

appeared to have disagreed with the notion that s 22 required a reversal of the onus back to the restraint enforcer. This understanding of Wallis AJ's judgment would mean that *Den Braven* was consistent with the Supreme Court of Appeal's approach in *Reddy* and a rejection of the principles in *Canon* and *Advtech*.

5.4.3 The applicability of the *Barkhuizen* principles in restraint cases

What has been shown thus far is that a special and unique set of rules have been developed for determining enforceability in restraint cases. This created an apparent divergence in approach between restraint cases¹⁷² and enforcement cases relating to general clauses.¹⁷³ However, these two divergent approaches dealt fundamentally with the same type of legal issue, the only difference being the specific type of valid contractual clause that was in issue. In both instances, the enquiry was the same: whether the enforcement of the valid clause was contrary to public policy in light of the subjective factual circumstances of the case. In the context of the present discussion, this divergence in approach has apparently caused judges dealing with restraint cases to overlook the principles in *Barkhuizen* on the public policy enquiry and onus. *Barkhuizen*, which was decided before *Advtech* and *Den Braven*, was the ruling law on the issue of the determination of enforceability of all types of contracts *including restraint of trade agreements*.

As indicated in chapter 4, it was established in *Barkhuizen* that the determination of the enforceability of all clauses (including restraint clauses) was fundamentally a public policy inquiry.¹⁷⁴ The Constitutional Court, in explaining what this meant within our Constitutional dispensation¹⁷⁵ held that all contracts are subject to constitutional rights, and that courts are obliged to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution. If the contract was contrary to public policy, it would not be enforced. It was then held that constitutional rights (such as the freedom of trade provided by section 22) inform public policy, and that they are regarded only as factors to consider in the course of the overall determination of the reasonableness of the contract or its enforcement. This application of constitutional rights by means of the doctrine of public policy entails an indirect application of the Constitution. Therefore, the Constitution and its rights

¹⁷² As shown in this chapter.

¹⁷³ AS shown in chapters 3 and 4.

¹⁷⁴ *Barkhuizen* at 333 - 334.

¹⁷⁵ *Den Braven* para 28.

could not directly be relied on to challenge the enforceability of a restraint agreement.¹⁷⁶ Therefore, in terms of *Barkhuizen*, there was no onus on a restraint enforcer to prove that a restraint, even though limiting in its nature, complied with the requirements of s 36(1). It was held that the onus remained on the restraint denier to prove that the restraint (or its enforcement) was contrary to public policy, and not that it infringed on his or her rights directly under s 22. *Barkhuizen* accordingly unified the approach to determining the enforceability of all types of contracts - including those in restraint of trade. Ngcobo J in *Barkhuizen* held that the party seeking to avoid the enforcement of the clause bore the onus of proving that its enforcement would be unreasonable.¹⁷⁷ He held, in contrast to *Canon* and *Advtech*, that:

“What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was good reason why there was a failure to comply”.¹⁷⁸

There is nothing in *Barkhuizen* which indicated that the party enforcing the clause must prove that it complied with the Constitution or its values in order for it to be enforceable. This was true even if the enforcement of the clause appeared to implicate a constitutional right or value. The enquiry remained a public policy enquiry. Accordingly, the findings in *Barkhuizen* in relation to the onus of proof confirmed the *Magna Alloys* principles on the incidence of the onus and thus rejected the proposition that the Constitution reversed the onus of proof to the restraint (or contract) enforcer to prove that its enforcement was reasonable.

Barkhuizen was thus clear on the approach to determining enforceability and the incidence of onus. What this meant was that *Barkhuizen* had resolved the issue on whether s 22 applied directly to restraint cases and whether s 22 required a reversal of the onus of proof. It is now clear that s 22 did not apply directly, and applied indirectly through public policy as a policy factor within the broader public policy enquiry. Because the general principles did not change under s 22, the issue of onus remained, that it was that the party seeking to avoid enforcement who must show that the enforcement of the restraint was contrary to public policy. As shown

¹⁷⁶ *Barkhuizen* at 332 - 333.

¹⁷⁷ *Barkhuizen* para 58.

¹⁷⁸ *Ibid.*

in chapter 4, these principles were consistent with what the Constitutional Court later regarded as trite law on the question of onus in *Beadica*.

5.5 The reformulation of the reasonableness test in Mozart

In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another*¹⁷⁹ Davis J had an opportunity to reconsider the approach to determining the reasonableness of the enforcement of a restraint in light of *Barkhuizen*. Davis J cautioned that *Barkhuizen* “must be read as a whole and not merely as an uncritical confirmation of the doctrine of *pacta sunt servanda*”.¹⁸⁰ Davis J observed that the approach in both the majority and minority judgments in *Barkhuizen*¹⁸¹ were nuanced because, even though they required our courts to recognise the value of *pacta sunt servanda* while equally considering constitutional rights and values by means of public policy, the examination of constitutional rights and values during this process should not be unduly restricted. Davis J believed that a strict adherence to *pacta sunt servanda* was too restrictive because it had the tendency to unjustifiably limit the role of constitutional values in the determination of enforceability.¹⁸² He proposed that the primary concern in restraint cases should not be centred on the importance of *pacta sunt servanda* but rather, the primary concern ought to be “the balance between the bargain, as it is phrased in the contract, and the demands of public policy that give content to the idea of a constitutional community”.¹⁸³

Davis J’s slight diminishing of *pacta sunt servanda* resembles Theron J’s approach adopted 11 years later in *Beadica*, that the public policy enquiry must be guided a little less by *pacta sunt servanda* and a little more by constitutional and equitable values.¹⁸⁴ This meant that a case did not have to be an extreme case in order for the court to intervene in the enforcement of a valid clause. This reflects the approach arguably adopted in *Beadica* which provided that the court will intervene in the enforcement of a valid clause in “worthy cases” as opposed to in “the clearest of cases”.¹⁸⁵

¹⁷⁹ 2009 (3) SA 78 (C).

¹⁸⁰ *Mozart* at 83E – G.

¹⁸¹ *Barkhuizen* paras 98 and 104.

¹⁸² *Mozart* at 84F – 85G.

¹⁸³ *Mozart* at 85A – B.

¹⁸⁴ See 4.2.1.3.

¹⁸⁵ *Beadica* para 89. See 4.2.1.3.

Davis J thus called for a shift in focus when applying public policy from one centred on traditional and contractual legal principles (such as *pacta sunt servanda*) to one with a constitutional focus:

“The challenge of our Constitution is not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution. Contract law cannot be reduced to a museum of past jurisprudence. Expressed differently, the methodology mandated by s 39(2) of the Constitution needs to be implemented whenever a dispute such as the present is placed before a court. This permits a far less deferential approach to the formal contractual provisions than if the case of *Den Braven* is followed”.¹⁸⁶

Davis J thus proposed that, when applying public policy to a restraint clause to determine its reasonableness and enforceability, the enquiry should be focused on striking a balance between the contract and the demands of public interest, rather than whether the principle of *pacta sunt servanda* should be favoured in the circumstances or not. Davis J therefore emphasised that the courts should consider constitutional values when applying the *Magna Alloys* principles and should be considered as equally outcome determinative as *pacta sunt servanda*. This does not require a direct application of the Constitution to the case, but requires that an appropriate balance be found between *pacta sunt servanda* and constitutional values policy considerations in the public policy enquiry. This encapsulates the “balancing exercise” that must take place as required in terms of *Barkhuizen* and *Beadica*. In restraint disputes, constitutional values should be considered as a general rule, and not only where it was evident that the enforcement of a restraint might infringe on s 22 or any other constitutional right.

Adopting the balancing approach envisaged *Barkhuizen*, and infusing it with the *Basson* test, Davis J summarised the approach to determining the enforcement of a valid clause in light the demands of the Constitution and its values. Davis J held that when determining whether a restraint of trade is contrary to public policy, the courts must consider, on the one hand, that each party must honour the agreed terms but, on the other hand, that each party must be free to enter into any business, profession or trade in the manner they deem fit.¹⁸⁷ These competing policy factors initially hold equal value, but their weighting will differ depending on the

¹⁸⁶ *Mozart* at 85B – G; Davis J’s propositions found support by Steenkamp J in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje & Another* (2011) 32 ILJ 601 (LC) para 25.

¹⁸⁷ *Mozart* at 82H – 83A.

subjective factual circumstances of the case. For example, if the facts indicated that the restraint denier would still be able to practise in his or her trade or profession if the restraint clause was enforced, then the value of freedom of trade would hold less weight in the balancing exercise. This approach reflected the demands of the broader interests of the community.

Davis J then considered the approach in the majority and minority judgments in *Barkhuizen* which provided, firstly, that the determination of the enforcement of a valid clause in terms of public policy must be determined with reference to constitutional values,¹⁸⁸ and that the courts should be aware that bargains freely entered into may still operate unfairly in some circumstances and should thus not be enforced.¹⁸⁹ Davis J adopted the view that this approach upheld *pacta sunt servanda* but left room for the courts to refuse to enforce a contract if they were in conflict with public policy as informed by constitutional values. Therefore, achieving the appropriate balance between *pacta sunt servanda* and other policy factors.

Davis J's infusion of the approach in *Basson* with the constitutional principles identified in *Reddy*, which required that due consideration be afforded to the Constitution and its values, resulted in a constitutional redescription of the *Basson* test in a manner that appeared to be consistent with the public policy test enunciated in *Barkhuizen*. The test described in 5.3.2 was reformulated by Davis J in the following terms:

- a) Is there an interest on the part of the applicant that is deserving of protection after the termination of a business relationship?
- b) Is that interest prejudiced by the conduct of the respondents?
- c) If the interest is so prejudiced, how does that prejudice get weighed both qualitatively and quantitatively against the interest of the respondents to be gainfully employed and to pursue the right of the dignity of work if the order sought is so granted?
- d) Is there any other aspect of public policy *as mediated by the values of the Constitution* and which is unrelated to the relation between the parties that, nonetheless, requires the restraint either to be upheld or to be struck down?
- e) Does the restraint go further than absolutely necessary to protect the legitimate interest of the applicant that it is deserving of legal protection in terms of the balancing exercise which I have outlined?

¹⁸⁸ *Barkhuizen* paras 28 – 30.

¹⁸⁹ *Barkhuizen* paras 98 and 104.

Although Davis J accepted *Barkhuizen* as the ruling law on the issue, it appeared that he did not expressly address his propositions in *Advtech* on the issue of onus. Therefore, Davis J must be understood to have accepted that the onus was on the party seeking to avoid the enforcement of the clause to prove that its enforcement was contrary to public policy. This was probably because Davis J was bound to the approach in *Barkhuizen*, which demanded the same.

5.6 Conclusion

In summary, the general principles on applying public policy to determine the enforceability of restraint clauses outlined in *Magna Alloys* were consistent with those applicable to all other types of clauses outlined in *Barkhuizen*. *Barkhuizen* emphasised that determining enforcement required a balancing exercise between various policy factors such as *pacta sunt servanda* and constitutional rights and values. This meant that the approach in restraint of trade cases was not supposed to be treated as a unique area of law, subject to its own unique principles. Even though restraint clauses were applied in unique factual circumstances, giving rise to a unique set of policy factors that would be relevant in the public policy enquiry, the approach to applying public policy remained the same as it did in general unfair enforcement cases. The *Magna Alloys* approach was developed further in *Basson*, which outlined a methodological approach for engaging in this balancing exercise and formulated the public policy enquiry around the competing individual and public interests. The court in *Mozart* added a layer to this by infusing the approach with constitutional values. The approach in restraint cases thus presented a sound methodology for applying public policy in a manner that not only gave effect to *pacta sunt servanda*, but also gave due recognition to equitable and constitutional values. Thus, maintaining an equilibrium between *pacta sunt servanda* and equitable values such as good faith, ubuntu, fairness and reasonableness – which was necessary for a satisfactory public policy enquiry. The courts had, after *Barkhuizen* and before *Beadica*, since battled to agree on an approach which respected both *pacta sunt servanda* and other values. While the courts in restraint cases have shown, analytically, how this ought to be done.

It is thus argued that the courts dealing with other types of valid clauses could learn from the approach adopted in restraint cases. This argument is supported by the fact that the approaches in both contexts share many similarities. Firstly, the approach in restraint cases also adopts the approach that courts will intervene in the enforcement of valid clauses in “worthy cases”.¹⁹⁰

¹⁹⁰ *Beadica* para 89; *Mozart* 84F – 85B.

This reflects the standard set in *Beadica* as to when the courts will intervene in the enforcement of a valid clause. Furthermore, the rules on onus outlined in the restraint cases are consistent with the rules outlined in *Barkhuizen* and *Beadica*. This is that the party seeking to enforce the clause must prove that the enforcement of the clause will be contrary to public policy. Similar to the approach in *Barkhuizen* and *Beadica*, the restraint approach further shows that the public policy enquiry involves an indirect application of the Constitution and its values. *Mozart* shows that these constitutional factors form but one of the many factors involved in the balancing exercise to determine enforceability. These similarities indicate that the public policy tests in both contexts are fundamentally grounded in the same principles. The only difference is that a more methodological approach is followed in the context of restraint clauses. As the approach in restraint cases presents a suitable guide for determining enforceability, it is submitted that courts dealing with the enforceability of other types of valid clauses could learn from this guide to see how they may develop a more methodological approach to determining the enforcement of valid clauses.

Chapter Six – The Model For Applying Public Policy To Determine Enforcement

6.1 Introduction

It is submitted that one cannot formulate a precise guide to determining the fairness or reasonableness of the enforcement of a valid clause. However, a general guide could potentially be developed to ensure that judges have a general approach that they can all follow when asked to determine the enforceability of a valid clause. As indicated in chapter 5, the courts in restraint cases begin their enquiry by assessing the individual and community interests that are implicated in each case.¹ After identifying these factors, the courts assess their weight in light of the subjective factual circumstances of the case. After finding the appropriate balance between the policy factors, the courts are able to decide, with reference to the outcome of the balancing exercise, whether the restraint clause should or should not be enforced. This thesis argues that the above approach appears to be consistent with the approach envisaged in *Beadica*, despite the fact that *Beadica* does not express the approach to be followed in these exact terms. It is therefore submitted that the approach in restraint cases may constitute a possible guide that judges dealing with unfair enforcement claims of general clauses should follow.

This chapter attempts to test the efficacy of the proposed guide or method by applying it to a case study of a *Barkhuizen 2*-type case. The case study chosen is *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society*.² This case is useful for the following reasons. *Garden Cities* was decided eight years before *Barkhuizen* and ten years before *Mozart*, and therefore did not have the benefit of the recently developed principles of enforceability. Furthermore, the reasoning and approach of the court would now appear to be rudimentary when viewed in light of the very detailed reasoning required by the public policy enquiry illustrated in chapters 3 to 5. As the facts in *Garden Cities* could be regarded as falling within the scope of the *Barkhuizen 2*, this provides an opportunity to undertake a systematic application of the guide proposed above.

¹ See 5.3.4.

² 1999 (2) SA 268 (C).

6.2 Reading *Mozart* and *Beadica* together: A synthesis

A conceptualisation of a guide to dealing with *all* unfair enforcement cases requires that the public policy test in general cases³ and restraint cases⁴ be read together. In the case law concerning both restraint clauses and other contractual terms, the courts have consistently held that if the enforcement of a valid term is contrary to public policy, it will not be enforced.⁵ This rule applies both to the restraint of trade agreements and all other types of contract terms.⁶ Public policy is now rooted in the Constitution and its values⁷ which work hand in hand with the broad interests of the community.⁸ In *Magna Alloys*, it was held that restraint clauses should be treated like all contracts. Thus, restraint clauses and other types of contracts are generally enforceable unless their enforcement is shown to be unreasonable or unfair for conflicting with public policy.⁹

Read together, the general principles in both contexts provide the following. The enforcement of a valid clause, if challenged, must be examined through the prism of public policy.¹⁰ The public policy enquiry occurs on two levels, the individual interests level and the community interests level.¹¹ These are discussed in 6.2.1. In weighing these competing interests against each other, the court must first consider two principal public policy considerations.¹² The first is that all agreements that are freely and voluntarily entered into must be honoured. The second is that a court will not enforce a valid clause that conflicts with public policy as informed by public policy factors arising out of the Constitution, the common law or the facts of the case. The main task to be conducted by the courts when determining the reasonableness¹³ or fairness¹⁴ of the enforcement of a contract in our constitutional era, is to strike a “balance between the bargain, as it is phrased in the contract, and the demands of public policy that give

³ See chapter 3.

⁴ See chapter 5.

⁵ *Magna Alloys* at 891G; *Sasfin* at 8C – D; *Bafana Finance Mabopane* at 585H; *Bredenkamp* paras 36 – 52; *Den Braven* paras 29 – 33.

⁶ *J Louw* at 243B; *Barkhuizen* paras 28 - 30, 98 and 104; *Magna Alloys* 891G -I, 892I - 893A.

⁷ *Reddy* at 496 – 498; *Bredenkamp* paras 36 – 52.

⁸ *Brisley* paras 88 – 95; *Meintjes v Coetzer* 2010 (5) SA 186 (SCA) para 15.

⁹ *Magna Alloys* 890 – 891; Van Huyssteen *General Principles of Contract* 210.

¹⁰ *Mozart* 82H – J.

¹¹ See 5.3.4.

¹² *Sunshine Records* 794C – E.

¹³ Discussed in Chapter 6.

¹⁴ Discussed in Chapter 5.

content to the idea of a constitutional community”.¹⁵ This means that even though the fundamental contract-law principle of *pacta sunt servanda* demands that a term is enforced (because it is a valid term and thus an objectively fair bargain), constitutional values may require that the term not be enforced because, in the particular circumstances, its enforcement may be in conflict with these values.

6.2.1 Individual interests and community (or public) interests

An important aspect in the approach in restraint cases that has not been fully explored in general cases is the emphasis on considering both the interests of the individual parties and the community’s interests.¹⁶ As explained in 5.3.2, on the individual interests level, the court assesses the policy factors arising out of the individual interests of the parties. At the community interests level, the court assesses the policy factors arising out of the public interest. The interests or policy factors arising out of these two levels are not mutually exclusive. For example, an individual party will have an interest in the other party honouring his or her part of the agreement (*pacta sunt servanda*), whilst the public also has an interest in the principle that people should honour their agreements. It must be said at the onset that these individual and community interests constitute “policy factors” that will form part of the public policy enquiry into the enforceability of a valid clause.

The individual interests of the parties are the business or commercial interests that the parties seek to promote in terms of the clause between them.¹⁷ When a valid clause is in dispute, it is usually the party who seeks to enforce the clause that has an individual interest that he or she seeks to protect. So in the context of a restraint clause, the restraint enforcer seeks to protect his or her proprietary interests.¹⁸ In the context of a renewal clause, the enforcer seeks to ensure that he or she has the sufficient time to arrange his or her affairs (perhaps, to find a new tenant and thus maintaining his or her income) if the other party decides not to exercise the option to renew. Or a time-limitation clause where the enforcer seeks to secure himself or herself from overly delayed insurance claims. In this context, the court weighs the contract enforcers

¹⁵ *Saner Restraint of Trade* 6.1; *Mozart Ice Cream* at 85B; *Barkhuizen* paras 28 – 30, 98 and 104.

¹⁶ See *Reddy* para 16 where Malan AJA held that the relevant interests in the case must be examined in light of the two principal policy considerations that the courts must always keep in mind, freedom to trade and *pacta sunt servanda*.

¹⁷ *Beadica* para 138.

¹⁸ See 5.3.4.1.

interests against the other party's interests.¹⁹ For example, a restraint enforcer's proprietary interest will be weighed against the restraint denier's interests not to have his or her freedom to practise in his or her trade or profession unduly limited. In the context of time-limitation clauses, the enforcer has an interest in not dealing with claims months or years after the cause of the claim has arisen. This will be weighed against the contract denier's interest not to be denied his or her right to access to court.

Although it is not possible to formulate an exhaustive list of factors that will be relevant in each case, it is interesting to note that the interests, and thus policy factors, that will most commonly arise out of the enforcement of the clause are closely linked to operation and the effect of the clause. For example, restraint clauses have the effect of limiting a person's ability to trade, and thus will impact on that parties freedom to trade, which is a recognised public interest as explained in chapter 5.²⁰ This is similar to time-limitation or exemption clauses, which take away a parties' right to seek judicial redress,²¹ and non-variation clauses, which allow parties to go against their word and opens up the potential for the abuse of the legal process.²² Therefore, individual interests will commonly be weighed against community interests, and in most instances, the community interests in question will outweigh the individual interest at play.²³ It follows that if there is no community interest that is implicated by the enforcement of the clause, then the individual interests will most likely be favoured in the balancing exercise of competing interests.

The above examples further show how equitable values such as good faith and fairness inform the public policy enquiry by explaining why these interests are relevant. For example, it can be argued that it is contrary to good faith and ubuntu for a court to enforce a restraint clause limiting a restraint denier's ability to trade where there are no protectible proprietary interests served in favour of the restraint enforcer. A restraint enforcer who seeks to enforce a restraint in these circumstances would be acting in bad faith, because he or she would seek to promote his or her own commercial interests at the expense of the other party – which would also be contrary to the values underlying ubuntu. Generally speaking, it would also be “unfair” for a court to enforce a restraint in these circumstances. As Du Plessis explained, equitable values

¹⁹ *Reddy* para 12.

²⁰ See 5.2.

²¹ *Barkhuizen* paras 52 and 54.

²² See 3.2.1.1.

²³ A Cockrell “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 at 62.

such as fairness, good faith and ubuntu play a “limiting” role within the public policy enquiry by preventing instances like the one just described.²⁴ But it plays this role through the application of public policy.

As explained in 2.2.1, Himonga, Taylor and Pope, suggested that ubuntu assisted the courts in resolving conflicts that arise between individual interests and public interests by harmonising them.²⁵ Fairness has been argued to encapsulate both good faith and ubuntu.²⁶ These concepts ensure that the balancing exercise between various interests is conducted in the light of equitable values. In a practical sense, equitable values require that simple justice is done between contracting parties, which is achieved by a fair balancing of interests of the individual parties and the public interest. The concept of ubuntu “requires a court to analyse the relationship between the parties in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties”.²⁷ Du Plessis argued that ubuntu, which is linked to good faith,²⁸ not only required a balancing of the interests between parties, but it was more importantly “concerned with the interests of the greater community”.²⁹ This argument is based on findings made by Sachs J in *Port Elizabeth Municipality v Various Occupiers*³⁰ that ubuntu combined “individual rights with a communitarian philosophy”³¹ and that it required our courts to “balance competing interests in a principled way”.³²

The aforementioned therefore indicates that not only does public policy require a balancing of competing individual and community interests, but that equitable values play an important role in helping the judge evaluate, and weigh against each other, the individual and public interests or policy factors that are relevant in each case. As explained in 4.2, this is indeed the approach endorsed in *Barkhuizen* and *Beadica*, although implicitly, and was expressly adopted in restraint cases,³³ and eventually affirmed in *Reddy*.³⁴ It is therefore submitted that this approach should be expressly recognised by our courts as the appropriate starting point to any public

²⁴ Du Plessis 2018 *Stell LR* 419.

²⁵ Himonga, Taylor and Pope 2013 *PELJ* 420 – 421.

²⁶ Du Plessis 2019 *PELJ* 14.

²⁷ Du Plessis 2019 *PELJ* 16.

²⁸ See 2.2.1.

²⁹ Du Plessis 2019 *PELJ* 16 – 17.

³⁰ 2005 (1) SA 217 (CC).

³¹ *Port Elizabeth Municipality* para 37.

³² Du Plessis 2019 *PELJ* 17.

³³ See 5.3.4.3 and 5.3.4.4.

³⁴ *Reddy* para 12 – 16.

policy enquiry. The questions that a court should ask when it seeks to identify the relevant interests were explained in 5.3.2 and are explained further below.

6.2.2 Identifying the relevant public policy factors

Although a full examination of the relevant common-law factors would be desirable,³⁵ it would not be possible in the formulation of a general guide aimed at addressing the enforcement of *all* valid clauses. Kruger suggested that the courts should consider adopting an inquisitorial approach to unfair enforcement cases. This can be done by engaging in a fact-finding enquiry so that all the relevant facts that point towards potential public policy factors can be considered when deciding whether to enforce a valid clause.³⁶ He suggested that this can simply be done if the courts are “proactive in the questioning of witnesses and counsel”.³⁷ However, because the majority of unfair enforcement cases appear to be done on application, and thus most of the facts would be set out in affidavits, the judge could rather encourage parties to provide all the facts that may show that the enforcement of the clause in dispute may implicate one or other policy factor. It is submitted that either fact finding method would assist in providing the court with the facts it needs to make an informed decision on whether to enforce the clause or not. Kruger suggested that by obtaining all the relevant facts, the uncertainty and unpredictability that accompanies the identification and selection of relevant policy considerations would be reduced.³⁸

The fact-finding enquiry described above could be in the form of a constructed list of standard questions that a judge should ask when confronted with an unfair enforcement claim.³⁹ As explained in chapter 5, a similar list of questions had already been established in the context of restraint clauses as expressed in the test in *Mozart*. The guidelines described in chapter 5 have allowed the courts in restraint cases to identify the vital policy factors at play in restraint cases, such as the protectable proprietary interests that the restraint enforcer seeks to protect by enforcement of the clause. The *Mozart* test is a great example of the list of questions that the court should ask when dealing with the unfair enforcement claim. As the questions outlined in the *Mozart* test are aimed at identifying the relevant individual and community interests, a

³⁵ Kruger 2011 *SALJ* 736.

³⁶ Kruger 2011 *SALJ* 731 – 732.

³⁷ Kruger 2011 *SALJ* 733.

³⁸ Kruger 2011 *SALJ* 733; *Fourway Haulage* para 22.

³⁹ *Ibid.*

similar list of questions, framed in a general sense, could be used to identify the relevant policy factors.

Below is a discussion of some of the policy factors that may arise out of the public policy enquiry.

6.2.2.1 *Constitutional factors*

The principle arising out of *Magna Alloys* is that the reasonableness of the enforcement of the restraint must be examined with reference to non-exhaustive policy factors.⁴⁰ The Supreme Court of Appeal has affirmed this principle in *Pridwin*. It is trite that the Constitution, its values and the interests of the community are considered when determining public policy⁴¹ and whether the enforcement of a contract will be in violation of it.⁴² Therefore, the court must identify whether there are any constitutional rights or values that are implicated by the enforcement of the clause in question. Whether there are any constitutional rights or values implicated should be delineated from the arguments advanced by the party seeking to avoid enforcement of the clause. This party may allege that enforcement of the clause in the particular circumstances will amount to an infringement of constitutional rights or values and would thus be contrary to public policy.

For example, in *Beadica* the applicants contended that the strict enforcement of the renewal clauses would be contrary to public policy for being inimical to the values of the Constitution, in particular, the right to equality which is contained in s 9(2) of the Constitution.⁴³ As mentioned in 6.2.1, due to the nature of a renewal clause, there seems to be no immediately identifiable policy factor that would be implicated by the enforcement of a renewal clause. Despite this, Theron J still considered whether she could rely on the right to equality as a policy factor in favour of non-enforcement in this particular case, probably because she still considered the case to be a “worthy case”⁴⁴ that deserved the attention of the court. Theron J considered the subjective circumstantial factors of the case. These factors determined how much weight could be afforded to the right to equality as a policy factor against enforcement of the renewal clause. The right to equality was given no weight as a policy factor because,

⁴⁰ Kruger 2011 *SALJ* 722.

⁴¹ *Saner Restraint of Trade* 6.2.

⁴² *Sasfin* at 8C – D; *Meintjes* para 15.

⁴³ *Beadica* para 13.

⁴⁴ See 4.2.1.3.

there were no facts which indicated an infringement or limitation on the right to equality. Theron J thus refused to enforce the clause on the basis that there were no policy factors in favour of non-enforcement. Accordingly, even though the right to equality was an important policy consideration that may have justified the courts intervention in the enforcement of the renewal clause, it could not have outweighed the respondents individual interests because the right to equality was simply not a relevant policy factor in light of the facts of the case.

As explained in 5.5, the constitutional right to freedom of trade will generally be implicated in restraint cases. *Mozart* indicated that the principle that each person should be free to enter into business, a profession or trade in the manner they deem fit is a principal policy factor to be considered in restraint cases.⁴⁵ The freedom of trade as a policy factor must be weighed against other policy factors such as whether the restraint enforcer has a protectable proprietary interest. Whether the freedom of trade outweighs the restraint enforcers protectable proprietary interest depends on the weight afforded to the freedom of trade, which is determined by the subjective factual circumstances of the case. For example, in *Mozart*, the respondents were able to provide evidence which indicated that there were no protectable proprietary interests that were infringed by the respondent's conduct.⁴⁶ This gave more weight to the respondents right to freedom of trade, which the respondents could prove would have been limited if the restraint clause was enforced. This made the freedom of trade a relevant and weighty policy factor in *Mozart* and so Davis J refused to enforce the restraint on that basis.

Another important consideration is that in enforcement cases, constitutional factors in favour of non-enforcement can be countered by constitutional factors in favour of enforcement which are given effect to by *pacta sunt servanda*: the freedom of association and dignity.⁴⁷ Thus, where the right to equality or the right to freedom of trade may weigh in favour of enforcement, the constitutional values or rights to dignity and freedom of association are countervailing constitutional factors that may, in most cases, weigh in favour of the enforcement of a valid clause. It is thus submitted that the courts are required to properly identify the constitutional factors in favour of both parties, and to find an appropriate balance between them when engaged in the public policy enquiry.

⁴⁵ *Mozart* 82I – J.

⁴⁶ *Mozart* 88 – 89.

⁴⁷ *Barkhuizen* para 12; *Beadica* paras 35 – 36.

Two aspects can thus be gleaned from the above discussion. Firstly, the courts identify constitutional factors that were relevant in determining whether the enforcement of the clause would be contrary to public policy. The identification of constitutional factors is implicit in the *Mozart* test.⁴⁸ The court in *Beadica* further demanded that constitutional rights and values are taken into account when applying public policy.⁴⁹ These include any countervailing constitutional factors, such as the freedom of association and the right to dignity – the constitutional factors that reflect *pacta sunt servanda*. Secondly, whether the clause is enforced or not depends on how much weight should be afforded to each factor *in the particular circumstances* of the case. The weight to be afforded to each factor is determinable by the subjective factual circumstances of the case. It is thus submitted that constitutional factors will in most cases form part of the public policy enquiry into the enforceability of a valid clause.

6.2.2.2 Common-law factors

In restraint cases, the courts have established an important guideline in determining whether the court should enforce a restraint clause. This is that the enforcement of the restraint clause must be necessary to protect a proprietary interest on behalf of the party enforcing the restraint.⁵⁰ However, it must be remembered that the protectable proprietary interests guideline was a guideline developed specifically to deal with restraint cases. As explained above, given the context-sensitive nature of public policy, the primary guidelines applicable to each public policy enquiry will be different in the context of other types of valid clauses. In the context of other valid clauses, the court may identify a similar type of guideline that had already been established in the common-law or the court may develop a guideline in terms of their constitutional powers to develop the common-law in line with the Constitution.⁵¹ For example, in the context of non-variation clauses, the courts had developed the guideline that non-variation clauses were necessary to prevent future variations of the contract that were not put in writing (i.e., the *Shifren* principle).⁵² This principle gave effect to *pacta sunt servanda*. The *Shifren* principle thus became one of the multitude of policy factors that the court would take into account when deciding whether to enforce a non-variation clause.⁵³

⁴⁸ See 5.6.

⁴⁹ See 4.3.1.2.

⁵⁰ *Mozart* 83B – D.

⁵¹ S 39 of the Constitution.

⁵² See 3.2.1.1.

⁵³ See 3.2.1.

In all cases, the most weighty common-law factor weighing for enforcement would be *pacta sunt servanda* and legal certainty. This is primarily because *pacta sunt servanda* is regarded as one of the two principal policy considerations in determining whether *any* valid clause is contrary to public policy,⁵⁴ which is essential to upholding legal and commercial certainty in contract law.⁵⁵ Davis J in *Mozart* cautioned against upholding *pacta sunt servanda* as a prime factor generally outweighing all other policy factors in the public policy enquiry. However, Davis J acknowledged that “without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties”.⁵⁶ The Constitutional Court in *Beadica* recognises that *pacta sunt servanda* and legal certainty must be balanced with other public policy factors that may favour enforcement or non-enforcement. Much like the approach to constitutional factors, it is proposed that the weight afforded to *pacta sunt servanda* relative to other policy factors will depend on the subjective circumstances of the particular case.

6.2.3 The proposed model summarised

The guide or model proposed above can be summarised in terms of the following list of questions:

- a) Are there any interests of the applicant that are deserving of protection? [individual interests in favour of enforcement].
- b) Are those interests being prejudiced by the conduct of the respondent?
- c) If the interests are so prejudiced, how does that prejudice get weighed both qualitatively and quantitatively against the interests of the respondent? [individual interests in favour of non-enforcement].
- d) Are there any other aspects of public policy *as mediated by the values of the Constitution* and which are unrelated to the relationship between the parties that, nonetheless, require the clause either to be upheld or to be struck down? [community or public interests weighing either in favour of, or against, enforcement]. These factors may be sourced from the Constitution or the common law.

⁵⁴ *Barkhuizen* paras 87 and 150; *Basson* at 762; *Christie Law of Contract* 3 – 12; See 1.2.2.

⁵⁵ *Brisley* para 90; *Nyandeni* para 92.

⁵⁶ *Mozart* at 85.

- e) Does the clause go further than absolutely necessary to protect the legitimate interests of the applicant that they are deserving of legal protection in terms of the balancing exercise which I have outlined?

Equitable values such as good faith, ubuntu, reasonableness and fairness will inform the balancing exercise envisaged above.⁵⁷

6.3 Case Study (Nuisance clause) – The *Garden Cities* case

Having set out the proposed model that courts could adopt when dealing with unfair enforcement cases, this section tests the efficacy of this model by applying it to the facts of the *Garden Cities* case.

6.3.1 *The facts*

In *Garden Cities*, a body corporate (Northpine Islamic Society) sought to escape the enforcement of a nuisance clause on the basis that its enforcement would infringe on the right to freely practise one's religion in terms of s 15(1) of the Constitution.⁵⁸ The salient facts were that Northpine Islamic Society purchased an erven from an association not for gain (*Garden Cities*) in terms of a written sale agreement. The Northpine Islamic Society was formed to erect, establish and maintain a mosque and an Islamic institution known as a madrasah.⁵⁹ Doing so allowed members of the Society to conduct its religious practice freely and in terms of its religious rights under the Constitution. The written agreement contained a nuisance clause (clause 20) which provided the following:

- a) "The purchaser will conduct no activities on this erf which will, in the opinion of *Garden Cities*, be a source of nuisance or disturbance to other owners of erven in the township and, in particular, no sound amplification equipment will be used on or in the buildings and/or structures to be erected on this erf.
- b) No "call to prayer" will be made from the buildings and/or structures and the purchaser undertakes to install a light at the top of the minaret which will be switched on at the

⁵⁷ See 4.2.1.2.

⁵⁸ *Garden Cities* at 270.

⁵⁹ *Garden Cities* at 270A – F.

hour of prayer. The light to be installed will be used in such a way not to be a nuisance or disturbance to other owners of erven in the township”.

Despite these provisions, the Society installed sound amplification equipment in order to broadcast calls to prayer. The members of the community who lived in surrounding properties managed by Garden Cities filed complaints to Garden Cities that they were being disturbed by the sounds which came from the mosque. To resolve the complaints, Garden Cities demanded that the Society ask its members to cease from continuing the calls to prayer. However, the Society ignored the demand and insisted that the practice would continue. Aggrieved, Garden Cities sought to enforce the nuisance clause against the Society prohibiting it from using the sound amplification equipment to conduct the calls to prayer. In response, the Society argued that it was not obliged to abide by the clause because it infringed on the freedom of its members to practise their religion in terms of s 15(1) of the Constitution.⁶⁰ The facts illustrate a classic *Barkhuizen 2* situation, where the contract enforcer seeks to enforce a clause commonly found in property development contracts, and where the contract denier seeks to avoid its enforcement on the basis that it implicates a constitutional right.

Writing for the Cape Provincial Division of the High Court, Conradie J dismissed the claim advanced by the Society and enforced the nuisance clause because the Society failed to show that the prohibition on the use of sound amplification amounted to an infringement on the religious rights of its members. It is evident here that the court required the contract denier (the Society) to allege the facts, or provide evidence, showing that the enforcement of the clause infringed on its constitutional rights. Because the Society failed to discharge this onus, Conradie J ultimately held that the enforcement of the clause did not infringe on the constitutional right and was not contrary to public policy.

In deciding whether to enforce the nuisance clause, Conradie J had to determine whether its enforcement would be contrary to public policy. In light of the claim advanced by the Society, Conradie J held the following:

“I am prepared to assume in the respondent’s favour that chap 2 of the Constitution operates to protect an aggrieved contracting party at the time the contract is sought to be enforced. This would certainly be the case where *strong public policy considerations*

⁶⁰ *Garden Cities* at 272A – H.

are involved. I am not sure that this is the case here. I nevertheless make that assumption”.⁶¹

Therefore, Conradi J recognised that the rights embodied in the Constitution might provide relevant policy factors to be weighed against the enforcement of a contract in terms of *pacta sunt servanda*. Conradi J further recognised that there might be policy factors arising from the subjective factual circumstances of the case that may weigh against the upholding of the enforcement of the contract. Indeed this was taken into account since Conradi J relied on the Society to provide reasons why not being able to amplify the calls to prayer constituted an infringement on the ability of its members to exercise their constitutional rights. Furthermore, Conradi J’s use of the word “strong” suggested that the policy factors raised by the person seeking to avoid the enforcement of the clause must be regarded as adequate enough to outweigh the importance placed on *pacta sunt servanda*.

The claim on behalf of the Society failed because it did not provide adequate reasons for failing to comply with the clause.⁶² As illustrated in *Beadica*, a failure to provide adequate reasons will usually be the end of the matter. That is what happened in this case. Conradi J found that the reasons provided by the Society for failing to comply with the nuisance clause were not adequate to warrant a refusal of the enforcement of the clause. It is important to note that Conradi J’s reasoning was based only on the Society’s failure to prove an infringement of their constitutional rights. He did not, in his reasons, refer to other potential policy factors and how they may or may not have changed his reasons for enforcing the clause in this case. As will be shown below, these could have been Garden Cities’ interest in its property development, and whether those interests outweighed the Society’s interests to amplify their calls to prayer. His reasoning, with respect, could thus be regarded as rudimentary and abrupt. Therefore, the question is to what degree could the reasoning in *Garden Cities* have been improved if it had had the benefit of the *Beadica* and *Mozart* tests for unfair enforcement? Or rather, the method proposed in 6.2.3? In exploring this question, the following section seeks to determine how the guide proposed in 6.2 could have assisted in deciding the case in *Garden Cities* in a more systematic way.

⁶¹ *Garden Cities* at 271A – B. Emphasis added.

⁶² *Garden Cities* at 272D – H.

6.3.2 The relevant public policy factors

The following table is provided to illustrate the relevant policy factors that could have been identified from the facts in *Garden Cities*,

Factors in favour of enforcement	Factors in favour of non-enforcement
1) Individual interests a) Continued peaceful residency of persons in the various properties 2) Community or public interests a) Constitutional i) Dignity – section 10 ii) Freedom of association – section 18 b) Common-law i) <i>Pacta sunt servanda</i> ii) Freedom of contract iii) Law of nuisance iv) Certainty v) Social expedience vi) Legitimate purpose vii) Equal bargaining positions viii) Scope and extent of the clause (very limited) 3) Subjective circumstantial (factual issues) a) Body corporate had no intention to comply with clause b) Calls to prayer through sound amplification not fundamental to Muslim practice	1) Individual Interests a) Unrestricted use of sound amplification 2) Community or public interests a) Constitutional i) Freedom to practise religion, belief and opinion – section 15 ii) Freedom to practise culture – section 30 iii) Freedom to take part in cultural, religious and linguistic community – section 31 iv) Dignity – section 10 v) European Convention on Human Rights – Article 9.1 b) Common-law i) None raised by the Society 3) Subjective circumstantial (factual issues) a) None of significance

It is acknowledged that the factors indicated in the table have “the potential to pull in different directions” in that one factor may weigh either for or against enforcement depending on the facts of the particular case.⁶³ Furthermore, the emphasis that the courts place on each of these factors, and what they mean in a particular context, may change depending on how the court chooses to interpret them in light of the particular facts of the case.⁶⁴ The table is thus merely an illustration of the identification and balancing exercise that the courts in unfair enforcement cases could engage in when determining the enforcement of a valid clause.

⁶³ Kruger 2011 *SALJ* 730.

⁶⁴ *Brisley* para 94; *Barkhuizen* para 57; *Reddy* para 21; *Den Braven* para 52.

6.3.3 *The application of the proposed model*

6.3.3.1 *Factors in favour of enforcement*

The first identifiable factor that could arguably have been relevant on the facts is the commercial interest of Garden Cities to ensure the undisturbed residency of the persons living in its properties. The question that would follow is whether this was an interest that was worthy of protection. This would depend on whether the nuisance clause sought to protect and what it sought to prevent,⁶⁵ and was not included in the contract merely to restrict the Society's use and enjoyment of its property. It was clear that the restraint embodied in the clause existed for a legitimate purpose. That would be, to protect the other members of the community from any nuisance or disturbance that may have hampered on their quality of residence. A comparison could be drawn between this factor and the principle envisaged in *Mozart* that the restraint must serve to protect a legitimate interest on behalf of the contract enforcer, which is worthy of protection. On the facts, there was a legitimate reason for prohibiting the sound amplification; this was that the other members of the community would be disturbed if the sound amplification were to persist.

The question that follows is to what extent did this interest outweigh the individual interests of the Society? It can be said that the interest of the Society was to have unrestricted amplification of its calls to prayer. How would the Society be harmed if its calls to prayer were restricted to the use of the human voice, as proposed by Garden Cities? There is no apparent harm that would be faced by the Society in comparison to the harm that would be faced by Garden Cities if the calls to prayer continued. Therefore, on an individual interest level, it could be argued that Garden Cities' commercial interests outweighed the Society's interest in this case.

The next question is whether there are any other aspects of public policy *as mediated by the values of the Constitution*, and which is unrelated to the relation between the parties that, nonetheless, requires that the nuisance clause be enforced? These would be the community interests or other public policy factors that operate in favour of enforcement in this case. The first constitutional factors that could potentially have weighed in favour of enforcement were the constitutional values of freedom of association and dignity.⁶⁶ As explained in 6.2.2.1, these values were given effect to by *pacta sunt servanda* because "self-autonomy, or the ability to

⁶⁵ *Bradfield Christie's Contract* 427.

⁶⁶ *Beadica* para 35.

regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity".⁶⁷ Garden Cities could have argued that by expressly refusing to abide by the clause, the Society acted contrary to *pacta sunt servanda*. Refusing enforcement in these circumstances would thus have been contrary to public policy because it would have undermined Garden Cities' right to freedom of association and dignity.⁶⁸

Furthermore, the principle *pacta sunt servanda* was itself a possible common law factor weighing in favour of enforcement because the parties willingly and voluntarily agreed to be bound by the nuisance clause. *Pacta sunt servanda* provides that the courts will enforce contracts that are willingly and thoughtfully concluded. This promotes legal certainty because knowing this; parties will safely transact and conduct business with one another secure in the fact that their agreements will be honoured.⁶⁹ On the facts of the case, the Society expressed its intention not to comply with the nuisance clause. This would go against the principle *pacta sunt servanda* and implicate the contractual values of certainty and freedom of contract. Du Plessis explained that *pacta sunt servanda* gave effect to good faith and its underlying values.⁷⁰ The express refusal to comply with the clause also meant that the Society acted in bad faith – which meant that if the court allowed the refusal of the enforcement of the clause, it would be endorsing conduct that was contrary to good faith. Good faith requires concern for a contracting party's dignity and expectations when he or she concludes the contract.⁷¹ By refusing to abide by the clause, the Society certainly acted against the expectations of Garden Cities, and as stated above, violated the dignity of Garden Cities by not honouring its legitimate expectations in terms of their agreement. Therefore, the values of legal certainty and good faith, with reference to the subjective factual circumstances of the case, gave more weight to *pacta sunt servanda* in the balancing exercise of policy factors.

An additional common law factor in favour of enforcement was the nature of a nuisance clause in terms of its scope and extent. As explained in 5.3.2.3.1, the scope and extent of the clause would be a relevant factor in determining whether its enforcement would be contrary to public policy. For example, in this context, it would be contrary to public policy if the clause was too broad in the sense that it prohibited not only sound amplification but prohibited the calls to

⁶⁷ *Barkhuizen* para 57.

⁶⁸ In terms of s 10 of the Constitution.

⁶⁹ *Hutchison Contract* 22.

⁷⁰ Du Plessis 2017 (LLD Unisa 2017) 26.

⁷¹ Du Plessis 2018 *Stell LR* 386.

prayer as a whole. An outright prohibition of calls to prayer by the clause would be too broad a prohibition because calls to prayer are a core tenet of Muslim religion and practice, and its prohibition would thus have constituted an infringement of the Constitutional rights of the Society and its members. On the facts, however, the nuisance clause was limited in extent and scope, because it sought only to prohibit sound amplification of the calls to prayer and not calls to prayer as a whole. Accordingly, its nature was arguably not too broad in extent and scope, and its enforcement could have been argued to be consistent with public policy.

The principles arising out of the law of nuisance also present additional policy factors in favour of enforcement of the clause. This would be an appropriate identification to make since the clause in question could be classified as a “nuisance clause”. In *Laskey and Another v Showzone CC and Others*⁷² Binns-Ward J held that in common-law, everyone is, in general, permitted to use their property for any purpose they choose “provided only that the use of the property should not intrude *unreasonably* on the use and enjoyment by the neighbours of their properties”.⁷³ The reasonableness or not of the disturbance in this context is dependent on the circumstances of the case. Milton expressed the test for determining whether conduct is “nuisancesome” and is thus actionable:

“The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man, but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference with the comfort of his existence or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm”.⁷⁴

Binns-Ward J described the balancing exercise that had to take place in *Laskey* between the rights of the Society to conduct their religious practice against the rights of the other members of the community not to be disturbed by the sound amplification:

⁷² 2007 (2) SA 48 (C).

⁷³ *Laskey* at 19.

⁷⁴ W A Joubert *et al* (eds) *Law of South Africa (Lawsa)* 19 “Nuisance” para 189 at 135 – 136.

“The balance that falls to be struck in the context of acknowledging the mutual rights of neighbours to the free use and enjoyment of their property on the one hand and the obligation on them on the other hand to exercise those rights in a manner which does not unreasonably impinge on the equivalent rights of the other implies the necessity for some degree of what Milton describes as ‘mutual sacrifice’, in accordance with a principle of ‘give and take; live and let live’.”⁷⁵

It could be argued that the same policy considerations applied in *Laskey* apply to the facts in *Garden Cities*. The main argument that could be raised by *Garden Cities* is that it sought to prevent the Society from disturbing the other members of the community from the amplified calls to prayer. The question that could have been raised in light of the policy considerations raised in *Laskey* is whether the sound amplification was reasonable in light of the purpose it sought to achieve, balanced against the harm caused to the residents. It is submitted that this would have been a relevant policy factor to consider in determining whether the enforcement of the nuisance clause could be upheld or whether the court should have refused its enforcement. Its enforcement may have been refused if, for example, the court found that the sound amplification did not interfere with the rights of the neighbours, and was reasonably necessary for the Society and its members to exercise their rights to practise their religion. It was not clear from the facts in *Garden Cities* whether the sound amplification caused such a nuisance that it interfered in the daily lives of the members of the community. However, given the complaints *Garden Cities* received, it is safe to assume that it caused a considerable amount of disturbance to those members, which eventually led them to file complaints against the Society.

Whether this meant the disturbance was unreasonable depends on whether it was caused for a legitimate purpose. It is clear from the facts that even though the sound amplification was customarily used in many other communities, it was not necessary for the fulfilment of the Muslim calls to prayer. According to the principles of the law of nuisance, the calls to prayer by sound amplification, in these particular circumstances, was unreasonable. The unreasonableness of the sound amplification of the calls to prayer in terms of nuisance law, would, therefore, constitute as a policy factor favouring enforcement of the renewal clause. This policy factor would carry a significant degree of weight for the fact that there was nothing

⁷⁵ *Laskey* para 21; *Joubert Nuisance* para 187.

in the facts that indicated that the sound amplification was necessary for the fulfilment of the constitutional, common-law or other rights of the Society and its members.

The KwaZulu-Natal Local Division of the High Court, Durban recently held in *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another*⁷⁶ that sound amplification of the calls to prayer may be prohibited in certain circumstances if it is unreasonable. In this judgment, Mngadi J cited recommendations from the South African Human Rights Commission (the SAHRC) in a mediation between a resident (the applicant) and a Madrasah (the respondent) where the applicant reported the Madrasah's calls to prayer for being too disruptive and infringing on his quality of life.⁷⁷ The SAHRC recommended:

- a) That the mosque administered by the Isipingo Beach Muslim Association *desist from using the external sound amplifier system* during the first Call of Prayer of each day.
- b) That in respect of the other four Calls of Prayer the head of the mosque in consultation with a Latchiah or another Council representative will determine the appropriate level of amplification.
- c) That once the level of amplification is decided upon, it would be fixed at that point and not left to the discretion of the person calling others to pray.
- d) That each call of prayer to last no longer than three minutes.
- e) That the person calling others to prayer to use the equipment properly and to be one metre from the microphone.
- f) That the siren attached to Madrasah Taleemudeem to remain its location within the building. That whilst the amplifier system at the mosque being operated by the Isipingo Beach Muslim Association is operational, the Madrasah Teleemudem *would not use its facilities to call people to prayer through the sound amplifier outside the mosque*.⁷⁸

Mngadi J's judgment provided that where a party conceded that the calls to prayer did not need to be made in a way that interfered with the use and enjoyment of the private space of other members of the community, all that the residents needed to prove was that the calls to prayer

⁷⁶ (3848/2019) [2020] ZAKZDHC 32 (21 August 2020).

⁷⁷ *Ellaurie* paras 5 – 8.

⁷⁸ *Ellaurie* para 8. Emphasis added.

were causing an interference.⁷⁹ In support of this principle, Mngadi J cited the statement of Dickson CJ in the Canadian case *R v Big M Drug Mart Ltd*⁸⁰ with approval:

“The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice”.⁸¹

It was thus recognised that where calls to prayer are made in a manner that infringes on a person’s rights to use and enjoyment of their property, the court can make an order which provides that the calls to prayer not be done this manner. It is submitted that brought within the context of *Garden Cities*, and the reasonableness of the enforcement of the nuisance clause, the principles in *Ellaurie* and *Laskey* provide that a nuisance clause was enforceable in cases where sound amplification was used to amplify calls to prayer, and where that sound amplification caused a disturbance to members of the surrounding community.

A final policy factor that could have been considered was the bargaining position between *Garden Cities* and the Society. As explained in 5.3.2.4.1, if the parties contracted on an unequal basis, the court would consider this as a factor weighing against the enforcement of the valid clause. Did the parties in *Garden Cities* hold equal bargaining positions in the conclusion of the contract and during the contractual relationship? The bargaining position of the parties does not appear to be evident from the facts. There was no indication that *Garden Cities* exerted any influence over the Society which may have compelled the Society to comply to its terms. The fact that the Society was able to expressly refuse to abide by the terms of the nuisance clause may indicate that it carried some degree of power in the contractual relationship. On the assumption that this was indeed the case, a reasonable inference would be that the parties stood in equal bargaining positions. Therefore, the Society would not be able to rely on the bargaining

⁷⁹ *Ellaurie* para 19.

⁸⁰ 18 DLR (4th) 321.

⁸¹ *Big M Drug Mart* para 123.

position between itself and Garden Cities as a policy factor weighing against the enforcement of the nuisance clause.

6.3.2.2 *Factors in favour of non-enforcement*

Regarding the constitutional factors that could have weighed in favour of non-enforcement of the clause, the Society contended that the prohibition of the call to prayer infringed on the freedom of religion rights afforded to the Society and its members.⁸² This right is provided by s 15(1) of the Constitution which provides that “everyone has a right to freedom of conscience, religion, thought, belief and opinion”. The Constitutional Court described the freedom of religion in *S v Lawrence*; *S v Negal*; *S v Solberg*.⁸³

“The sense of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practise or by teaching and dissemination”.

In the present day, the Society’s argument could thus have been framed as follows. The enforcement of clause 20 would amount to a limitation on the right to freedom of religion and thus contrary to public policy in the particular circumstances because its enforcement prevented its religious practice (the amplification of the calls to prayer). This argument could have been supported by other constitutional factors such as the freedom to practise one’s culture in terms of s 30 of the Constitution, the right to take part in cultural, religious and linguistic communities in terms of s 31 of the Constitution and the right to dignity. Finally, as acknowledged by Conradie J,⁸⁴ Article 9.1 of the European Convention on Human Rights was also a relevant policy factor in determining the enforcement of the nuisance clause. It provides that:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practise and observance”.⁸⁵

⁸² *Garden Cities* 271A – C.

⁸³ 1997 (10) BCLR (CC) para 92.

⁸⁴ *Garden Cities* 272A – C.

⁸⁵ *Ibid.*

How much weight ought to be afforded to the constitutional factors identified on behalf of the Society? Garden Cities indicated that although the calls to prayer were central to the Muslim practice, the sound amplification, in particular, was not. Garden Cities sought only to prohibit the Society from amplifying the calls to prayer and did not seek to limit the Society's rights to conduct the calls to prayer as a whole. Therefore, the Society failed to prove that the sound amplification infringed on its (and its members) constitutional rights in terms of ss 15, 30, 31 and 10 of the Constitution. It follows that the enforcement of the nuisance clause could not have been found to implicate any constitutional rights or values negatively. Accordingly, the constitutional rights of the Society as policy factors against the enforcement of the nuisance clause would not have been afforded any weight in the balancing exercise to determine its enforcement. Furthermore – having found that the constitutional rights invoked by the Society were not relevant to the question of sound amplification – there were no other policy factors that could have weighed against *pacta sunt servanda* in the balancing exercise to determine enforcement. Given the facts of the case, it is therefore clear that *pacta sunt servanda*, the freedom of contract and legal certainty would have outweighed any potential factors that operated in favour of non-enforcement of the nuisance clause.

The final question that could have been asked was whether the nuisance clause went further than was absolutely necessary to protect the legitimate interests of the applicant that it was deserving of legal protection in terms of the balancing exercise that has just taken place. In other words, were there any other means Garden Cities could have employed to protect its residents from disturbance while allowing the Society to continue its amplified calls to prayer? There are no apparent alternatives that could have been employed to achieve the same purpose aimed at by the nuisance clause.

6.3.4 Concluding the balancing exercise

On a balance of the policy factors that could have been identified on the facts of *Garden Cities*, it can be demonstrated that there were many more public policy factors that weighed in favour of the enforcement of the nuisance clause. This confirms Conradie J's 1999 judgment and outcome, that the clause should have been enforced due to a lack of policy factors weighing in favour of non-enforcement of the nuisance clause.

The above case study illustrates how the guide proposed in this chapter may be useful in deciding unfair enforcement cases. It is useful because it allows the courts to engage in the

public policy enquiry in a systematic way, with clear steps to follow and questions to ask. The case study is not intended to provide a detailed *ratio* in place of the *ratio* by Conradie J. Rather, it is intended to show how the guide outlined in 6.2.3 could be applied in the context of a common *Barkhuizen 2*-type case to provide a more systematic methodology for arguing and adjudicating these challenging cases. The case study shows that by simply answering the questions set out in the guide, a court would be able to:

- a) Identify the relevant public policy factors.
- b) Attach a certain degree of weight to each factor with reference to the subjective factual circumstances of the case.
- c) Balance these factors against one another to determine which of them should be favoured, and thus whether the clause should be enforced or not.

6.4 Conclusion

This thesis examined the application of the doctrine of public policy to determine the enforceability of a valid clause. It was shown that before *Barkhuizen*, a test had not been established to determine the enforceability of a valid clause, only that the public policy enquiry existed as a means to test the enforceability of clauses that were objectively contrary to public policy. It was then shown that after *Barkhuizen* established the second leg of the public policy test to determine the enforceability of valid clauses, there was uncertainty as to how exactly this test should be applied due to the various interpretations accorded by later courts to the principles set out in *Barkhuizen*. It was shown that the uncertainty was resolved by the Constitutional Court in *Beadica*, but it was proposed that the *Beadica* judgment could have gone further by formulating a much more clear or methodological approach to determining the enforceability of a valid clause.

It was submitted that the above proposition was not an extreme or controversial one, because a methodological approach had already been developed from the 1980s in what we should now see in retrospect was a contextualised application of *Barkhuizen 2*: the reasonableness test in the context of restraint of trade agreements. It was shown that in that context, the courts have developed a clear guide to determining the enforceability of restraint clauses. A guide that has been regarded as trite in determining the enforcement of restraint clauses. By using a case study, it was shown that this guide was suitable because it assisted the courts in: (a) identifying the relevant community and individual interests, and other policy factors, (b) expressly required

that consideration be given to the Constitution and its values – including equitable values such as good faith, ubuntu, fairness and reasonableness, (c) required the courts to assess the factors in light of the facts of the case to determine the weight that each factor should carry on the decision as to whether the clause should be enforced or not and (d) required a balancing exercise that ensures that all the relevant factors are adequately weighed against one another. It was thus concluded that our courts could learn from the approach in restraint cases to formulate a general guide dealing with all types of valid clauses. This would encourage our courts to apply the doctrine of public policy in a uniform manner, and would effectively encourage clear, practical and consistent contractual enforcement analysis in South Africa.

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