THE ROLE OF GOOD FAITH, EQUITY AND FAIRNESS IN THE SOUTH AFRICAN LAW OF CONTRACT: THE INFLUENCE OF THE COMMON LAW AND THE CONSTITUTION*

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INTRODUCTION

The role of abstract values such as good faith and fairness in South African contract law needs to be considered against the wider background of the South African legal system and its historical development. South African private law is essentially uncodified1 and we must remember that, at the heart of this uncodified system lies seventeenth-century Roman Dutch law,2 which was the law of Holland at the time when the Cape of Good Hope was occupied, in 1652, by a Dutch commercial company, the Dutch East India Company. In 1806 the Cape was taken over by the British. The first Charter of Justice promulgated by the new colonial power in 1826 created a new Supreme Court, headed by a Chief Justice and two other judges who were to be appointed from the bars of the United Kingdom. The charter further provided that the substantive law to be applied by the court was the existing legal system — ie Roman Dutch Law — but that the judges could formulate their own law of procedure.3 Because the newly appointed judges were trained and formerly practiced in a common-law system, they superimposed the procedure known to them as well as the principle of stare decisis on the

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1 Despite mini-codifications of some of its constituent parts, such as the Companies Act 61 of 1973, the Insolvency Act 24 of 1936, the Bills of Exchange Act 34 of 1964 and the Intestate Succession Act 8 of 1987.
2 A term coined by the Dutch author Simon van Leeuwen in his work Het Roomsch Hollandsch Recht (1664).
basic system of Roman Dutch law. Moreover, since these first judges at the Cape were more comfortable with the English language, they often resorted to English law when difficulties arose. The other geographical areas that eventually formed part of what is now the Republic of South Africa, followed closely in the footsteps of the Cape Colony. And so it came about that we joined the small group of jurisdictions — which includes Scotland, Louisiana and Sri Lanka — that are classified as mixed legal systems.

With the passage of time, the system of precedent or stare decisis also provided the South African judiciary, and particularly those on the higher rungs of the court hierarchy, with a medium to develop our system of uncodified common law. By modifying, extending or supplementing these common-law principles, the courts have sought to keep the law in tune with changing social needs and values. By its very nature, however, the system does not lend itself to radical change. It has an inherent restraint, in that judges who take steps forward do so in the knowledge that they are not only deciding the cases before them, but that they are laying down the the ground rules for deciding tomorrow’s cases as well. The result is that changes by the courts are implemented incrementally — and as far as possible — within the framework of existing legal principles.

A far more recent source of influence on the South African law of contract is the 1996 Constitution. After 1994, South Africa, for the first time, attained a Bill of Rights which became part of the 1996 Constitution. It has been said that the Bill of Rights represents a value system rather than a compilation of rules. This value system was ordained by the Constitution as the supreme law of the land. Accordingly, any rule of contract law in conflict with the supreme law is no longer valid. Moreover, the courts are enjoined by the
Constitution, when developing the common law, to promote the spirit purport and object of the Bill of Rights.\textsuperscript{9}  

The Constitution also created a so-called ‘twin apex’ court system; that is, the Constitutional Court, which has the final say in constitutional matters, and the Supreme Court of Appeal, which is the highest court in non-constitutional matters.\textsuperscript{10} In accordance with the principles of stare decisis, these two courts thus bind all courts — including each other — in their respective fields of final jurisdiction.  

Finally, by way of introduction, I should point out that in South African legal parlance, the concept of bona fides or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness and equity.\textsuperscript{11}

GOOD FAITH AND THE EXCEPTIO DOLI GENERALIS

Historically speaking, one of the main instruments employed by the courts to transport abstract values of fairness and equity into our substantive contract law, was the Roman-law defence of ‘bad faith’ — the exceptio doli. As described by Professor Reinhard Zimmermann,\textsuperscript{12} with reference to decided cases, the South African courts had over many years used the exceptio doli to introduce various equitable doctrines, mostly originating from English law, but unknown to Roman Dutch law — such as fictional fulfilment of conditions,\textsuperscript{13} rectification,\textsuperscript{14} and estoppel\textsuperscript{15} into our contract law.\textsuperscript{16}

\textsuperscript{9} Section 39(2).
\textsuperscript{10} See ss 167 and 168 of the Constitution
\textsuperscript{11} See Tucker’s Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 651C–F, described by Reinhard Zimmermann & Daniel Visser ‘Introduction, South African law as a mixed legal system’ in Zimmermann & Visser Southern Cross (1996) 1 at 25 as a case where ‘the concept of bona fides has been exploited in grand style’. The same shift in the meaning of bona fides seems to have occurred in the contract law of other systems derived from Roman law. So, e.g., in the Netherlands, this has resulted in the substitution of ‘goede trouw’ in the old Burgerlijk Wetboek (BW) with ‘redelijkheid en billijkheid’ in art 6:248 of the 1992 BW. (See A S Hart-kamp Verhoudingsrecht Aser-serie Deel II (11 ed) para 303. Similar developments also occurred in Germany with regard to the ‘Treu und Glauben’ provision in § 242 of the Bürgerliches Gesetzbuch (BGB). See Reinhard Zimmermann and Simon Whittaker Good Faith in European Contract Law 30–1.
\textsuperscript{12} Reinhard Zimmermann ‘Good faith and equity’ in Zimmermann & Visser op cit note 4, 217 at 221ff.
\textsuperscript{13} See MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 591; Gowan v Bowen 1924 AD 550 at 567.
\textsuperscript{14} See Weinerlein v Goch Buildings Ltd 1925 AD 282 at 292 (per Wessels) and at 296 (per Kotze JA).
\textsuperscript{15} See Waterfall Estate & Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd 1905 TS 717 at 722, Sunday v Surrey Estate Modern Meat Market (Pty) Ltd 1983 (2) SA 521 (C) at 526.
\textsuperscript{16} Of significance is the fact that the courts always found it necessary to interpose instruments of hard contract law between these abstract values and their application.
Unfortunately the exceptio doli met with a fatal accident in 1988. It happened in the case of Bank of Lisbon and South Africa Ltd v De Ornelas\(^{17}\) when Joubert JA, writing for the majority, decided that the time had come to bury the exceptio doli as a ‘superfluous defunct anachronism’. ‘Requiescat in pace’, he said, with a final wave of farewell.\(^{18}\) However, the dramatic funeral of the exceptio doli was not in itself a calamity of major proportions. The instrument was so entangled in its history that it could in any event not without considerable difficulty be employed by modern courts.\(^{19}\) However, certain dicta in the judgment of Joubert JA\(^{20}\) were of greater concern to a number of academic authors,\(^{21}\) since they were capable of the interpretation that the rules of our law of contract have become so firmly established that there is no room for any further development so as to give effect to bona fides, fairness and equity, even when this were to be demanded by the changing needs or values of society.

**PUBLIC POLICY**

Somewhat paradoxically, the seed of an idea to use an alternative concept, namely that of public policy, as a doctrinal gateway for the introduction of fairness and good faith into our contract law, was planted at the funeral of the exceptio doli. It occurred when Jansen JA said the following in his minority judgment in the Bank of Lisbon case:\(^{22}\)

‘The exceptio doli generalis constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or boni mores (cf Ismail v Ismail).\(^{23}\) Conceivably they to contractual relationships. See Dale Hutchison ‘Good faith in the South African law of contract’ in Roger Brownsword, Norma J Hird and Geraint Howells (eds) *Good Faith in Contract, Concept and Context* (1999) 236.

\(^{17}\) 1988 (3) SA 580 (A); and cf Rand Bank v Rubinstein 1981 (2) SA 207 (W).

\(^{18}\) Ibid at 607B.


\(^{20}\) See the judgment at 605I–606B; and also — at 606D — the reference with apparent approval to the following statement by Kotze JA in Weinerlein v Goch Buildings Ltd supra note 16 at 295: ‘Our common law, based to a great extent on the civil law, contains many an equitable principle, but equity, as distinct from and opposed to law, does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of law.’

\(^{21}\) See Gerhard Lubbe ‘Bona fides, billikheid en openbare belang in die Suid-Afrikaanse kontraktereg’ (1990) 1 Stellenbosch LR 7; Zimmermann op cit note 12 at 236 and idem ‘Law of obligations — Character and influence of the civilian tradition’ (1992) 3 Stellenbosch LR 5; L F van Huyssteen & Schalk van der Merwe ‘Good faith in contract: Proper behaviour amidst changing circumstances’ (1990) 1 Stellenbosch LR 244; Hutchison op cit note 16 at 221.

\(^{22}\) Bank of Lisbon at 617G–H.

\(^{23}\) 1983 (1) SA 1006 (A) at 1025F–1026C. In view of the new constitutional dispensation the views regarding the boni mores of our society in *Ismail*, with reference to potentially polygamous marriages must be regarded as out-dated. See Ryaland v Edos 1997 (2) SA 690 (C) and Amod v Multilateral Vehicle Accident Fund 1999 (4) SA 1319 (SCA).
may overlap: to enforce grossly unreasonable contract may in the appropriate circumstances be considered as against public policy or *boni mores*."

Jansen JA was referring, of course, to the principle of South African law that an agreement must be legal to be enforceable, coupled with the further principle that an agreement which is contrary to public policy is said to be illegal and therefore not enforceable.24 Though these are well-established principles, the idea to extend them to contracts that are grossly unreasonable, however, was new.

The seed planted by Jansen JA grew to fruition a mere six months later in *Sasfin (Pty) Ltd v Beukes*.25 As in most cases where the boundaries of law are moved forward, the facts in *Sasfin* cried out for an extension to the law. Dr Beukes was a specialist anaesthetist who borrowed money from Sasfin. As security for the loan, he signed a deed of cession in favour of Sasfin. In terms of the deed of cession he effectively placed Sasfin in control of all his professional earnings. As a result, Dr Beukes could effectively be deprived of his whole income and the means of support for himself and his family. To that extent, he was, as Smalberger JA put it in the majority judgment, ‘virtually relegate to a slave, working for the benefit of Sasfin’.26

These provisions in the deed of cession, the majority of the court decided, were so unreasonable that their enforcement would be contrary to public policy. And because these offending clauses were not capable of being severed from the rest of the contract, according to the majority, they rendered the entire cession invalid and unenforceable. However, in formulating the reasons for the judgment, Smalberger JA, expressed inter alia the following reservation:27

‘No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness . . . In the words of Lord Atkin in *Fender v St John-Mildmay*:

[28] “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds.”’

On the facts, the result of *Sasfin* was not controversial. The controversy arose from the application of that principle in subsequent cases. Thus, shortly after *Sasfin*, the Witwatersrand Local Division held that certain provisions in

24 See *Robinson v Randfontein Estates G M Co Ltd* 1925 AD 172 at 204–5; Schalk van der Merwe, L F van Huyssteen, M F B Reinecke, G F Lubbe *Contract: General Principles* 3 ed (2007) 191ff; Christie op cit note 19 at 344ff.

25 1989 (1) SA1 (A).

26 Ibid at 13H.

27 Ibid at 9B–G.

28 [1937] 3 All ER 402 (HL) at 407B–C.
the standard suretyship contract of a leading commercial bank were so unreasonable that they were contrary to public policy and therefore invalid. This gave rise to a plethora of cases, particularly in the Witwatersrand Local Division, in which sureties raised a defence of 'contrary to public policy for unreasonableness' whenever banks claimed against them on suretyship agreements. The defence became so popular that one judge expressed the view that it 'has come to be regarded as a free pardon for recalcitrant and otherwise defenceless debtors' while in another case it was described as 'the favourite defence of last resort'.

What turned out to be rather embarrassing for the judges in the former Transvaal was that specific clauses in standard suretyship contracts of the same bank were held by some judges to be so unreasonable that they should not be enforced, while other judges found the very same clauses acceptable and enforceable. It even happened that the same judge declared the same clause in a contract unenforceable in one case and acceptable in another. In the Cape High Court the Judge President learned from the Transvaal experience. When the 'favourite defence of last resort' was first raised in that court, he appointed a full bench of three judges, whose decision would then, of course, bind all single judges of that court. This gave rise to the judgment of the full court in Standard Bank of SA Ltd v Wilkinson, which managed to stem the tide of cases where the 'contrary to public policy for unreasonableness' defence was raised. It did so by underscoring the caveat so pertinently given by Smalberger JA in Sasfin, namely that a provision in a contract cannot be declared invalid for reasons of public policy merely because it offends the sense of fairness of the individual judge. Public policy can only be invoked, so the Cape full court held, in cases where the contract — or part thereof — is so unreasonable that the harm to the public is substantially incontestable.

The decision in Bank of Lisbon also gave rise to a further consequence. There were those who suggested that this decision made it necessary for the legislature to intervene. This led to an enquiry by the South African Law Commission into the question 'whether the courts should be enabled to remedy contracts or contractual terms that are unjust or unconscionable and thus to modify the application to particular situations before the courts of such contracts or terms so as to avoid the injustices which would otherwise ensue'. In its report on the matter, presented in April 1998, the Law Commission recommended that the courts should have the power to modify contracts or terms that are unjust or unconscionable. This would allow the courts to rectify contracts where they are found to be unconscionable or unfair, thereby preventing the harm to the public that would otherwise ensue.

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29 Donelly v Barclays National Bank Ltd 1990 (1) SA 375 (W) at 381F.
30 Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1992 (4) CLD 314 (W) at 315.
31 CFD Engineering Co (Pty) Ltd v Morkel 1992 (3) CLD 228 (T) and Volkskas Bank Ltd v Theron 1992 (4) CLD 336 (T).
32 1993 (3) SA 822 (C).
33 Ibid at 828A–B.
34 See note 35 infra at 1.
Commission introduced a draft bill. Broadly stated, the draft bill recommended that courts should be afforded jurisdiction to amend or rescind a contract, or any of its terms, if it is of the view that the enforcement of the contract, or some of its provisions, would be unreasonable, unconscionable or oppressive.36

The project committee’s proposal elicited objections from various quarters. For example, one such objection was succinctly formulated as follows:

’[T]o give the courts a carte blanche discretion to strike down contracts on the basis of “unconscionability” . . . would in all likelihood provoke much legal and commercial uncertainty: contractual litigation would mushroom, the expectations of contracting parties could be frustrated, and the courts would in all probability differ regarding the application of such wide principles.’37

As a result of these objections (it may be surmised), Parliament has not reacted to the proposal of the Law Commission, though it was presented some ten years ago. The chances that the legislature will ever do so are becoming increasingly remote. I say this because the legislature’s tendency seems to be rather to intervene with more specific legislation aimed at circumscribed types of contracts, particularly in the field of consumer protection. This does not mean, however, that the report had no influence on the general law of contract. The project leader of the sub-committee of the Law Commission responsible for the report was Mr Justice Olivier of the Supreme Court of Appeal and it requires little imagination to infer that the

36 Section 1 of the draft bill provides as follows:
’If a court is of the opinion that:
(a) the way in which a contract between the parties or a term thereof came into being; or
(b) the form or the content of a contract; or
(c) the execution of a contract; or
(d) the enforcement of a contract
is unreasonable, unconscionable or oppressive, the court may declare that the contract —
(aa) did not come into existence; or
(bb) came into existence, existed for a period and then, before action was brought, came to an end; or
(cc) is in existence at the time action is brought, and it may then
(i) limit the sphere of operation and/or the period of operation of the contract; and/or
(ii) suspend the operation of the contract for a specific period or until specified circumstances are present; or
(iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.’

recommendations of the sub-committee induced his minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*.\(^{38}\)

The plaintiff in *Saayman*, (the respondent on appeal) was acting in her capacity as curatrix bonis for her mother, Mrs Malherbe. She was appointed in that capacity because Mrs Malherbe was declared to be incapable of managing her own affairs. Prior to that declaration, Mrs Malherbe had signed a deed of suretyship in favour of First National Bank (the appellant on appeal) for the debts of her son. After her appointment as curatrix bonis, Mrs Saayman instituted an action in the Cape High Court for the suretyship to be set aside. The court of first instance found that, on the evidence presented, Mrs Malherbe lacked contractual capacity and that the suretyship therefore stood to be set aside on that basis. On appeal to the Supreme Court of Appeal, four judges agreed with both the reasoning and the conclusion of the Cape High Court.

These findings in the case can hardly be described as novel or ground-breaking. After all, it is a trite principle of South African law that a person who lacks contractual capacity cannot conclude a valid contract. Rather, the relevance of the case lies, as I have said, in the minority judgment of Olivier JA. He started out by saying that he did not agree with the factual finding by the trial court and the majority on appeal that Mrs Malherbe lacked contractual capacity when she signed the suretyship agreement. Despite this finding, he concluded that Mrs Malherbe was not bound by the agreement that she signed — but on what basis? Broadly stated, on the basis that in the circumstances of the case, principles of bona fides, equity and good faith militated against the strict application of established rules of contract and that, in the event, the court is entitled to refuse to enforce the terms of the contract between the parties; though such enforcement may be dictated by the strict rules of contract law.\(^{39}\) For this thesis the learned judge relied, inter alia, on the good faith provisions of the German Civil Code (§ 242 BGB) and the Dutch code (art 6: 242 BW),\(^{40}\) to which I will presently return.

The minority judgment by Olivier JA gave rise to uncertainty and controversy in the high courts. In *BOE Bank Bpk v Van Zyl*,\(^{41}\) for example, the defendant, Van Zyl, signed as surety for his son-in-law in favour of the plaintiff-bank. When the bank sued him on the suretyship, his defence was one of duress, alternatively undue influence. In support of these defences he contended that he signed the suretyship because the bank had threatened to lay criminal charges against his son-in-law and, though he was not particularly fond of the latter, he did not want his daughter and grandchildren to suffer the indignity of seeing him go to prison.

\(^{38}\) 1997 (4) SA 302 (SCA) at 318ff.

\(^{39}\) Ibid at 326G (my translation from the original Afrikaans). See also 321A–C, 322A–E and 331D–E.

\(^{40}\) Ibid at 326J–328G.

\(^{41}\) Decided on 9 March 2000, but only reported in 2002 (5) SA 165 (C).
On these facts, the court of first instance upheld the defence of duress. On appeal to a full bench it was decided, however, that Van Zyl’s situation did not satisfy the requirements of either duress or undue influence. Van Zyl then raised a further defence — based on the minority judgment by Olivier J in *Saayman* — that the court should in any event refuse to enforce the suretyship agreement because the bank acted contrary to the principles of fairness and good faith. The full bench was, however, not persuaded that the minority judgment in *Saayman* constituted authority for the proposition that the considerations of good faith, equity and fairness by themselves constituted an independent basis for the court’s interference in contractual relationships. Olivier JA could not have intended, so the full court held, effectively to abolish the requirements of defences such as duress and undue influence, which had been developed and carefully formulated over many years by decisions of the South African courts.

A different approach was adopted in *Janse van Rensburg v Grieve Trust CC*. The case concerned the contractual remedy known as the *actio quanti minoris* which had been introduced to the Roman law of purchase and sale by the officials responsible for the Roman marketplace, called the aediles curules. It provided relief to the purchaser in cases of undisclosed latent defects in the thing sold, or where innocent misstatements were made by the seller regarding the quality of the merx, and in this case Van Zyl J concluded that the minority judgment in *Saayman* authorized him to amend the rules of this ancient remedy to apply also the seller where a traded-in car made up part of the pretium – on the basis that, in his view, the original rules gave rise to an unfair result.

In two cases, *Mort NO v Henry Shields-Chiat* and *Miller & another NNO v Dannecker*, the Cape High Court arrived at more or less the same conclusion as Van Zyl J about the effect of the minority judgment in *Saayman*. The *Miller* case related to a rule known as the *Shifren* principle, named after the 1964 Appellate Division case in which it was formulated, *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*. The import of the decision in *Miller* was that the minority judgment in *Saayman* authorized high courts to deviate from the *Shifren* principle, though long-established by the Appellate Division, whenever they found the application of the rule to be unfair.

42 See *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C).
43 2002 (5) SA 165 (C) para 63.
44 Ibid paras 64–7.
45 2001 (1) SA 315 (C).
47 *Janse van Rensburg* at 325B–326I.
48 2001 (1) SA 464 (C) at 474f–475I.
49 2001 (1) SA 928 (C) para 19.
50 1964 (4) SA 760 (A).
The *Shifren* decision was of interest because it constituted the outcome of an intense debate raging at the time, where both the opposing arguments relied on considerations of fairness and equity and where both sides invoked the principles of *pacta sunt servanda* in support of their respective positions. The issue was whether a clause in a contract, to the effect that ‘no variation of the contract will be of any force and effect unless reduced to writing and signed by both parties’, should be acknowledged as enforceable in law. Prior to the *Shifren* decision, supporters of the clause argued that it serves the fair and equitable commercial purpose of limiting factual disputes in litigation and that the refusal to enforce it would amount to an unjustifiable negation of the principle, that both parties to a contract are bound to that to which they voluntarily agreed. Their opponents argued that the enforcement of the clause constitutes a limitation on the freedom of the parties to agree to change their minds and, where they have in fact entered into an oral variation agreement, to an unjustifiable negation of the subsequent agreement. Apparent to all was that, whatever course came to be chosen, there could be inequity and unfairness in a particular case.

As appears from the reported judgment in *Shifren*, the Appellate Division considered the opposing arguments raised in the preceding debate and then took the policy decision that a non-variation clause should, in principle, be regarded as valid and enforceable. What the judgment in *Miller* amounted to, was a reversal of that policy decision, in direct conflict with the principle of *stare decisis*. Moreover, if the decision were to stand, the outcome of any future reliance on a *Shifren* clause would depend on the position taken by the individual judge in the policy debate. In the result, parties to litigation would have no idea whether the non-variation clause in their contract would be enforced or not.

Not unexpectedly, the correctness of the *Miller* decision came up for consideration by the Supreme Court of Appeal in the case of *Brisley v Drotsky*,51 in which Olivier JA was again a member of the five judge bench. The lease between the parties in the case contained a typical *Shifren* or non-variation clause. Despite this clause, the lessee (Brisley) relied on an oral variation agreement as the basis for her defence. The response by Drotsky (the lessor) was of course based on *Shifren*. Relying on the *Dannecker* case, Brisley’s counter argument departed from the premise that the minority judgment in *Saayman* constituted authority for the proposition that considerations of good faith and equity trumped a reliance on a non-variation clause. In considering this argument52 the majority of the judges in *Brisley* — with Olivier JA dissenting — pointed out that the minority judgment of the latter in *Saayman* represented the view of a single judge based on findings of fact with which the four other members of the court did not agree. They held that the Cape High Court decisions in *Janse van
Rensburg, Mort and Miller were wrongly decided in that they relied on the incorrect premise that High Court judges were authorized by the minority judgment in Saayman not to apply established rules of contract law whenever they regarded the result of such application as unreasonable or unfair.\(^{53}\)

As to the role of good faith, reasonableness and fairness the majority held that:

(a) although these abstract values are fundamental to our law of contract, they do not constitute independent, substantive rules that courts can employ to intervene in contractual relationships;

(b) although these abstract values perform creative, informative and controlling functions through established rules of contract law, they cannot be acted upon by the courts directly; and that,

(c) when it comes to interference with contractual relationships, courts can only do so if permitted by the rules of hard law and, although these abstract values support and justify the rules of hard law, they do not constitute rules of hard law themselves; and further that

(d) past experience has shown that acceptance of the notion that judges can refuse to enforce a contractual provision, merely because it offends their personal sense of fairness and equity, gives rise to intolerable legal and commercial uncertainty.

Shortly after Brisley, similar issues arose before the Supreme Court of Appeal in Afrox Health Care Ltd v Strydom.\(^{54}\) Afrox was the owner of a private hospital. Strydom was admitted to the hospital for an operation and post-operative treatment. Upon admission he signed a standard-form contract which contained an exemption clause absolving the hospital from liability for damages arising from the negligence of its nursing staff. After the operation, negligent conduct by a nurse led to complications. Strydom sued Afrox for the damages that he suffered as a result of these complications. In defence Afrox relied on the exemption clause. Strydom’s answer to this defence was twofold: first, that it was contrary to public policy and, secondly, that the effect of the clause was unreasonable, unfair and in conflict with the principles of good faith.

In support of his answer based on public policy, Strydom relied mainly on s 27(1)(a) of the Constitution, which guarantees the right of every person to medical treatment. To this argument, I will presently return. As authority for his second answer he relied on the minority judgment of Olivier JA in Saayman. In this regard the court confirmed its decision in Brisley v Drotsky, namely that good faith, reasonableness and fairness do not provide an independent or free-floating basis for interfering with contractual relation-

\(^{53}\) See also South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) para 27; Christie op cit note 19 at 17.

\(^{54}\) 2002 (6) SA 21 (SCA).
ships. Consequently it held that Afrox’s reliance on the exemption clause could not be denied on this ground.55

A practical illustration of how the underlying abstract values of good faith and equity operate in South African law is to be found in the more recent judgment of the Supreme Court of Appeal in *South African Forestry Co Ltd v York Timbers Ltd.*56 The facts of the case are fairly complicated. Broadly stated, however, the dispute arose from (very) long-term contracts for the supply of saw logs from the plantations of the South African Forestry Company (Safcol) to the sawmills of York. Because the duration of the contracts was so long, they provided for a revision-of-price mechanism which required a certain amount of cooperation from York. Through a series of clever manoeuvres, York succeeded, however, to avoid these revision procedures, which enabled it to sell its timber at prices 60 per cent lower than its competitors, who also obtained their saw logs from Safcol under similar contracts, but who had cooperated in price-revision proceedings. In the event Safcol sought to cancel the contracts, essentially on the basis that York’s conduct was in conflict with the dictates of fairness, reasonableness and good faith. In the High Court, York successfully resisted the cancellation, but this decision was set aside on appeal in the Supreme Court of Appeal. In the course of its judgment, the court confirmed the position it took in *Brisley* and *Afrox,* namely that abstract values do not constitute substantive rules that can be employed by the courts to intervene in contractual relationships, but that these values perform creative, informative and controlling functions through established rules of contract law.57 Two examples of how these values operate in practice appear from further statements in the judgment.

First, with reference to terms implied by law — the so-called naturalia of the contract — the court said:58

‘Unlike tacit terms which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our courts’ approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly their powers of complementing or restricting the obligations of parties to a contract by implying that these should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith.’

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55 Ibid paras 31–2.
56 2005 (3) SA 323 (SCA). See also the general comment by Davis J regarding this decision in *Harlequin Duck Property 204 v Elizabeth Anne Fieldgate t/a Second Hand Rose* [2006] 4 All SA 573 (C) at 582.
57 See para 27.
Secondly, with reference to the interpretation of contracts, the court stated:\(^{59}\)

‘The question whether parties have complied with their contractual obligations depends on the terms of the contract as determined by proper interpretation. The court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, because it may be regarded as unfair to one of them. . . . [However] in the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. . . . While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different where a contract is ambiguous. In such a case the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.’

In accordance with this approach to interpretation, the court eventually held that, although the terms of the contracts imposed no express duty on York to assist Safcol in the exercise of its right to seek a price increase, the underlying principle of fairness and good faith requires the importation of this duty either through the interpretation process or by incorporation of an implied term. And because York had failed to comply with this contractual obligation, Safcol was entitled to cancel the agreements.

With regard to the present state of South African law, I therefore find myself in agreement with Professor Hector MacQueen when he says: \(^{60}\)

‘In neither Scots nor South African contract law is there an active general principle of good faith . . . [and] in both systems the role of good faith is to inform and explain the rules of the law of contract and, when necessary, to provide the basis for amending these rules. In neither of the two systems, however, is good faith recognised an independent or free-flo\(\text{a}\)ating basis for the setting aside or amendment of a contract.’

I also find myself in agreement with Lord Hope of Craighead’s statement in the House of Lords\(^{61}\) that

‘good faith in Scottish contract law, as in South African law, is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature’.

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\(^{59}\) South African Forestry paras 30–2. See also Dharumphal Transport (Pty) Ltd v Dharumphal 1956 (1) SA 700 (A) at 706–7; Mittermeier v Skema Engineering (Pty) Ltd 1984 (1) SA 121 (A) at 128A–C; G F Lubbe & C M Murray Farlam and Hathaway Contract Cases Materials and Commentary 3 ed (1998) at 468 para 6.


\(^{61}\) R (European Roma Rights) v Prague Immigration Officer [2005] 2 AC 1 (HL(E)) para 60.
THE INFLUENCE OF THE CONSTITUTION

This brings me to the following question: how will this position be influenced by the Constitution, and more particularly, by the Bill of Rights?

Following the guidance of the Constitutional Court in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* — which concerned the law of delict — the Supreme Court of Appeal, in *Brisley and Afrox*, and again in *Napier v Barkhuizen*, employed the concept of public policy as the doctrinal gateway for the importation of constitutional values into the law of contract. On appeal in the last-mentioned case, reported as *Barkhuizen v Napier*, this approach was endorsed by the Constitutional Court. In accordance with this approach, a contractual provision that is in conflict with the values enshrined in the Constitution will be regarded as contrary to public policy and consequently unenforceable. In the result, those who seek to avoid a contractual provision on constitutional grounds, usually contend that that provision amounts to an infringement of a specific constitutional guarantee. Thus, for example, it was contended in *Afrox* that the exemption clause in favour of the private hospital was in conflict with the right to health care services guaranteed in s 27(1)(a) of the Constitution.

In *Barkhuizen* the term in the Lloyds’ insurance contract objected to provided that, if the underwriters were to repudiate a claim under the policy, they would be released from liability unless summons was served on them within 90 days of the repudiation. This provision was attacked on the basis that it was in conflict with s 34 of the Constitution, which guarantees free access to an independent tribunal. In both these cases the courts therefore had to decide on the validity of the complaint by comparing the contractual provision objected to with the constitutional guarantee relied upon. In *Afrox* it was found that the infringement of the constitutional provisions relied upon had not been established on the facts presented in evidence. The same conclusion was reached by the majority of the Constitutional Court in *Barkhuizen*, while the minority held otherwise. In future, similar attacks can be expected against contractual provisions on the basis that they offend

62 2001 (4) SA 938 (CC) paras 54–6.
63 2006 (4) SA 1 (SCA).
64 2007 (5) SA 323 (CC) paras 28–9.
65 The same gateway, ie that of public policy, appears to have been used for the introduction of constitutional values into the law of contract in other jurisdictions. See Hector MacQueen ‘Delict, contract and the Bill of Rights: A perspective from the United Kingdom’ (2004) 121 SALJ 359; the *Lüth* decision of the German Federal Constitutional Court BVerfGE 7, 198; David P Currie *The Constitution of the Federal Republic of Germany* (1994) 181ff; Mathias Habersack & Reinhard Zimmermann ‘Legal change in a codified system: Recent developments in Germany’s suretyship law (1999) 3 Edinburgh LR 272 at 281; Chantal Mak *Fundamental Rights in European Contract Law* (2008) 60–1 (Germany) and 79–80 (Netherlands); Hartkamp op cit note 11 para 45a.
66 *Barkhuizen* paras 19–22.
67 See paras 52, 66 and 67. See also the judgment of the SCA in *Napier* paras 17ff.
68 See Moseneke DCJ at paras 109–115.
specifically entrenched constitutional values such as non-racism, non-sexism, the sanctity of life, freedom of trade, or the freedom to pursue one’s occupation or profession. Each time this happens the outcome will depend on the court’s exercise of a value judgement.69

A careful reading of the different judgments in Barkhuizen70 shows the core investigation to have been whether the enforcement of the time-limitation clause involved would in the circumstances be reasonable and fair. The basis of this approach, as I understand the judgment, is not because the court regarded the abstract values of reasonableness and fairness as independent grounds for interference with contractual relationships, but because it concluded, in the exercise of its value judgment, that s 34 of the Constitution contains no absolute bar against time-limitation clauses and, consequently, that there is no reason why public policy would not tolerate such a clause if it affords the claimant a reasonable and fair opportunity to seek judicial redress.71

Thus the question remains: what, if anything, is the impact of the Constitution on the abstract values of fairness, equity and good faith — on the one hand — and the value expressed by the maxim pacta sunt servanda — on the other — none of which is, of course, specifically mentioned in the Bill of Rights? In Brisley72 Cameron JA found support for the principle of pacta sunt servanda in the constitutional values of dignity and freedom. ‘Contractual autonomy’, he said, ‘is part of freedom’ and ‘shorn of its obscene excesses, contractual autonomy also informs the constitutional value of dignity’; by which he understood, ‘the liberty to regulate one’s life by freely engaged contractual arrangements’.73 Academic authors74 criticized this view on the basis that it over-emphasizes the ‘empowerment based’ aspect of dignity while at the same time ignoring another aspect of dignity, namely that aspect which demands that a human being should never be treated as the means to an end, but always as an end in itself, and this imposes a limitation on the contractual freedom of the other party. In the same vein, the values of freedom and dignity were used by the German Federal Constitutional Court (the Bundesverfassungsgericht)75 to find an unduly burdensome agreement unconstitutional. This is so, the court said, because:

\[\text{‘where one of the parties [to a contract] dominates to such an extent that he or she can, for all practical purposes, unilaterally determine the content of the} \]

69 See Johannesburg Country Club v Stott 2004 (5) SA 511 (SCA) para 12; Brisley supra note 51 paras 91–2; Napier (SCA) supra note 63 para 14.
70 See paras 56–67 (Ngcobo J); paras 94–112 (Moseweke DCJ).
71 See paras 45–52 (Ngcobo J); para 93 (Moseweke DCJ).
72 Supra note 51 paras 93–4.
73 See Napier (SCA) supra note 63 para 12.
75 BVerfGE 89, 214–236.
agreement, the autonomy of the other party is replaced by a state of heteronomy'.

In this new light, and although I concurred with Cameron JA in *Brisley* and *Afrox*, I now, upon consideration, tend to agree with Professor Gerhard Lubbe that the values of ‘dignity’ and ‘freedom’ display a perplexing capacity to pull in several directions at the same time and may accordingly fulfil very different roles. By their very nature these values are simply too vague to provide a decisive answer in deciding cases. Fortunately, I do not believe that we need to find a specific constitutional value, expressly referred to in the Constitution, to underpin every rule of contract law. In the present context, the inquiry works the other way around, namely: is there anything in the approach formulated by the Supreme Court of Appeal with regard to the role of good faith, reasonableness and fairness in our contract law which is in conflict with the constitutional value system? The short answer, I believe, is that there is none.

Whether the Constitutional Court will agree with this view remains to be seen. The unpredictability results from the following obiter statement by Ngcobo J, on behalf of the majority, in *Barkhuizen*:

‘As the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common-law rule that contractual clauses that are impossible to comply with should not be enforced. To put it differently: good faith . . . has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts. Whether, under the Constitution, this limited role for good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.’

One suspects that this open-ended statement was triggered by the judgment of Sachs J who found himself in a minority of one. The question in the case, Sachs J said, was — and I paraphrase — whether the fairness that public policy in our new constitutional dispensation demands, permits an insurer to rely on a clause hidden in the fine print of a standard-form document, which did not form part of the negotiated terms of the contract.

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76 Translation by Habersack & Zimmermann op cit note 65 at 277; See also Mak op cit note 65 at 33; Jan Smits ‘Private law and fundamental rights: A sceptical view’ in Tom Barkhuysen & Siewert Lindenbergh (eds) *Constitutionalisation of Private Law* (2006) 9 at 12.
77 Op cit note 74 at 420. See also Smits op cit note 76 at 17.
78 See also Cameron JA in *Brisley* supra note 51 paras 93–4 and in *Napier (SCA)* supra note 63 paras 12–14.
79 Para 82.
80 Described by O’Regan J as unnecessary in para 120.
81 See Ngcobo J in para 87.
82 Ibid paras 122–4.
Rather unsurprisingly, in view of the way in which the question was formulated, he arrived at the conclusion that, on the facts of the Barkhuizen case, the insurer should not be allowed to rely on the time-clause involved. ‘But’, he continued, ‘whether onerous and unilaterally imposed terms in standard-form contracts of adhesion should in general be regarded as offensive to public policy in our new constitutional dispensation can be left open for future considerations’.83 It appears that Sachs J has no affinity for standard-form contracts, about which he, inter alia, said the following in the course of his judgment:

‘Prolix standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. It may be said that far from promoting autonomy, they induce automatism.’84

And:

‘In my view, to treat mass-produced script as sanctified legal Scripture is to perpetuate something hollow and to dishonour the moral and philosophical foundation of contract law.’85

Without any inclination to enter into a philosophical debate with Sachs J about the moral foundations of contract law, one cannot help wondering, if his approach were to be endorsed by our courts as a general principle, how many Lloyd’s contracts would be concluded in South Africa. One also wonders how a modern commercial system would be able to function without standard-form contracts. I am not suggesting that it is irrelevant whether a contractual provision — regarded as unreasonable — was a negotiated term or whether it was tucked away in a standard form contract.86 Nor do I suggest that an unequal bargaining position between the parties is none of the court’s concern.87 I do believe, however, that these and numerous other considerations can be accommodated under the rubric of public policy, which has by now become firmly established as a mechanism of judicial control over contractual enforcement.88 Of course, the concept of public policy needs development and fine tuning. But one of the great attributes of our legal system is exactly, as I have said at the outset, that, over many years, it has allowed the courts to provide for the changing needs and

83 Ibid para 185.
84 Ibid para 155.
85 Ibid para 156.
86 See Whittaker & Zimmermann op cit note 11 at 28; Tjakie Naude ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ (2006) 17 Stellenbosch LR 361 at 366; Habersack & Zimmermann op cit note 65 at 278–9; Suisse Atlantique v Rotterdamsche Kolen Centrale [1966] 2 All ER 69 (HL) at 79.
87 See the debate in the Barkhuizen case between the majority — Ngcobo J at paras 57 and 64–6 and the minority — Moseneke DCJ at paras 109–115 of the Constitutional Court judgment. See also: Napier (SCA) supra note 64 para 17ff; Christie op cit note 19 at 18–19.
88 See South African Forestry supra note 53 para 27 and Christie op cit note 19 at 17.
values of society by incremental change without creating wholesale legal and commercial uncertainty.

In the further development of public policy as an instrument of control, assistance can obviously be derived from other legal systems.\(^{89}\) Equally self-evident, however, is the fact that such reference should be considered in the broader context of these legal systems. Thus, for example, proponents of the thesis that fairness and reasonableness should in themselves be recognized as independent grounds for interference with contractual relationships, often find support for their thesis in the good faith provisions of the German Civil Code (BGB)\(^ {90}\) and the Dutch Civil Code (BW).\(^ {91}\) And the suggestion is then made that these provisions bestow a general jurisdiction on the courts operating within these systems to determine the enforceability of contractual provisions on the basis of judicially perceived notions of what is reasonable and fair.\(^ {92}\) But it must be borne in mind that these general provisions had deliberately been formulated in the abstract\(^ {93}\) and that they have since been enveloped by layers of court decisions.\(^ {94}\) Eventually the role of good faith in those systems seems to be little different from the one that it performs in our law. This appears, for example, from the following statement by Professor Hein Kötz:\(^ {95}\)

‘Most cases [where the good faith provision in § 242 of the BGB is relied upon] . . . can be assigned to one of a number of well-defined rules which have all been developed by the courts under the umbrella of § 242, but which now lead a separate and independent existence so that, figuratively speaking, the

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\(^{89}\) So, for example, the German Federal Supreme Court (the Bundesgerichtshof) has used the instrument of public policy (in § 138 I of the BGB) to curb the excesses that occurred in suretyship agreements. See BGH (1979) NJW 805; Reinhard Zimmermann & Nils Jansen ‘Quieta movere: Interpretative change in a codified system’ in Peter Cane & Jane Stapleton (eds) The Law of Obligations. Essays in Celebration of John Fleming (1998) 285 at 295.

\(^{90}\) Para 242 of the BGB provides as follows: ‘The debtor is bound to perform according to the requirements of good faith (Treu und Glauben), ordinary usage being taken into account.’ Translation by Whittaker & Zimmermann op cit note 11 at 18.

\(^{91}\) Art 6: 248 of the BW reads: ‘(1) A contract has, not only the legal consequences agreed to by the parties, but also those which according to the true nature of the contract result from the law, usage and the dictates of reasonableness and fairness (redelijkheid en billijkheid).’ (2) A rule binding upon the parties as a result of the contract does not apply to the extent that in the given circumstances, this would be unacceptable to criteria of reasonableness and fairness.’ (My translation from the original Dutch.)

\(^{92}\) See Olivier Jaan Saayman supra note 39 at 326I–327C.

\(^{93}\) See Reinhard Zimmerman ‘Introduction to German legal culture’ in Werner F Ebke & Matthew W Finkin Introduction to German Law (1996) 1 at 18.

\(^{94}\) Ibid at 20. See also Hartkamp op cit note 11 paras 307ff.

statutory foundation of § 242 could be withdrawn without any risk of having the judge-made edifice collapse. It would be a poor advocate who would simply cite § 242 to the judge and invite him to dispense justice to his client according to the principles of good faith and fair dealing. What would be expected of him would be a reference to the more specific doctrines of, say, laches, or frustration, or forfeiture, including the judgments applying these doctrines to individual cases. There is hardly a case involving a problem of contractual interpretation or the implication of a term in which the court would not, for good measure, put in a reference to § 242.’

And it is not insignificant that in respect of the Netherlands — where on the face of it, the most advanced role had been allocated to fairness and good faith in art 6:248 of their 1992 BW — Hartkamp96 makes the following statement:

‘Nu spreekt het vanzelf . . . dat art 6:248 lid 2 aan de rechter niet de bevoegdheid geeft een overeenkomst of een beding terzijde te stellen op de enkel grond dat hy de inhoud voor een der partijen onbillik oordeelt. Het enkel feit dat tussen de prestaties over en weer, eventueel aanzienlijke ongelijkwaardigheid bestaat of dat een beding bezwaarlijk voor een der partijen is, rechtvaardigt so ’n ingrijpen niet.’97

Further development and fine tuning of public policy as an instrument in the present context, will also require greater awareness and imagination on the part of practitioners. Take Afrox as an example. If it had been pleaded and argued that any contractual exemption from liability for death and/or personal injury is per se contrary to public policy, the result may very well have been different.98 It may also have made a difference — both in Afrox and in Barkhuizen — if the response had been pertinently raised and then supported by the evidence, that the indemnity clauses were unnecessary and/or unduly oppressive, and/or that the bargaining position of parties was so unequal that the plaintiff in reality had no say at all.99 And maybe the fine tuning of ‘public policy’ may also require greater activism and ingenuity on the part of the judiciary than they have hitherto displayed.

CONCLUSION

If we have learnt anything from what happened in the past in South African courts, it is this: imprecise and nebulous statements about the role of good faith, fairness and equity, which would permit idiosyncratic decision-making on the basis of what a particular judge regards as fair and equitable, are

96 Op cit note 11 para 319. For the text of art 6:248, see note 91 above.
97 ‘Now it speaks for itself . . . that art 6:248 part 2 does not give the judge the power to set aside a contract or clause on the sole ground that he finds the content to be unfair towards one of the parties. The mere fact that substantial inequality may exist between the reciprocal performances between the parties or that a clause is oppressive in respect of one of the parties does not justify interference.’
99 See Lubbe op cit note 74.
dangerous. They lead to uncertainty and a dramatic increase in often pointless litigation and unnecessary appeals. Palm-tree justice cannot serve as a substitute for the application of established principles of contract law.