IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 72/05

BAREND PETRUS BARKHUIZEN Applicant

versus

RONALD STUART NAPIER Respondent

Heard on : 4 May 2006

Decided on : 4 April 2007

JUDGMENT

NGCOBO J:

Introduction

[1] This application for leave to appeal against a decision of the Supreme Court of Appeal concerns the constitutionality of a time limitation clause in a short-term insurance policy.[1] A clause of this nature prevents an insured claimant from instituting legal action if summons is not served on the insurance company within the time limit set out in the clause. The applicant contends that this clause is unconstitutional in that it violates the right to approach a court for redress.

[1] The decision of the Supreme Court of Appeal is reported as *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

Factual background

[2] The applicant entered into a short-term contract of insurance with a syndicate of Lloyd's Underwriters of London, represented in this country by the respondent. In terms of that contract, the applicant was insured against, among other risks, loss resulting from damage to his motor vehicle, a 1999 BMW 328i. On 24 November 1999, the motor vehicle was involved in an accident resulting in damage beyond economic repair. On 2 December 1999, the applicant duly notified the respondent of the occurrence of the accident and the resulting damage and claimed R181 000 representing the sum insured. On 7 January 2000, the respondent repudiated the claim, alleging that the motor vehicle had been used for business purposes, contrary to the undertaking to use it for private purposes only.

[3] Two years later, that is on 8 January 2002, the applicant instituted action against the defendant claiming the sum of R181 000 together with interest thereon. The summons was met with a special plea, alleging that the respondent had been released from liability because the applicant had failed to serve summons within 90 days of being notified of the repudiation of his claim. The special plea was based on clause 5.2.5 of the contract which provides:

> "if we reject liability for any claim made under this Policy we will be released from liability unless summons is served . . . within 90 days of repudiation."

[4] The respondent also pleaded over, a plea that is not relevant for present purposes.

[5] In his replication, the applicant conceded non-compliance with clause 5.2.5 but alleged that the clause is contrary to public policy in that, among other things, it prescribes an unreasonably short time to institute action and it constitutes an infringement on the right of the insured to seek the assistance of a court. What is more, the applicant alleged that the clause is contrary to the provisions of section 34 of the Constitution. That provision, which guarantees the right of access to court, provides:

> "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."

[6] The replication did not evoke any further pleading from the respondent.

The decisions of the courts below

(a) The High Court

[7] The Pretoria High Court, which heard the matter in the first instance, was asked to adjudicate on the special plea only. To this extent, the parties agreed on a terse statement of facts recording the existence of the insurance contract, the occurrence of the accident and the submission of the written claim to the respondent on 2 December 1999, the repudiation of the claim on 7 January 2000 and the institution of legal action on 8 January 2002. And nothing more.

[8] In argument in the High Court, the applicant relied only on the argument that clause 5.2.5 was unconstitutional because it was inconsistent with the provisions of

section 34 of the Constitution. As the High Court noted, the applicant did not rely on the argument that the clause was contrary to public policy, an argument which was foreshadowed in the pleadings. As a consequence, the High Court did not deal with this argument, but dealt only with the argument that clause 5.2.5 is inconsistent with section 34.

[9] The High Court upheld the argument. It found that clause 5.2.5 is inconsistent with section 34 and made a declaration to that effect. The High Court relied, for its conclusion, on the decision of this Court in *Mohlomi v Minister of Defence*.[2] In that case, this Court considered a time limitation provision in a statute which regulated the institution of proceedings against the South African National Defence Force. The impugned provision required a claimant to give notice of a claim one month before issuing summons and gave a claimant six months to sue from the date of loss. It did not permit condonation of non-compliance with its provisions. The Court held that the impugned provision limited the right of access to court and that this limitation was not reasonable and justifiable under section 33(1) of the interim Constitution, the predecessor of section 36(1).[3]

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[2] 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

[3] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[10] The High Court accepted that clause 5.2.5 in itself is not a law of general application within the meaning of section 36 of the Constitution. However, it held that the law of general application in this case was the common law rule that agreements are binding and must be enforced (*pacta sunt servanda*). Having found that the clause is not reasonable and justifiable under section 36, the High Court declared the clause invalid and dismissed the respondent's special plea with costs.

(b) The Supreme Court of Appeal

[11] On appeal, the Supreme Court of Appeal accepted the correctness of the "general premise" that contractual claims are subject to the Constitution. It also accepted that a contractual term that is contrary to public policy is unenforceable and that public policy " . . . now derives 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."[4] However, it found that the evidence placed before it by way of a stated case was "extremely slim" for it to determine whether these constitutional values have been impeached. It held that the High Court's finding that clause 5.2.5 was unfair was not self-evident on the record and, moreover, that the evidence did not warrant such a finding. In this regard it held that:

> "Whether the period is in fact reasonable, and thus whether the clause is 'fair', would depend, amongst other things, on the number of claims the insurer has to deal with, how its claims procedures work, what resources it has to investigate and process claims, and on the amount of the premium it exacts as a *quid pro quo* for the cover it offers. Of all this, we know nothing."[5]

[4] Above n 1 at para 7.

[5] Id at para 10.

[12] The Supreme Court of Appeal, however, cautioned that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution. Here, it emphasised the principles of dignity and autonomy which "find expression in the liberty to regulate one's life by freely engag[ing] [in] contractual arrangements."[6] What the Constitution requires of the courts, the Supreme Court of Appeal held, is that they "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."[7] The Supreme Court of Appeal further explained that this entails "that intruding 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."[8]

[13] However, the Supreme Court of Appeal accepted that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue. It held that the critical question is whether the applicant in effect was forced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality and in a way that requires the court to develop the common law of contract so as to invalidate the term in question. It concluded that it was not possible to reach any conclusion on this aspect in the light of the scanty evidence before it.

[6] Id at para 12.

[7] Id at para 13.

[8] Id.

[14] The evidence that the Supreme Court of Appeal had in mind was: the short term insurance products market; the availability of such products; the availability of diversity of time limits to those seeking short term insurance cover; and whether for a person in the position of the applicant who, according to the Supreme Court of Appeal, "travels in a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle . . . [a] short-term vehicle insurance is an optional convenience, or an essential attribute of life."[9] It concluded that "without any inkling" in relation to these matters, "the broader constitutional challenge" based on constitutional values, "cannot even get off the ground."[10]

[15] I do not understand the Supreme Court of Appeal as suggesting that the principle of contract *pacta sunt servanda* is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgment. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.

[9] Id at para 15.

[10] Id at para 16.

[16] Addressing the constitutional challenge based directly on section 34, the Supreme Court of Appeal held that the Constitution does not prevent time bar provisions in contracts where these are entered into freely and voluntarily. It held that the *Mohlomi* case was not applicable since, unlike the present case, it dealt with a pre-existing right to legal redress, namely, compensation for injury. If the Supreme Court of Appeal intended to hold that the broad test announced in *Mohlomi* is not applicable when considering whether a time limitation term in a contract is contrary to public policy, for reasons that appear later in this judgment, I am unable to agree with this view.

[17] On the meagre facts set out in the agreed statement of facts, the Supreme Court of Appeal found that there is no evidence that the insurance contract in issue here was not entered into freely and voluntarily. It accordingly held that there was no breach of the provisions of the Constitution. In the event, it upheld the appeal, set aside the order of the High Court and replaced it with one upholding the special plea with costs.

[18] The present application for leave to appeal is the sequel.

The contentions of the parties

[19] In this Court, both in his application for leave to appeal and in argument, the applicant contended that clause 5.2.5 is contrary to public policy and, therefore, unenforceable. In support of this contention, counsel for the applicant submitted that public policy represents the legal convictions of the community. In developing this

argument, it was submitted that these legal convictions have now been codified in a set of constitutional values enunciated in the Bill of Rights. The Bill of Rights, therefore, reflects public policy, he argued. Clause 5.2.5 constitutes an unreasonable and unjustified limitation of the constitutional right of access to court, which is guaranteed in section 34. Counsel argued that this limitation is not reasonable and justifiable under section 36(1) of the Constitution and that, therefore, clause 5.2.5 violates public policy and is unenforceable.

[20] Now this argument conflates two different arguments. The first argument is one based on public policy, namely, that clause 5.2.5 is contrary to public policy because it violates the right of the applicant to seek judicial redress. This argument does not rely directly on section 34 as a separate and independent ground for attacking the limitation clause. Rather, it relies on section 34 only for the purposes of determining the content of public policy and demonstrating that clause 5.2.5 is contrary to public policy. This argument, therefore, relies upon section 34 as a reflection of public policy. The other argument is based directly on section 34. This argument contends that clause 5.2.5 limits the rights guaranteed in section 34 and considers whether such limitation is reasonable and justifiable under section 36(1). It is this argument that was considered and upheld by the High Court but was rejected by the Supreme Court of Appeal.

[21] For its part, the respondent contended that the provisions of section 34 have no application to constitutional challenges to contractual terms. Relying on the decision of the Supreme Court of Appeal, the respondent submitted that there is no

evidence to explain why the applicant was unable to comply with clause 5.2.5. The respondent further submitted that, in any event, the clause is not unreasonable because it is not inflexible. The clause, it was submitted, should be read with the implied term that parties to a contract ought to act *bona fide* (in good faith). This implied provision, so the argument went, rendered the clause flexible enough to accommodate the circumstance where the applicant is prevented by factors beyond his control from complying with the requirements of the clause.

[22] This case requires us to determine, as a threshold issue, the proper approach to constitutional challenges to contractual terms.

The proper approach to constitutional challenges to contractual terms

[23] The section 34 argument raises the fundamental question of the appropriateness, or otherwise, of testing a contractual provision directly against a provision in the Bill of Rights. This raises the question of horizontality, that is, the direct application of the Bill of Rights to private persons as contemplated in section 8(2) and (3) of the Constitution. This Court has yet to consider this issue. But apart from this, there are further difficulties. Clause 5.2.5, if found to limit section 34, is not a law of general application. It cannot therefore, on its own, be subjected to a limitation analysis under section 36(1). The limitation clause contemplates that only a law of general application will be subject to it. It is this difficulty that confronted the High Court in the first place.

[24] To overcome this difficulty, the High Court had to find a law of general application peg on which to hang clause 5.2.5. It found this peg in the form of the common law principle of contract that is expressed in the maxim *pacta sunt servanda* agreements are binding. The High Court reasoned that the framers of the Constitution intended the phrase "law of general application" in section 36 to have a wide meaning. It therefore, held that the common law principle that agreements are binding is a law of general application. Having clothed clause 5.2.5 in the law of general application garb, the High Court then posed the question whether parties can, by a term in a contract, agree to limit the right of access to a court. Here the question, the High Court reasoned, was whether such a limitation is reasonable and justifiable under section 36(1). Having found that the limitation is not reasonable and justifiable under section 36(1), the High Court found that clause 5.2.5, not the common law principle that agreements are binding, fell foul of section 34.

[25] But this was not the end of the difficulties. There was section 172(1)(a) of the Constitution, which requires a court to declare "any law or conduct" that is inconsistent with the Constitution to be invalid. Clause 5.2.5 is manifestly not "conduct" within the meaning of section 172(1)(a). That left the question, whether it is a "law". The High Court found that the clause was a "regsvoorskrif", that is, a "law" within the meaning of section 172(1)(a). It is not clear from the judgment of the High Court why, if the clause is not a law of general application for the purposes of a limitations analysis, it is nevertheless a "law" within the meaning of section 172(1)(a).

[26] These difficulties that the High Court had to overcome, and the manner in which it dealt with them, in my judgement, cast grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights. The High Court accepted that the clause was not a law of general application. Hanging the clause on the common law principle of *pacta sunt servanda* does not meet the difficulty. For what is ultimately found by the High Court to be flawed is not the common law principle, but the clause itself. And this clause is, ultimately, elevated to a "law" within the meaning of section 172(1)(a).

[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the state is a party. This does not arise in this case.

[28] Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.[11] Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the

[11] *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) at 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) at para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) at para 18; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA) at para 11.

values of human dignity, the achievement of equality and the advancement of human rights and freedoms,[12] and the rule of law.[13] And the Bill of Rights, as the Constitution proclaims, "is a cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom."[14]

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[30] In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have

[12] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

[13] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the constitution and the rule of law."

[14] Section 7(1) of the Constitution.

consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.

Public policy and the right of access to court

[31] Section 34, the provision in the Constitution that guarantees the right to seek the assistance of courts, proclaims that "[e]veryone 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 . . . ."[15] Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals.[16] This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law.[17] Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.

[32] When we had occasion to consider section 34, we alluded to these matters saying:

> "Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*:
>
> > 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and

[15] Section 34 of the Constitution.

[16] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 63.

[17] Above n 13.

> institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.'"[18]

[33] Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.

[34] Our common law has always recognised the right of an aggrieved person to seek the assistance of a court of law. Courts have long held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. The one occasion which comes to mind when this was said is in *Schierhout v Minister of Justice*.[19] On that occasion the Appellate Division, as the Supreme Court of Appeal was then known, held that:

> "If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land."[20]

Terms in a contract that deny the right to seek the assistance of a court were considered to be contrary to public policy and thus contrary to the common law.[21]

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[18] *Zondi* above n 16 at para 61.

[19] 1925 AD 417.

[20] Id at 424. See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

[21] *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 729 (A) at 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 AD at 621F-G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423H-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200; and *Benning v Union Government (Minister of Finance)* 1914 AD 29 at 31.

[35] Under our legal order, all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that "promotes the spirit, purport and objects of the Bill of Rights."[22] Section 39(2) of the Constitution says so.[23] All this is, by now, axiomatic.[24] Courts are equally empowered to develop the rules of the common law to limit a right in the Bill of Rights "provided that the limitation is in accordance with section 36(1)."[25]

[36] The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy.

Should the applicant be permitted to raise the public policy argument in this Court?

[37] Counsel for the respondent submitted that the applicant should not be permitted to rely on the public policy argument because this argument was being

[22] Section 39(2) of the Constitution provides:

> "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."

[23] Id.

[24] *Carmichele* above n 11 at paras 33-56; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44.

[25] Section 8(3)(b) of the Constitution.

raised for the first time in this Court. It was neither considered by the High Court nor by the Supreme Court of Appeal, so the argument went. The applicant did not dispute the fact that the public policy argument, now pursued in this Court, was not raised in the argument in the courts below but contended that it was nevertheless raised in the pleadings.

[38] It is not entirely accurate to say the Supreme Court of Appeal did not consider the public policy argument. It did. And what it said must be understood in the context of the manner in which the public policy argument was raised before it. The public policy argument appears to have been run together with the argument based on the direct infringement of section 34. But even if it is accepted that the public policy is being raised for the first time in this Court, the point raised on behalf of the respondent cannot succeed.

[39] The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.[26] Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be

[26] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 44; *Cole v Government of the Union of SA* 1910 AD 263 at 273; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24-5; and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290.

unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.[27]

[40] Here the parties agreed on the facts to be placed before the trial court in the light of the pleadings. The public policy argument is foreshadowed in the applicant's replication which alleges that the time limitation clause is contrary to public policy in that: (a) it allows a claimant an unreasonably short time to issue summons; (b) it violates the common law right to approach a court for redress; (c) the time limitation does not pursue a legitimate purpose; and (d) it takes away the right of a claimant to approach a court for redress if the summons is not served within 90 days. He then concludes by alleging that the clause violates both public policy and section 34.[28]

[41] In these circumstances, the respondent can hardly suggest that he would not have agreed to the stated facts had he been aware that the point was to be raised in

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[27] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (A) at para 30.

[28] The applicants amended replication reads:

> "1.6.1 Klousule 5.2.5 van Bylaag 'PB', kom neer op 'n sogenaamde tydsbeperkingsklousule, oftewel vervaltermyn.
>
> 1.6.2 Die gemelde tydsbeperkingsklousule, oftewel vervaltermyn, objektief beoordeel, is strydig met die openbare belang, aangesien dit:
>
> 1.6.2.1 'n onredelike kort tydperk verleen aan versekerdes, na verwerping van 'n eis, om aksie teen die versekeraar in te stel;
>
> 1.6.2.2 ongetwyfeld, 'n uiters drastiese bepaling is wat 'n ernstige inbreuk maak op die gebruiklike gemeenregtelike regte van 'n beswaarde versekerde om die bystand van 'n geregshof op te soek en te bekom;
>
> 1.6.2.3 klaarblyklik geen bruikbare of regmatige doel nastreef nie;
>
> 1.6.2.4 uiteindelik 'n versekerde sy reg ontneem om 'n beregbare geskil rakende sy versekeringsdekking in 'n geregshof te laat beslis, indien dagvaarding nie binne die tydsbeperking, oftewel, vervaltermyn, bestel word nie.
>
> 1.6.3 Die gemelde tydsbeperkingsklousule, oftewel, vervaltermyn, druis, voorts, in teen die bepalings van artikel 34 van die Grondwet van die Republiek in ag geneem word nie.
>
> Bygevolg behoort klousule 5.2.5 van Bylaag 'PB' ten nadele van die versekeraar (die Verweerder) uitgele te word, aangesien dit beide strydig met die openbare belang en strydig met artikel 34 van die Grondwet, 1996, is en nie redelik en regverdigbaar is nie."

argument. Nor can he suggest any unfairness arising from the fact that the point and all its ramifications were not canvassed and investigated at trial. The parties here were content to have the issues of law raised in the pleadings decided on facts agreed upon. This Court is, therefore, in the same position in which the High Court was in so far as the determination of these issues is concerned. All the facts that the parties considered sufficient for the determination of the law points, raised in the pleadings, are before us.

[42] The point taken by the respondent must therefore be rejected.

[43] In these proceedings we are concerned with an application for leave to appeal. While there can be no question that this application raises a constitutional issue, the question which we must determine is whether it is in the interests of justice to grant leave to appeal. A consideration of what is in the interests of justice involves the weighing-up of the relevant factors, including the prospects of success.[29] It is clear from the above that the issues raised by the applicant are important constitutional issues which warrant consideration by this Court. I conclude therefore, that it is in the interests of justice to grant leave to appeal.

[44] I now turn to the question whether clause 5.2.5 is contrary to public policy and thus unenforceable.

[29] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 10; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR (CC) 433 at para 15; and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

Does public policy tolerate time limitation clauses in contracts between private parties?

[45] The main thrust of the argument presented on behalf of the applicant was that the clause limits the applicant's right to seek judicial redress in court and thus offends public policy. That the clause limits the right of the applicant to seek judicial redress cannot be gainsaid. What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress.

[46] The question whether public policy tolerates time limitation clauses in contracts must be considered in the light of the fact that time limitations are a common feature both in our statutory and contractual terrain. Their effect is the same whether they occur in a statute or a contract. They deny the right to seek the assistance of a court once the action gets barred because an action was not instituted within the time allowed. This is true of all of them, regardless of the amount of time they allow. These clauses therefore limit the right to seek judicial redress.

[47] Yet their importance cannot be gainsaid. In *Mohlomi,* in the context of a statutory time limitation provision, this Court recognised the importance of limiting time during which litigation may be launched:

> "Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the

> interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."[30]

[48] I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness. What is also relevant in this regard is that the Constitution recognises that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy.

[49] Counsel for the applicant did not contend otherwise. He submitted that, firstly, on its face, the period of 90 days is so manifestly unreasonable that it offends public policy; and secondly, the clause is unreasonable because it insists on compliance with its provisions regardless of the circumstances. There was some debate in this Court on what is the proper test for determining whether a time limitation clause in a contract is contrary to public policy. Counsel for the applicant urged this Court to apply the test announced in *Mohlomi*. Counsel for the respondent

[30] Above n 2 at para 11. See also *Engelbrecht v Road Accident Fund* CCT 57/06, 6 March 2007, as yet unreported at para 29.

contended that *Mohlomi* does not apply in this case. I had better deal with this aspect first.

The applicable test

[50] In *Mohlomi*, this Court had to consider the constitutional validity of a time limitation contained in section 113(1) of the Defence Act 44 of 1957. That provision required legal action to be instituted within six months from the time when the cause of action arose and also within that time required a month's prior notice before the commencement of legal action. The provision was challenged on the ground, among others, that it was inconsistent with section 22 of the interim Constitution, the equivalent of section 34. The Court held that consistency with the right of access to court, "depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances . . . to a real and fair one."[31] This test, the Court added, "lends itself to no hard and fast rule which shows . . . where to draw the line."[32]

[51] In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. Broadly speaking, the test announced in *Mohlomi* is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness

[31] Above n 2 at para 12. The Court formulated the test as follows:

> "What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the inquiry turns wholly on estimations of degree."

[32] Id.

cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals.[33] Public policy is informed by the concept of ubuntu. It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.

[52] In my judgement, the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy. There is no reason in principle why this test should not be applicable in determining whether a time limitation clause in a contract is contrary to public policy.

[53] There is one matter which arises from the decision of the Supreme Court of Appeal, which requires attention. In concluding that *Mohlomi* is not applicable in this case, the Supreme Court of Appeal found that, unlike in *Mohlomi*[34] and *Moise v Greater Germiston Transitional Local Council*,[35] the applicant had no claim outside of the contract. The Supreme Court of Appeal relied on *Geldenhuys and Joubert v Van Wyk*[36] which dealt with the time bar applicable in claims against the Road Accident Fund where the defendant is unidentifiable. The Supreme Court of Appeal reasoned as follows:

> "In such cases, injured victims by definition have no remedy, since they do not know and cannot trace the wrongdoer who inflicted their injury. The legislation therefore

[33] *Price Waterhouse* above n 11 at para 23. See also *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9F-G; and *Jajbhay v Cassim* 1939 AD 537 at 544.

[34] Above n 2.

[35] 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC).

[36] 2005 (2) SA 512 (SCA); [2005] 2 All SA 460 (SCA).

> creates a right of recourse against the Fund where no enforceable right existed before; but limits the right at inception by requiring that it be enforced within a shortened time period. In *Geldenhuys & Joubert* this court accordingly rejected the argument that the legislative time-limit unfairly restricts the claimant's right, since this misconceives its nature. The Fund is not a wrongdoer, and the claimant is not its victim."[37] (Reference omitted.)

And it continued:

> "The plaintiff's right to insurance cover arose from his contract with the defendant, which in creating his right stipulated at its inception that a claim, to be enforceable, had to be instituted within 90 days of repudiation. The access to courts provision of the Bill of Rights does not prohibit this."[38]

[54] In my view, the distinction drawn by the Supreme Court of Appeal is somewhat narrow and formalistic. It does not take sufficient account of the fact that at least since *Nino Bonino v De Lange*,[39] our courts have recognised that contracting parties may not prevent one another from having disputes arising from the contract resolved by a court of law. If the term of a contract provides an impossibly short period of time for the dispute to be referred to a court of law, that term will be contrary to public policy and unenforceable. This is because our Constitution recognises the importance of disputes being resolved by courts and independent tribunals. The fact that the time limitation clause arises in the contract that confers the right does, in my view, negate this result.

[37] Above n 1 at para 25.

[38] Id at para 27.

[39] *Nino Bonino* above n 20.

[55] I accept that there is a conceptual difference between a statute which introduces a limitation on the period within which a pre-existing right may be prosecuted and a contract which establishes rights and time periods within which those rights must be prosecuted. That conceptual difference, however, cannot have the consequence suggested by the Supreme Court of Appeal. Such a consequence would undermine the importance of the right of access to courts. In each case, of course, the question will be whether the contract contains a time limitation clause which affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law. In approaching this question, a court will bear in mind the need to recognise freedom of contract but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts.

The determination of fairness

[56] There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.

[57] The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt*

servanda which, as the Supreme Court of Appeal has repeatedly noted,[40] gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common law principles of contract.

[58] The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. 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 a good reason why there was a failure to comply.

[59] It follows, in my judgement, that the first inquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation

[40] *Brisley* above n 11 at para 94; *Barkhuizen* above n 1 at para 12.

of the contracting parties. In *Afrox*, the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor which together with other factors, plays a role in the consideration of public policy.[41] This is a recognition of the potential injustice that may be caused by inequality of bargaining power. Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours.

[60] I accept that there may well be time limitation clauses that are so unreasonable that their unfairness is manifest. A clause I have in mind is one that requires a claimant to give notice of a claim and to sue within 24 hours of the occurrence of the risk insured against. Having regard to the information that needs to be obtained, and the steps that need to be taken before a written claim can be submitted and legal proceedings instituted, it would not require any additional information to conclude that the clause is so unreasonable that its unfairness is manifest. There may be other examples of time limitation clauses which give claimants subject to them too short a time to institute legal proceedings that they are tantamount to an outright denial of the right to seek judicial redress.

[61] The first question therefore is whether clause 5.2.5 falls within this category of time limitation clauses.

[41] *Afrox* above n 11 at para 12.

Is clause 5.2.5 so manifestly unreasonable that it offends public policy?

[62] In *Mohlomi*, the Court found two flaws in the provision in issue which together rendered it unconstitutional. The first was that it gave claimants "too short a time"[42] to give notice in the first place and to sue in the second. This, the Court held, limited the right to seek judicial redress.[43] The second flaw was that the provision was inflexible. It insisted on strict compliance with its requirements no matter how harsh this may have turned out to be in a given case.[44] This, the Court found, rendered the provision unjustifiable under section 33(1) of the Interim Constitution.[45] Thus, too short a time to give notice (one month) and to sue (six months), and the inflexibility of the provision, rendered section 113(1) of the Defence Act unconstitutional.

[63] Relying on the reasoning in *Mohlomi*, counsel for the applicant contended that the period of 90 days allowed by clause 5.2.5 was too short a time to sue. The fact is that the period of 90 days began to run once the claim had been lodged with and repudiated by the insurance company. At this stage, the applicant not only knew what his cause of action was, but he also knew the identity of the defendant as well as the amount of his claim. All that remained was for the applicant to issue summons against the respondent. This he could do either himself or through a lawyer as he eventually did. Thus the moment the 90-day period began to run, the applicant had all the information that was necessary to sue. It is clear that 90 days is not a manifestly

[42] Above n 2 at para 14.

[43] Id.

[44] Id at para 13.

[45] Id at para 20.

unreasonable period comparable to the 24 hour period described above. The question remains whether, considering the circumstances of its conclusion, it still violates public policy.

[64] We are concerned here with a contract between the applicant and the respondent. The reasonableness or otherwise of the period allowed by the clause must be assessed by reference to the circumstances of the parties. In *Mohlomi*, this Court observed that the harshness of the statutory provision in issue there must be assessed in the light of the realities that prevail in our country, the realities that our history has bequeathed to us. And as this Court observed, this is:

> ". . . a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."[46]

[65] Indeed, many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness.

[66] This Court must however operate on the basis of the evidence that was presented to the High Court and that is now before us. There is no admissible evidence that the contract was not freely concluded, that there was unequal bargaining

[46] Above n 2 at para 14.

power between the parties or that the clause was not drawn to the applicant's attention. There is nothing to suggest that the contract was not freely concluded between persons with equal bargaining power or that the applicant was not aware of the clause. On the contrary, the indications are that he was aware of the time limitations. The contract required him to submit a written claim with the respondent within thirty days of the accident but he submitted his written claim within at least eight days of the accident through his insurance broker.

[67] In these circumstances, I am unable to conclude that the 90-day period allowed to the applicant to sue is so unreasonable that its unfairness is manifest and that therefore its enforcement would be contrary to public policy.

The inflexibility argument

[68] The other flaw that the Court found in the statutory provision involved in *Mohlomi* was that it was inflexible in that it insisted on strict compliance with its provisions regardless of how harsh this may have turned out to be in a given case. Relying on this aspect of *Mohlomi*, counsel for the applicant submitted that the clause is inflexible in that it requires the applicant to comply with it no matter how harsh this may be. The respondent countered this argument by submitting that the clause must be read with the implied term that all parties to a contract must act *bona fide*. This means, it was argued, that if non-compliance with the time limitation clause is due to no fault on the part of the claimant, the insurance company may not invoke the time bar clause. This renders the clause flexible, so it was argued.

[69] The inquiry is not whether the clause is inflexible. The inquiry is whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause. This would require the party seeking to avoid the enforcement of the clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances. Thus insisting on compliance with a 90-day time bar clause against a claimant who, shortly after repudiation lapsed into a coma and came round six months later, would no doubt be unfair and its enforcement would be contrary to public policy. By contrast, insisting on compliance with a 90-day time bar clause against a claimant who deliberately neglected to comply with it, would not be unfair.

[70] While it is necessary to recognise the doctrine of *pacta sunt servanda,* courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it,

> "employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."[47]

And this entails, the Supreme Court of Appeal explained,

[47] Above n 1 at para 13.

> "that intruding 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."[48]

[71] This is a sound approach.

[72] Thus if a court finds that a time limitation clause does not afford a contracting party a reasonable and fair opportunity to approach a court, it will declare it to be contrary to public policy, and therefore invalid. To the extent that the Supreme Court of Appeal appears to have held otherwise, that dictum cannot be supported.[49]

[73] Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled "is the general sense of justice of the community, the boni mores, manifested in public opinion."[50] Thus where a claimant seeks to avoid the enforcement of a time limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause. The enforcement of the time limitation clause in such circumstances would result in an injustice and would no doubt be contrary to public policy. As has been observed, while public

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[48] Id at para 13.

[49] The Supreme Court of Appeal held:

> "Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle . . . [I]n appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements." Id at para 12.

[50] *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152-3; and *Schultz v Butt* 1986 (3) SA 667 (A) at 679B-E.

policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view, the hands of justice can never be tied under our constitutional order.

[74] The contentions by the parties on the question whether clause 5.2.5 is enforceable regardless of how unfair or unjust this might be in a given case, raises difficult and complex questions concerning the development of the common law of contract, in particular, the need to extend the application of the common law legal principles that seek to achieve justice and fairness to time limitation clauses.

[75] For instance, common law does not require people to do that which is impossible. This principle is expressed in the maxim *lex non cogit ad impossibilia* – no one should be compelled to perform or comply with that which is impossible. This maxim derives from the principles of justice and equity which underlie the common law. Over the years the maxim has become entrenched in our law and has been applied to avoid time bar provisions in statutes. The occasion that comes to mind when this was done was in *Montsisi v Minister van Polisie*.[51]

[76] In *Montsisi*, the Appellate Division held that the principle expressed by the maxim *lex non cogit ad impossibilia* applied to a statutory time bar provision contained in section 32(1) of the Police Act 7 of 1958. The case concerned a plaintiff who sued the Minister of Police for damages for unlawful assault alleged to have been

[51] 1984 (1) SA 619 (A).

committed upon him by police while he was being detained in terms of section 6 of the Terrorism Act 83 of 1967. The court held that it was impossible for the plaintiff to comply with the provisions of section 32(1) while he was in detention, and that therefore the expiry period provided for in section 32(1) did not run against him so long as he was in detention.[52]

[77] The court reasoned as follows:

> "Dit behoef geen betoog dat dit onbillik sou wees indien iemand, vir wie dit vanweë sy aanhouding ingevolge art 6 van die Wet op Terrorisme onmoontlik was om aan die vereistes van art 32(1) te voldoen, sy reg om vergoeding te eis weens onregmatige dade wat tydens sy aanhouding teenoor hom gepleeg is, ontsê sou word omdat hy nie aan die vereistes van art 32(1) voldoen het nie. Die Wetgewer het met art 32(1) klaarblyklik nie beoog om 'n persoon wat meen dat hy 'n eis teen die Minister het, sy eis te ontneem nie, maar wel dat hy daardie eis, op straf van verval, binne die betreklik kort tydperk van ses maande ná die ontstaan van sy eisoorsaak moet instel. Hierdie Hof het , soos reeds gesê, in *Hartman v Minister van Polisie* waar art 32(1) teen die eis van 'n minderjarige opgewerp is, beslis dat die bepalings van art 13(1)(a) van die Verjaringswet nie op die termyn van ses maande wat in art 32(1) bepaal word, van toepassing is nie, maar het terselfdertyd gesê (op 499A) dat hy hom nie uitspreek oor die vraag of daar in 'n geval soos dié wat in *Magubane v Minister of Police* voorgekom het spesiale oorwegings kan wees wat nie in *Hartman v Minister van Polisie* aanwesig was nie. (Die *Magubane*-saak was 'n geval soos die onderhawige: 'n spesiale pleit ingevolge die bepalings van art 32(1) is teen die eiseres opgewerp nadat dit vir haar, vanweë haar aanhouding, onmoontlik was om aan die vereistes van die artikel te voldoen.)
>
> Die vraag ontstaan nou of daar bevind kan word dat, hoewel die minderjarige eiser in *Hartman v Minister van Polisie* nie 'n antwoord op 'n spesiale pleit ingevolge art 32(1) gehad het nie, die appellant in die onderhawige geval wel kan sê dat sy eis deur die artikel belet word nie. Ek het tot die gevolgtrekking gekom dat wel so bevind kan word, en wel in die lig van die algemene oorwegings wat die spreuk *lex non cogit ad*

[52] Id at 638G-H.

> *impossibilia* ten grondslag lê (*D* 50.17.185: *impossibilium nulla obligatio est)* en wat inhou dat iemand se versuim om 'n verpligting na te kom wanneer dit vir hom onmoontlik was om dit na te kom, hom nie tot sy nadeel toegereken word nie."[53] (Footnotes omitted.)

[78] The principle enunciated in *Montsisi* has since been recognised and, where appropriate, applied.[54]

[79] The other common law principle that is relevant is the requirement of good faith which the respondent submitted should be implied in this case. To counter the argument that the clause is inflexible and insists on compliance even when this would be unjust, counsel for the respondent submitted that the contract in issue here is subject to an implied term requiring the parties to act *bona fide*. As I understand the argument, the requirement of good faith will preclude the respondent from insisting on compliance with the time limitation clause when it will be unjust to the applicant. Good faith, the argument went, is implied as a matter of law. Reading clause 5.2.5 subject to the requirement of good faith, the clause takes account of the reasons for non-compliance and does not insist on compliance with its provisions when this would be unjust to the applicant. Counsel for the applicant submitted that the requirement of good faith is not part of our law.

[80] The requirement of good faith is not unknown in our common law of contract. It underlies contractual relations in our law.[55] The concept of good faith was

[53] Id at 634E-635A.

[54] *Pizani v Minister of Defence* 1987 (4) SA 592 (A) at 602G-I; *Mati v Minister of Justice, Police and Prisons, Ciskei* 1988 (3) SA 750 (Ck) at 755-6; *Minister of Law and Order and Another v Maserumule* 1993 (4) SA 688 (T) at 691G-692B; and *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C) at 332B-H.

considered by the Appellate Division in *Tuckers Land and Development Corporation v Hovis*, albeit in the context of whether the doctrine of anticipatory breach should be grafted into our law. The court was concerned, in particular, with whether the doctrine of anticipatory breach relates to a breach of an existing obligation. The court observed that in Roman law, courts generally had wide powers to complement or restrict the duties of parties, and to imply contractual terms in accordance with the requirements of justice, reasonableness and fairness. The concepts of justice, reasonableness and fairness constitute good faith. After examining Roman and Roman-Dutch law authorities on the application of the concept of *bona fide*, the Court observed:

> "On principle this meant that the courts should have had wide powers to read into a contract any term that justice required. But apparently they did not exercise these powers. According to De Blécourt-Fischer *Kort Begrip van het Oud-Nederlands Burgerlijkrecht* 7th ed para 193 the recognition of contracts generally as being *bonae fidei*
>
> > 'leidde niet tot een vrymoedig toepassen van het beginsel der *judicia bonae fidei.* Er bestaat neiging, om, bij de uitlegging van hetgeen overeengekomen was, zich te houden aan hetgeen partijen hadden bepaald en er zo min mogelijk van af te wijken'.
>
> The courts did, however, imply, as a matter of law, those terms that had been accepted in Roman law usually to flow from the *bona fides* involved in the *judicia bonae fidei*. The need was apparently not then felt to complement these to any significant extent. But, as *Van Warmelo* points out, a community's concept of what *bona fides* (in the sense of reasonableness, justice and equity) prescribes may in time change."[56]

[81] The court accordingly concluded that:

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[55] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651C.

[56] Id at 652A-B.

> "It could be said that it is now, and has been for some time, felt in our domain, no doubt under the influence of the English law, that in all fairness there should be a duty upon a promisor not to commit an anticipatory breach of contract, and such a duty has in fact often been enforced by our Courts. It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon by the Roman law in respect of the *judicia bonae fidei*. It would not then be inapt to say, elliptically, that the duty flows from the requirement of *bona fides* to which our contracts are subject, and that such duty is implied in law and not in fact. It is interesting to note that according to Willston Law of Contract 3rd ed para 1337A the German law has developed along somewhat similar lines (and cf De Wet and Van Wyk (op cit at 152-3))."[57]

[82] 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.[58] 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."[59] 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.

[83] While there is a compelling argument for the proposition that both the maxim *lex non cogit ad impossibilia* and the requirement of good faith should be applicable to

[57] Id at 652D-F.

[58] *Brisley* above n 11 at para 32.

[59] Hutchinson "Non-variation clauses in contract: any escape from the Shifren straitjacket?" (2001) 118 *SALJ* 720 at 743-4 quoted with approval in *Brisely* above n 11 at para 22.

the enforcement of time limitation clauses, the applicability of these common law principles will depend on the reason advanced for non-compliance. In the view I take of the facts, it is not necessary to reach any firm conclusion on whether the maxim *lex non cogit ad impossibilia* and the requirement of good faith may be applied to the enforcement of a time limitation clause.

[84] The difficulty in the present case is that the applicant has not furnished the reason for the non-compliance with the time clause. He waited for two years after the defendant had repudiated his claim before instituting legal proceedings. On the face of it, there is nothing in his particulars of claim which suggests why he had to wait for such a long period. If the applicant had been prevented by factors beyond his control from complying with clause 5.2.5, one would have expected this fact to have been pleaded. We are left to speculate on the reason for non-compliance. Without those facts, it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy. Indeed without those facts, our decision on the constitutional issue raised may not be decisive of the litigation and might prove to be purely academic.

[85] But this has consequences for the appeal. In the result, without facts establishing why the applicant did not comply with the clause, I am unable to say that the enforcement of the clause would be unfair or unjust to the applicant. For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequence in these

circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent.

[86] Given the fact that the case must be adjudicated on the basis of the stated facts, the question whether it would be unfair to enforce clause 5.2.5 must be determined on the basis of the stated facts. These facts do not disclose any reason for non-compliance which would render the enforcement of clause 5.2.5 unjust and unfair. On the facts presented, the conclusion that the enforcement of clause 5.2.5 would not be unjust to the applicant, is unavoidable. It follows therefore that the special plea was well taken.

[87] In his dissenting judgment, Sachs J deals with a range of issues and concerns, including standard form contracts, actual and implied consensus, public policy, the significance of small print in written contracts and the power imbalance between insurers supported by legal expertise and people without expertise. I share many of his concerns and sentiments. *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it. Furthermore, the application of *pacta sunt servanda* often raises the question whether a purported agreement or pact is indeed a real one, in other words whether true consensus was reached. Therefore the relevance of power imbalances between contracting parties and the question whether true consensus could for that matter ever be reached, have often been emphasised.

[88] The facts of this case simply do not require us to consider these issues. What is more, these issues were never raised in the pleadings and could not, therefore, have been anticipated by the parties in the formulation of their statement of agreed facts. In these circumstances it is not appropriate to deal with them.

[89] For all these reasons, the appeal must be dismissed.

[90] This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the courts below.

Order

[91] In the event, an order is now made in the following terms:

(a) Leave to appeal is granted.

(b) The appeal is dismissed.

Madala J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

MOSENEKE DCJ:

[92] I have had the distinct benefit of reading the elegantly reasoned judgment of my colleague Sachs J. I respectfully concur in the outcome he proposes. Like him, I would uphold the appeal, dismiss the respondent's special plea and remit the matter to the High Court for the final adjudication of the applicant's claim.

[93] I have also read the strongly reasoned majority judgment prepared by my colleague Ngcobo J. Whilst I agree with the majority judgment in some respects, I regret that I am unable to embrace its reasoning and primary conclusion that the impugned time bar clause does not violate public policy because the agreed facts do not show that it is unfair to the applicant. This conclusion Ngcobo J reaches by holding that the facts do not disclose any reason for non-compliance that would render the enforcement of the time bar provision unjust and unfair. In his view, the onus is upon the party seeking to avoid the harshness of a time limitation clause to show that the contractual provision is contrary to public policy in the sense that it does not afford an adequate and fair opportunity to seek judicial redress.

[94] In my view, the fault line in the reasoning of the majority judgment lies in the way it frames the enquiry into whether a contractual provision offends public policy. The judgment advocates that the consistency of a contractual term with public policy must be assessed by reference to the circumstances and conduct of the parties to the contract. In this particular case, the judgment goes on to hold that "the fairness or otherwise of the clause must therefore be assessed by reference to the circumstances of the applicant."[1]

[95] This preferred subjective yardstick has prompted a fulsome enquiry into: (a) whether the applicant is poor or illiterate; (b) whether he was unaware of his rights; (c) whether he had access to professional advice; and (d) whether he was impeded by financial, educational or geographical reasons from meeting the deadline set by the time bar. In the same vein, much has been made of the fact that he is a software developer and drives a new BMW 328i, which in the words of the Supreme Court of Appeal is "a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle."[2] The majority judgment also notes that the applicant lodged his claim with the insurance company promptly after the motor collision that saw his motor vehicle damaged beyond repair, thereby implying that he could have issued summons well within the 90-day prescriptive period. In effect, the applicant's personal attributes and station in life played a decisive role in the determination of the majority judgment that the time bar clause is fair and just and thus accords with public policy.

[1] Para 64 of Ngcobo J's judgment.

[2] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) at para 15.

[96] In my view, the enquiry must be characterised differently. The appropriate test as to whether a contractual term is at odds with public policy has little or nothing to do with whether the party seeking to avoid the consequences of the time bar clause was well-resourced or in a position to do so. The question to be asked is whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend public policy. In the context of this case, the question to be posed is whether the provision itself unreasonably or unjustifiably limits the right to seek judicial redress. Ordinarily, the answer should not rest with the peculiar situation of the contracting parties, but with an objective assessment of the terms of their bargain.

[97] The proper approach would be to look at the time bar stipulation itself within the context of the entire agreement with a view to assessing whether it evinces a tendency or reasonable likelihood to deprive the claimant of the right to approach the courts for redress. When one weighs whether a contractual term is at variance with public policy, it matters little, or perhaps matters not, what the personal attributes of the party seeking to escape the results of the time bar are. It is not inconceivable that the personal and social station of the claimant may have some bearing on the public policy evaluation, but ordinarily it is not decisive. It is the likely impact of the impugned stipulation that should be determinative of what public notions of fairness may tolerate.

[98] Courts emphasise that it is the *tendency* of the clause to deprive the respondent of his right to judicial redress, which should be scrutinised for reasonableness. Public

policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.

[99] The issue whether the peculiar situation of contracting parties should enter the equation in assessing a contractual term, which is said to offend public policy, is neither novel nor free from controversy. But it is, by now, well settled. In fact, judicial opinion on the issue has a century long pedigree and was recently confirmed by the unanimous Supreme Court of Appeal judgment of *Bafana Finance Mabopane v Makwakwa and Another*.[3]

[100] A few examples should suffice. In *Sasfin (Pty) Ltd v Beukes*,[4] the court was called upon to determine whether certain provisions of a cession concluded by a medical practitioner in favour of a finance house were contrary to public policy. Smalberger JA made it clear that what is important is the likely effect of the contractual term complained of and not the personal characteristics of the party seeking to escape the oppressive stipulation. Referring to the impugned stipulation of the cession, he states:

[3] 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA).

[4] 1989 (1) SA 1 (A).

> "Clause 3.4.2 is couched in very wide terms. It gives Sasfin *carte blanche* in regard to the sale of Beukes' book debts. It is open to abuse, and the likelihood of undue prejudice to Beukes exists if its terms are enforced. As stated in *Eastwood v Shepstone (supra)*, it is the tendency of the proposed transaction, not its actually proved result, which determines whether it is contrary to public policy."[5]

[101] Following on several divergent decisions, a unanimous Appellate Division in *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd*[6] re-endorsed the approach laid down in *Sasfin*[7] on how to assess terms said to be contrary to public policy. The court had to decide whether a clause, which provides for a conclusive proof certificate of the amount of indebtedness under a suretyship, is contrary to community notions of fairness. The Appellate Division reiterated the approach in the following words:

> "The identity of the creditor (and, for that matter, the debtor) is to my mind irrelevant to the validity or otherwise of a conclusive proof clause. Were that ever to be allowed to be a relevant consideration, we would soon find ourselves in the legal quagmire so graphically and correctly described by a full bench of the Cape Provincial Division in *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C)."[8]

[102] In *Standard Bank of SA Ltd v Wilkinson*,[9] a full court of the Cape High Court, dealing with an attack on the validity of a suretyship on the grounds of public policy, remarked that:

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[5] Id at 14F. See also *Eastwood v Shepstone* 1902 TS 294 at 302 (per Innes CJ).

[6] 1995 (3) SA 1 (A).

[7] Above n 4.

[8] Above n 6 at 13I–J.

[9] 1993 (3) SA 822 (C).

> "If once clauses come to be judged . . . against the purpose of the contract, its setting and the relationship between the parties, creditors will come to be faced by a multiplicity of defences by 'recalcitrant debtors' and sureties seeking to have their agreements, freely and voluntarily entered into, declared *contra bonos mores*. It will, we fear, give rise to a plethora of litigation based upon the 'last resort' defence of public policy. It will also no doubt, in such event, produce the many conflicting decisions on individual clauses that presently exist."[10]

[103] Lastly, in *Bafana Finance*,[11] the Supreme Court of Appeal unanimously emphasised that whether a clause is inimical to public policy will depend upon whether it evinces a *tendency* rather than *proved results* to deprive another contracting party of the right to approach the Court for redress.[12]

[104] Whilst there is often merit in contextual analysis, it is clear that contractual terms should not be tested for their consistency to public norms by merely observing the peculiar situation of contracting parties. The enquiry must rather focus on the arrangement that the stipulation contemplates, on its impact on the parties, whoever they may be, on its tendency or likely outcome and ultimately, on its fairness between the parties as measured against public notions of fairness. This approach is particularly apposite in our constitutional setting. Trite as it is that our constitutional values allow individuals the dignity and freedom to regulate their affairs, they also require that bargains, even if freely struck, may not steer a course inimical to public notions of equity and fairness, which are now sourced from constitutional values. To

[10] Id at 831A-B.

[11] Above n 3. See also Christie *Law of Contract* 4 Ed (Butterworths, Durban 2001) at 398–404; Kerr "Public policy concerning clauses in contracts declaring certificates to be 'conclusive proof' of their contents" (1993) 110 *SALJ* at 668.

[12] Above n 3 at para 21.

defeat a complaint that a contractual term offends public policy by holding that the complainant has not shown individual unfairness is, in effect, to extol the *laissez faire* notions of freedom of contract at the expense of public notions of reasonableness and fairness.

[105] I am therefore in agreement with Sachs J who holds that courts are obliged to find relevant objective factors that might provide pointers towards public policy compliance in relation to terms limiting access to courts. And Sachs J does so admirably by looking first at the time bar provision itself within its full contractual setting. He meticulously examines other ancillary documents which provide valuable clues on the likely manner in which the insurance agreement was concluded.

[106] Here, I pause to record that the facts in the stated case itself may be terse. Yet to the pleadings are attached the voluminous insurance agreement and ancillary correspondence which form part of the pleadings and may be rightly looked at in disposing of the special plea. Indeed clause 5.2.5, on which the special plea is founded, does not appear in the stated case and can only be reached by reference to the pleadings.

[107] Sachs J correctly concludes that the contract of insurance in this case is a standard form contract or a contract of adhesion, which on its very face, claims copyright on the contract form. I did not understand the respondent to contend that the contractual terms, other than the schedule that contains the particulars of the applicant and his motor vehicle, were adapted or customised to suit the applicant.

[108] Thereafter, Sachs J rightly seeks guidance from international responses to contracts of adhesion and in particular, from the United Nations instruments and developments in the United Kingdom and South America. He examines proposals of the South African Law Reform Commission on the reviewability of unfair terms in contracts and on legislative reform in the area of consumer protection. Sachs J provides a survey of academic opinion and thereafter points to far-reaching statutory reform on prescriptive periods for diverse claims as indicative of burgeoning public policy on reasonable limitation of actions. Lastly, Sachs J turns to the specific time bar in this case and correctly finds it offensive to public policy as it unreasonably limits the right to an adequate and fair opportunity for legal redress entrenched in section 34 of the Bill of Rights. I agree. Below I proffer a few additional reasons.

[109] As the majority judgment does, I hold that the two-part test in *Mohlomi*,[13] on whether a provision affords a claimant an inadequate and fair opportunity to seek legal redress, applies in this case. The first part relates to whether the impugned term is too short, first to give notice and next to sue. The second part probes whether the stipulation is inflexible and requires strict compliance, whatever the circumstances.

[110] I accept that the special plea has to be decided on the stated case, sparse as the facts may be. In this regard, the facts must be understood within the context of the pleadings and, in particular, the insurance agreement and other annexures. However, I do not accept that the facts are not enough to adjudicate the special plea of

[13] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

prescription and the replication that the contractual provision is inimical to public policy.

[111] For my part, the impugned time bar clause, clause 5.2.5, fails the test laid down in *Mohlomi* on both counts. The clause is unreasonably short and it is manifestly inflexible. It is couched in certain and explicit terms. The claimant must serve summons within 90 days of repudiation. If this is not done, the insurer is released from liability. The clause irreversibly takes away, in an unreasonably short time, the right of action of the insured and, in that way, denies the insured a reasonable opportunity to have the dispute decided by an independent tribunal.

[112] The period is unreasonably short on several grounds. First, to require a claimant to find litigation funds, appoint an attorney, cause counsel to be briefed and issue and serve summons within a period of 90 days of repudiation of the claim, is unreasonable and unconscionable. The likely impact or tendency of this brief time bar is to release the insurer from liability to its considerable financial gain and to the irreparable prejudice of the insured.

[113] Second, it is not clear what legitimate purpose is served by this unseemly haste. Once the claimant has given timeous notice of an intention to claim, the insurance company is afforded the opportunity to investigate the claim and to preserve evidence for trial. One must wonder why this one-sided rush is necessary to protect the interests of the insurance company. The likely harm to the insured that the provision wreaks seems disproportionate to the interest the insurance company seeks to protect.

In other words, the prejudice that the clause visits on claimants is disproportionate to the conceivable benefits that it confers on the insurance company.

[114] Third, the attenuated time bar is not reciprocal. The insurance agreement does not contain any time bar to the insurer's right of action against the insured. It may repudiate the claim when it chooses and any claim it may have against the insured seems to be limited only by the three-year prescription period of general application.

[115] Fourth, at least since the advent of our democracy, Parliament seems to have adopted a new approach to ameliorate the consequence of time limitation clauses in statutes. Here I have in mind the Institution of Legal Proceedings against certain Organs of State Act.[14] Its declared purpose is to regulate and harmonise the periods of time within which to institute legal proceedings against certain organs of State and to give notice of such proceedings. Under section 2(2)(b),[15] debts which became due after the commencement of this statute are governed by Chapter III of the Prescription Act.[16]

[116] The effect of this is that the prescription period for delictual debts against the State organs, governed by the Institution of Legal Proceedings against certain Organs

[14] Act 40 of 2002.

[15] Section 2 states:

> "(2) Subject to section 3 and subsections (3) and (4), a debt which became due—
>
> …
>
> (b) after the fixed date, will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act No. 68 of 1969), read with the provisions of that Act relating thereto."

[16] Act 68 of 1969.

of State Act, is now three years. This is in line with the prescription period that pertains to delictual debts in general. The period within which legal proceedings may be instituted against State organs has therefore been extended to three years.[17] In addition, the notice of such proceedings must now be given within six months from the date on which the debt became due.[18]

[117] What is more, a court is empowered to condone non-compliance with the notice provision if it is satisfied, among other things, that good cause exists for the failure to give timeous notice, and the organ of State was not unreasonably prejudiced.[19] This statute therefore permits account to be taken of the claimant's fault, or the lack of it as well as prejudice suffered by the State, or the absence of it. In my view, these statutory trends in prescription of delictual claims against the state and private entities are indicative of the boni mores.

[118] In the present matter, the impugned time bar clause, on its terms, does not provide for extension of time on good cause shown, and is enforceable whatever the

[17] Under section 32 of the Police Act 7 of 1958, legal proceedings against the police had to be instituted within six months from the date of the cause of action, and one month's prior notice of such proceedings had to be given. When this statute was amended in 1995 by the South African Police Service Act 68 of 1995, the period was extended to twelve months in terms of section 57(1). The one significant change was section 57(5), which empowered courts to condone non-compliance with time limitation provisions where the interests of justice required it. Section 57(5) therefore permitted account to be taken of the claimant's fault, or the lack of it, and the prejudice suffered by the State, or its absence. Section 113 of the Defence Act 44 of 1957 required proceedings against the defence force to be instituted within six months from the time when the cause of action arose and also required a month's prior notice of such proceedings. Section 57 of the South African Police Service Act and section 113 of the Defence Act have been repealed by the Institution of Legal Proceedings against certain Organs of State Act, 2002, with the result that legal proceedings against these organs of State must now be instituted within three years.

[18] Section 3 of the Institution of Legal Proceedings against certain Organs of State Act, 2002, states:

> "(2) A notice must—
>
> (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1) . . .".

[19] Id at section 3(4).

reason is for failure to comply. In other words, the clause may be enforced however unfair or unjust its consequences may be. In this Court, the respondent contended that the time limitation is not an absolute defence to an insurance claim brought out of time because, at common law, the applicant has remedies that may be invoked to escape its oppressive consequences. The respondent relied on the doctrine of good faith and the common law maxim that the law does not require people to do the impossible. However, given the view the majority judgment takes that the facts are insufficient, it does not find it necessary to reach a firm conclusion on whether the maxim relating to impossibility and the requirement of good faith may be applied to the enforcement of a time limitation clause. In effect, the majority judgment does not decide whether the clause is inflexible because there are no facts to show why the applicant did not comply with the time limitation.

[119] It seems clear that the respondent's contention that there are common law defences which could render the time bar clause flexible is, at best, of no practical value in this case. This argument is an after-thought. It was never pleaded or argued in the High Court or the Supreme Court of Appeal. It amounts to a belated invitation to this Court to develop the common law. In any event, the common law qualification that the respondent seeks to have read into the stipulation flies in the face of the respondent's actual conduct, which is that the special plea is sufficient to destroy the applicant's claim. In my view, the clause means what it says. If the summons is not served within 90 days of repudiation of the claim, the insurer is released from liability. The clause is, on its face, unreasonable and unjust. It denies the applicant a

reasonable and adequate opportunity to seek legal redress and is therefore at odds with public policy.

O'REGAN J:

[120] I have had the pleasure of reading the judgment prepared in this matter by Ngcobo J. I concur in the order he proposes and in the reasoning in support of that order as it appears in paragraphs 1-72 and paragraphs 84-91. In my view, the discussion in paragraphs 73-83 is not necessary for the decision in this case. As Ngcobo J explains in paragraph 84, there are no facts on the record to establish that it was either impossible for the applicant to issue summons within the period of 90 days as required by the contractual time period or to establish that it would, for any other reason, be unfair to enforce the time limitation clause against him. In the absence of any facts to this effect, there is, in my view, no need for this Court to consider in what circumstances a court may, in terms of the principles of contract, decline to enforce a time limitation clause against a particular applicant based on the defences of impossibility or good faith. That difficult question can stand over for decision in an appropriate matter. I accordingly respectfully decline to consider the issues discussed in paragraphs 73-83 of Ngcobo J's judgment. For the rest, however, I am in agreement with his judgment.

MOKGORO J concur in the judgment of Moseneke DCJ.

SACHS J:

[121] The facts in this case are as scanty as the relevant bundle of contractual terms are voluminous and the legal implications vast. The parties are the applicant, Mr Barkhuizen, and Mr Napier, representing an insurance broking company, Hamford (Pty) Ltd (Hamford). They agreed on a statement of facts in the Pretoria High Court in the following spartan terms:

> "The applicant was at all relevant times insured by Hamford. On 24 November 1999 the applicant's insured motor car, a BMW with registration number JSM 825 GP, was involved in a motor car accident. He duly informed the insurer of the event on 2 December 1999. On 7 January 2000 Hamford repudiated the claim of the applicant in writing. On 8 January 2002 the applicant served the particulars of his claim on Hamford."

[122] The time periods were of particular importance because Hamford relied on a provision in one document in the bundle to the effect that if they rejected liability for any claim, they would be released from liability unless summons was served on them within 90 days of repudiation. They entered a special plea dependent on the enforcement of this provision. When compared with the normal prescription period for launching contractual claims, 90 days is undoubtedly a very short obligatory period for the institution of legal proceedings. But the primary question, in my opinion, is not whether Mr Barkhuizen was obliged to show on the facts of the case that this time period operated in practice unfairly against him. The basic issue, I

believe, is whether, objectively speaking, and taking account of the fact that the clause relied upon was contained in a standard form document annexed to but not forming an intrinsic part of what appears to have been the actual negotiated terms of the contract, the enforcement of the time-bar would be consistent with public policy in our new constitutional dispensation.

[123] This raises the issue of whether and to what extent concepts of consumer protection require that received notions of sanctity of contract be revisited. Should considerations of public policy in our present constitutional era compel courts to refuse to give legal effect to an imposed, onerous and one-sided ancillary term buried in a standard form contract that unilaterally and without corresponding advantage, limits the enjoyment of an important constitutionally protected right, namely, that of access to court? In my view, the stated facts when coupled with the bundle of contractual documents contained in the Particulars of Claim, are sufficient to enable this Court to pronounce without further evidence on the public policy issues raised.

[124] In this respect I feel that the enquiry made by Ngcobo J with regard to the fairness of the provision did not go far enough. In my view, what contractual fairness in the light of the Constitution requires is a special examination of the provenance of the time-bar and not just an analysis of whether Mr Barkhuizen has shown that he was in fact treated unfairly by its operation. The question is whether the fairness that public policy demands, permits the invocation at all by Hamford of the clause. In my view the answer can be found without further evidence. No question of onus arises. The documents speak for themselves.

The actual contractual arrangements

[125] In considering the appropriate manner in which to evaluate the time-bar, it is impossible to avoid going through the tedious process of examining the four documents before this Court which are said to establish the contractual arrangements in which it appears. There has been no suggestion from either party that there are any other relevant factors bearing on these arrangements, though it does appear from the documents that what was involved was a renewal of an insurance policy previously entered into.

[126] *The first document:* In a letter dated 22 October 1999 Hamford indicates that it has successfully maintained their premiums on the Homesecure policy without increase since 1996, but unfortunately, due to the increase in motor vehicle accidents and costs of repairs, it has no alternative but to nominally increase the insurance premiums on motor vehicles from 1 December 1999. The letter goes on to say:

> "Please ensure that provision is made for a revised monthly premium of R528.81 to be debited on 1 December 1999. Kindly note that any endorsements on your policy before 1 December 1999 might have an effect on the premium.
>
> Enclosed is a new Schedule of Insurance and revised policy wording including excess payments which become effective on 1 December 1999. Please read your Schedule and ensure that you are aware of and comply with the security requirements.
>
> Should you have any queries with regard to the above, please contact your Broker or Hamford.
>
> Thank you for your valued support in the past and be assured of our best attention in the future.

Yours faithfully,

Lynford Clarke
Director"

[127] *The second document:* On 1 November 1999 Hamford Underwriting Department wrote to the applicant as follows:

"Policy Number: PL001318/98

We have revised your policy as requested by yourself and have pleasure in attaching an updated schedule for your records.

Kindly check the schedule and ensure that all the details contained therein are correct. Should you not advise us to the contrary within 14 days of date hereof, it will be assumed to be correct.

Ensure that you are aware of and comply with the security requirements as listed on the schedule. Please note that cover is subject to compliance with the requirements.

Vehicles have to be inspected before cover will incept. Should you reside in the Pretoria, Johannesburg or surrounding areas, the vehicle inspection must be performed by our own inspector. Please contact Pat Davies at [number provided] or our office to arrange an appointment.

Please do not hesitate to contact your broker should you have any queries.

Kind Regards

HAMFORD UNDERWRITING DEPARTMENT"

[128] *The third document:* The attached schedule runs to four pages.[1] It is clear from its terms that it is intended to set out all the key terms agreed to by the parties. In Section 5a on the third page under the heading "Motor Vehicles", it sets out information of special relevance to this case. This relates to the sum insured, the premium and details of the car. Opposite the word "Cover" appears the word "Comprehensive". Opposite the word "Requirements" it reads "1. Approved Tracking Device . . . 2. Vehicle Inspection Report". At the bottom of the page is a column headed "Loadings" under which the word "No" appears next to the words "[Under] 25 Years Old", "Motor Only" and "Business Use", respectively. Another column headed "Discounts" has the word "Yes" next to "Tracking Device", and "No" next to "Lady Driver", "Advanced Driver" and "[Over] 55 Years Old", respectively.[2] On the last page is a signature for and on behalf of Hamford. Right at the end is a box headed "Schedule of Cancelled Sections/Items", which refers to a car radio, CD shuttle, lap tops and FAH 770 GP.

[129] Before considering the fourth and last document I note three points. The first is that it appears from the documents themselves that the negotiations were largely if not completely conducted by correspondence, and that these three contractual documents

[1] The first page, headed "Endorsements", indicates that the previous premium for ensuring a car radio in the Hyundai has been cancelled and replaced by premiums for a car radio, CD shuttle and satellite navigation in the BMW. The second page, headed "Policy Schedule", gives details about the insured, bank debit order details and broker details. This is followed by Section 2 in which R2 000 000 is given as the sum insured for personal liability for a premium of R1,63. Section 3, dealing with household goods, covers the rest of the page. It gives details about the sum insured and the premium, describes the house and itemises security requirements that have to be complied with, stating that theft cover will only be given once all the security requirements have been installed. The third page itemises the all-risks cover and premiums for the car radio and satellite navigation.

[2] Finally, the fourth page includes a small premium for SASRIA (riot cover), a policy fee of R55 and a total monthly premium of R564,83. Below that is the statement:

> "This schedule shall be deemed to be correct in accordance with the instructions of the Insured or Broker, unless Hamford is advised to the contrary within 30 days hereof."

were prepared and signed by Hamford, with the terms being based on information provided by the applicant, recorded by Hamford and intended to be binding if Hamford was not advised to the contrary within 14 days. The second is that no time limitation for bringing proceedings is referred to in these three documents. And the third is that no mention whatsoever is made of any further document to be regarded as part of the contract, that is, the correspondence does not refer to an attached contract of re-insurance with Lloyd's, the fourth document included in the bundle. I now turn to consider the status of that fourth document.

[130] *The fourth document:* The fourth document is a printed document of 29 pages, each headed with the word "Lloyd's" under which is stamped the words "Hamford: Sertifikaat van Versekering".[3] Below that on the covering page the following appears:

> "Underwritten at LLOYD'S
>
> This is to certify that certain Underwriters at LLOYD'S OF LONDON (whose names and proportions underwritten by them shall be supplied on application and hereinafter collectively called the Insurer) have granted Hamford (Pty) Ltd authorisation under Contract (which bears the Seal of the Lloyd's Policy Signing Office) to grant insurance in accordance with this Policy wording.
>
> HAMFORD (PTY) LTD shall act as underwriting manager of LLOYD'S OF LONDON and shall issue quotations, policies and pay claims Insured in accordance with its mandate from LLOYD'S OF LONDON.
>
> Signed on behalf of the Insurer and Hamford (Pty) Ltd:
>
> L.R. Clarke
> Managing Director

[3] "Hamford: Certificate of Insurance".

> IMPORTANT: Carefully examine this policy
> Immediately on receipt please examine this Policy and if it is not in accordance with your Application kindly return it at once to the office of issue.
> Immediate notification must be given to Hamford (Pty) Ltd of any changes which may affect the Insurance provided by this Policy."

The first page is headed "What to do in the event of a motor accident", and sets out in small print various responsibilities of the insured emphasising the importance of reporting. Then follow 27 pages in equally small print. They are grouped in eight sections, each with its own format and extensive headings, clauses, sub-clauses, many written in dense legal language. Only one portion is to some degree highlighted: in the General Section at the beginning it deals with cancellation, and stands out slightly from the rest of the text because it is in bold type.

[131] On the fourth page in a section headed "General", the first five lines purport to state the contractual relationship between the Insured (whose name is not given) and the Insurer. They read:

> "The Insurer agrees to insure the Insured, where he holds insurable interest in the property, in respect of the insured events subject to all the terms, exceptions and conditions contained herein or endorsed hereon upon the payment and acceptance of the premium as specified in the Schedule for the period of insurance. The proposal form completed by the Insured shall be the basis of this option . . . of the Insurer by payment, replacement, reinstatement or repair."

A multitude of provisions appear in the following 22 pages, dealing with terms covering such diverse themes as the meaning of headnotes, loss or damage arising out

of computers not being compliant with the year 2000, averaging, automatic inflation margins, war and nuclear risks. Much space is taken up with "Special Exclusions".

[132] If one pages through these 22 pages diligently, on the fourth page one comes across several headings, the fourth of which reads: "Claims Procedures and the Requirements". After stating that notification of an event likely to give rise to a claim must be given as soon as possible and the claim submitted within 30 days, eight further procedural requirements are stipulated. Then follows a sub-heading "Requirements". Three are listed on this page. At the top of the fifth page are four more provisions, including the one at the heart of this litigation. Clause 5.2.5 reads:

> "If we reject liability for any claim made under this Policy we will be released from liability unless summons is served on Lloyd's SA or Hamford (Pty) Ltd within 90 days of repudiation."

More than 20 pages of small print in single space follow, covering a vast range of topics, much of it relating to matters such as sea-craft that could have no bearing on the relationship between the applicant and the insurer. Finally, at the foot of the 29th page the reader is informed as follows:

> "Copyright © 1997. The contents and layout of this document remains the sole and exclusive property of Hamford (Pty) Ltd and no part of it may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of Hamford (Pty) Ltd."

[133] Reading the four documents together establishes that the negotiated terms between the parties are contained in Document 3, the Schedule, and not in

Document 4, the self-entitled Certificate of Insurance. Furthermore, none of the documents are signed by the insured, and although Documents 1 and 2 (the letters signed on behalf of Hamford) draw attention to the Schedule, they do not refer to the Certificate of Insurance. Document 2 invites the applicant to peruse Document 3, the Schedule, and states that if he does not advise to the contrary within fourteen days, the details will be assumed to be correct. The applicant's attention is then specifically drawn to the need for compliance with security requirements and the importance of his vehicle being inspected.

[134] The fourth document does not appear to have been discussed by the parties. Presumably, however, it had been attached in the previous year to the negotiated documents. I will assume in favour of the insurer that the applicant was aware of its existence and of the fact that in some rather vague way the relationship between the insurer and Lloyd's as reflected in it had a bearing on his relationship with Hamford. Yet not only was it not signed by him, there is no evidence from Hamford that its provisions were drawn to his attention. It was in fact a prolix, dense and hard to read example of a standard form contract, sometimes referred to as a contract of adhesion, and copyrighted to boot.

Standard form contracts

[135] Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a "take-it-or-leave-it" basis,

thus eliminating opportunity for arm's length negotiations.[4] They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the "fine print" of the contract.

[136] As it is impracticable for ordinary people in their daily commercial activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through endless small print in endless standard forms, would be beyond the expectations that could be held of any ordinary person who simply wished to get his or her car insured. What the insured in fact looks for is a reliable insurer that offers what he or she thinks are reasonable terms as regards cover and premiums. Indeed to expect the would-be purchaser of short-term insurance to seek full legal advice on every term in the standard form contract would both require that the expense of the premium be exceeded many times over, and result in the absurdity of the short term of the cover expiring before comprehensive clarity on each and every provision was obtained.

[4] See Woolfrey "Consumer Protection — a new jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109 at 119-20. See generally Aronstam *Consumer Protection, Freedom of Contract and the Law* (Juta, Kenwyn 1979).

[137] Standard form contracts, such as the one in the present case, undoubtedly provide benefits for those who produce and rely on them. In the context of mass production of goods and services, the use of standard forms gave rise to the most significant new phenomenon in the practice of making contracts in the twentieth century— the application of mass contracts to consumer transactions.[5] For a business dealing with consumers, lawyers devised printed contracts which purported to govern exclusively the business relationship between the parties.[6] Standard form contracts are thus ordinarily the product not of negotiations but of the employment of legal teams by sellers of goods and services to serve their interests. In a business context, such a standard form contract preserves the wisdom of the in-house lawyers about the best way in which to handle recurrent problems of negotiation and performance.

[138] In many consumer and business transactions, the contract will be concluded on the basis of a printed document which purports to contain all the terms of the contract.[7] In some cases the printed document will be signed by both parties, but often it is merely handed over or posted at the time of the formation of the contract.[8] Some doubt has been expressed about the validity of such standard forms to count as contracts at all.[9] The process often resembles an imposition of will rather than mutual consent to an agreement, so these transactions have been described as contracts of adhesion.[10]

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[5] Collins *The Law of Contract* 3 ed (Butterworths, London 1997) at 2-3.

[6] Id at 112.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[139] The use of standard forms responds to two economic pressures. They reduce the transaction costs of contracting by making available at no extra cost a suitable set of terms. In addition, the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate sales staff. For these reasons, it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.[11]

The legal status of standard form contracts

[140] A strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom. Davis J has presented the argument in the following terms:

> "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 and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated.
>
> But the principles of equality and dignity direct attention in another direction. Parties to a contract must adhere to a minimum threshold of mutual respect in which the

[11] Id at 112-3.

> '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'. The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution. . . .
>
> In short, the constitutional State which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. 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*."[12] (References omitted.)

[141] I should add that the legal convictions of the community should not be equated with the convictions of the legal community. The doctrine of sanctity of contract and the maxim pacta sunt servanda have through judicial and text-book repetition come to appear axiomatic, indeed mesmeric, to many in the legal world. Their virtue if applied in an unlimited way is not self-evident, and their reach, if not their essence, have come to be severely restricted in open and democratic societies. This has happened over several decades through the overlapping effects of consumer protection struggles, scholarly critiques, legislative interventions and creative judicial reasoning. The jurisprudential pedestal on which it once imperiously stood has been singularly narrowed in the great majority of democratic societies.[13] Our new constitutional order, I believe, further attenuates its one-time implacable application.

[142] These broad considerations provide an important backdrop against which public policy in the present matter has to be viewed. More directly, there appear to be three

[12] *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 474J-475F. This passage was cited by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 69.

[13] See below paras 42-8.

specific factors which in combination raise serious questions about the enforceability on public policy grounds of the specific standard form clause in the present matter.

[143] The first is that an expressly guaranteed constitutional right is engaged, namely the right to have a dispute between the parties resolved by a court.[14] This is an area where public and private law meet. The courts are there precisely to ensure that legal disputes are not settled through self-help but through recourse to an impartial tribunal. Indeed, the courts have developed the law of contract over the centuries because they have been relied upon to hold the balance between the parties and establish appropriate norms and standards for regulating their respective rights. The special significance of the right of access to the courts will be dealt with later.

[144] Secondly, the area of activity relates to matters of considerable public concern. Insurance for car users is not a luxury but part and parcel of every-day life, a virtual necessity for many vehicle owners. The insurance industry deals with members of the public who come off the streets and place their faith in the solvency, efficiency, probity and integrity of the insurers. Insurance companies compete on aspects concerning cover, no-claim bonuses and premiums, not on the basis of what appears in the small print. Its public service character is reflected in self-regulation as an industry, and the appointment of an Ombudsman. Insurance thus has become a necessity for large sections of our society— it is not a personal indulgence. The insurance industry is highly organised and large insurance companies play a major

[14] Section 34 of the Constitution reads:

> "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."

role in public life. The public interest in promoting fair dealing in insurance contracts so as to protect relatively vulnerable individuals contracting with large, specialist business firms, is accordingly strong.

[145] In this respect legal tradition, if unmodified, will frequently lag well behind social and commercial reality. As Rakoff pointed out in an influential article,[15] "freedom of contract" has long been defined in terms of the separation of the market and the state, private and public law; at its fullest reach, it is the doctrine of laissez faire. But to use such a framework to deal with contracts of adhesion, is to err both in valuing highly a claim to freedom that is inapposite, and to overlook the elements of liberty that are actually at stake. Far from enforcement of the organisation's standard form terms furthering fundamental human values, the standard document grows out of and expresses the needs and dynamics of the organisation. He explains that:

> "Emphasis on the standard analysis . . . obscures the manner in which individual freedom really is at stake. A conception of contractual freedom modelled on the opposition between individual and state is inadequate in industrialized, organized and institutionalized society. Institutions other than the state can and do dominate the individual within the framework of private law as ordinarily conceived. . . . What the courts should say is that enforcing boilerplate terms trenches on the freedom of the adhering party. Form terms are imposed on the transaction in a way no individual adherent can prevent, and a major purpose and effect of such terms is to ensure that the drafting party will prevail if the dispute goes to court. The adhering party is remitted to such justice as the organization on the other side will provide. . . . [T]he use of contracts of adhesion enables firms to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms."[16] (Footnote omitted.)

[15] Rakoff "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harvard Law Review* 1173 at 1237.

[16] Id.

[146] I would add that this is not to say that once we recognise that the legal enforcement of standard form terms provides the basis for domination of this sort, we are pushed toward the conclusion that such terms should be completely unenforceable. Such a conclusion would be over-robust. If business firms play an important part in public life, and if their ability to do so relies significantly on the use of standard forms, some degree of use of the forms is sustainable. I will suggest later that what is required is neither a blanket acceptance of standard form terms, nor a blanket rejection, nor an ad hoc determination by each judge in accordance with his or her personal predilections as to what is fair or not. What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society. More specifically it calls for examination of the "tendency" of the provision at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society.

[147] Thirdly, the clause in question appeared in a classic example of a standard form contract. Unlike other leading cases that have been litigated on in recent years, where the challenged clause was one of which both parties were aware at the time of contracting, but was sought to be struck down because of its extortionate character,[17]

[17] See *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) at para 4; *Brisley* above n 12 at para 9. But see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 18F/G-G.

the clause in the present case was not signed by Mr Barkhuizen, but buried in a voluminous add-on document. On the face of it the actual bargain struck between the parties was contained in the letter sent by Hamford to the applicant, and the Schedule that accompanied it. These two documents convey what the parties actually agreed to. The Certificate of Insurance with Lloyd's in which Clause 5.2.5 can be found, was sent to him in circumstances not clear from the record. It contains endless provisions in a font sufficiently small to reduce the costs of the paper used while simultaneously discouraging any reasonable person from ploughing through it. Clause 5.2.5 sought unilaterally and without giving Mr Barkhuizen any corresponding benefits, to impose onerous terms on him that he had apparently not knowingly agreed to, and to restrict the ordinary rights he would have had to seek enforcement of his claim under the law of contract.

[148] In my view, it is the combination of these three factors that characterises this case and establishes the specific matrix in which it must be evaluated. Of particular relevance is the enforceability or otherwise of terms which might technically be brought within what is referred to as "the contract", but which did not form part of the actual consensus or real agreement between the parties. The potential unreasonableness in the eyes of the community, leading to a possible finding of violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing

to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be aware.[18]

[149] It is appropriate at this stage to consider the relevance, if any, of the fact that the applicant was not a poor and illiterate person likely to be bamboozled by any complex legal document. Standard form contracts by their very nature have standard effects. The fact is that one-sided clauses, the existence or import of which the consumer is likely to be largely or totally unaware, hit the computer-literate owner of a relatively new BMW who buys online, with the same impact as they do the owner of the jalopy close to the scrap yard, who signs with a thumbprint.[19] It is not only the indigent and the illiterate who in practice remain ignorant of everything the document contains; the fact that consumer protection is specially important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers. If, in our new constitutional order, the quality of public policy, like the quality of mercy and justice, is not strained, then the wealthy must be as entitled to their day in court as the poor.

[150] The questions before us, then, are as follows: does public policy, propelled by the letter and spirit of our Constitution, regard received notions of contract law as encapsulated in the notion of sanctity of contract, to be inviolate and unchanging?

[18] I stress "a reasonable person in his or her position". In relation to precisely the same documents the situation of two business people bargaining with each other, each backed up by a battery of lawyers and accountants, even if one is economically in a much stronger position than the other, would be very different from that of an insurance company dealing with a motorist coming off the street to its office, or phoning through instructions. I would emphasise too, that I am not dealing with terms that were actually agreed upon, or that were part of or implicit in the bargain actually struck, or that provided for reciprocal benefits. In these cases different considerations could apply.

[19] In this regard it is significant that the new Consumer Protection Bill refers in its preamble both to the rights of historically disadvantaged persons and to protecting the interests of all consumers. See below n 53.

Does it countenance a person being bound by onerous terms even though they were unilaterally attached to the actual bargain made? To what extent does public policy in an open and democratic society require that the service-provider who authored such provisions show that these terms were specifically drawn to the consumer's attention? How central to public policy is the fact that these terms attenuate a constitutionally protected right in a manifestly one-sided way? And what weight does public policy attach to the reality that the person negatively affected cannot in the circumstances reasonably be expected to have understood the provision to constitute an obligation actually undertaken by him or her under the contract? To answer these questions it is necessary to look at the manner in which contract law has evolved over the centuries in relation to the central issue of mutual consent lying at the heart of contractual obligation. Freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy.[20] Yet the evolution of contract law suggests that the notion of sanctity of contract has been used to undermine rather than reinforce true volition.

The evolution of contract law: from actual to imputed consensus

[151] The right, and power, to make a contract evolved over time to become a central part of the bundle of legal rights that constituted legal personality.[21] Indeed, as Maine demonstrated in the nineteenth century, the emergence of the concept of contract as a means of organising relationships between people, was seen as marking the maturity

[20] *Brisley* above n 12 at para 94.

[21] Fridman *The Law of Contract in Canada* 4 ed (Carswell, Scarborough 1999) at v.

of a legal system.[22] The historical movement from "status to contract", in his famous phrase, was not only vital, it was inevitable. The making of contracts was an aspect of freedom. It is not surprising, therefore, that the common law, which historically was a powerful tool in the evolution of political freedom, should adopt the attitude that the less interference with an individual's exercise of the right and power to contract, the better. As Atiyah has shown, this attitude of the common law vis-à-vis contract was intrinsically bound up with the economic doctrine of laissez faire. It presupposed freedom to contract or not to contract, and non-interference by the courts under the governing principles of the law of contract. What gave a particular character to contract law, however, was the development of the notion that consent to contractual terms could be inferred objectively.

[152] Atiyah explains the process in the following terms:

> "When we turn to contract law itself, the decline in the importance of consent, or free choice, is manifest in a variety of ways. I need not dilate on the extensive use in modern times of standardised written contracts which are drawn up by one party and merely presented for signature to the other. This phenomenon has been much written about and is now widely acknowledged to involve substantial derogations from the consensual model of contract. Frequently one party has little effective choice in the matter at all, and neither reads nor understands,

[22] Id. Fridman refers to Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, London 1861) at 140. Maine writes:

> "Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. . . . [W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*" (His emphasis.)

> nor in any real sense agrees to the terms contained in such standard documents. But it is worth pausing to ask how such documentary contracts ever came to be accepted as possessing the validity of genuine agreements. Given the importance attached to the element of consent in the classical model of contract, how was it that the judges were able to conceive of such written documents as contractual?"[23]

[153] His answer is that when faced with written documents, the courts in practice looked less for signs of genuine agreement, and insisted more on the external conduct of the parties. Once the document could be treated as contractual, it made the task of the courts so much easier; the dispute could be solved by looking at the terms in the document, and there would be no need to go into the broader and more difficult questions involved in searching for "implications", or trying still more broadly to find a just solution to the dispute.[24]

[154] In recent decades, however, more emphasis has been placed on restoring a truly consensual approach. This has come about not because judges have been prepared to overturn settled principles of the common law in order to dispense "palm tree justice". As Fridman explains,[25] a prime factor in this evolution may well be the greater interest of the State, ie society at large, in the regulation of private arrangements. A contract

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[23] Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford 1985) at 731. At 731-2 he adds the following:

> "The problem is all the greater because . . . in the high noon of classical theory the Courts gave a new meaning to the requirements of the Statute of Frauds. The written note or memorandum required by the Statute, they insisted, was merely evidence of an agreement; the actual binding contract rested not in the writing itself, but in the will of the parties. But when, later in the nineteenth century, the Courts were faced with the new problems of printed clauses, or tickets containing references to terms contained elsewhere, there was an increasing tendency to treat the written terms, subject to certain conditions, as themselves the actual words of the contract."

[24] Id at 733.

[25] Fridman above n 21 at vi.

may no longer be of concern solely to the parties. The public in general may be concerned with the consequences of such arrangements, whoever the parties and whatever the subject-matter of the arrangement. "Our more liberal, democratic and egalitarian society," he states, "places more emphasis upon the achievement of just result than on the maintenance of technical doctrine derived from precedents that stretch back several centuries."[26]

[155] Prolix standard form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. It may be said that far from promoting autonomy, they induce automatism. The consumer's will does not enter the picture at all. Indeed, it could be contended that the question has moved from being one of whether judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.

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[26] In similar vein Collins above n 5 at v-vi explains the changed mode of thinking as follows:

> "Perhaps no other subject in the standard canon of legal education can claim such an august tradition, such rigour of analysis, and such sublime irrelevance, as the law of contract. The multitudes of textbooks typically repeat an interpretation of the subject which has remained unaltered for a century or more in its categorization of the legal materials. The latent values which inform these works include a priority attached to personal liberty, minimal regulation of market transactions, and a profound divide between private economic transactions and public control over the social order. This fidelity to nineteenth-century *laissez-faire* ideals, which is unmatched in other fields of legal studies, often remains concealed behind a presentation of the law which emphasizes the formal, technical, and historical qualities of legal reasoning.
>
> . . . .
>
> My interpretation of the legal materials emphasizes the way the law both establishes market transactions as an important site for citizens to acquire meaning for their lives, and controls the market for the sake of establishing and protecting public goods. I have referred to these goals compendiously as a conception of the 'social market'."

[156] A distinction needs to be drawn, then, between those aspects of the contract where the minds concerned actually met, and a range of surrounding provisions that were never discussed at all, but that, like Mount Everest, were just there. Little wonder that such provisions characteristically appear in small print.[27] Their objective is not to record negotiated terms but to be as un-prominent as possible so as to provide the least possible distraction from finalising the contract, while securing the greatest obligatory reach for the consumer and the most-reduced prospect of liability for the provider. Thus, while businesspeople can get their lawyers to scrutinise the small print with professional lenses and advise accordingly, ordinary consumers cannot be expected to do the same. The result is that much of the contract is in reality not a record of what was agreed upon but a superimposed construction favouring one side. 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. It certainly does not promote the spirit of openness central to our new constitutional order.

[157] I now turn to consider the significance of these historical and philosophical considerations for the issue of unenforceability of contracts that go against public policy, as animated by the Constitution, in South Africa.

Public policy in South African contract law

[27] And little wonder that the phrase "watch out for the small print" has become synonymous with a warning to beware of hidden ways of taking away with the left hand what the right hand has given.

[158] As the majority in the Supreme Court of Appeal held in *Sasfin*[28] the interest of the community or the public are of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.

[159] The Court cited as authority what Innes CJ said in *Eastwood v Shepstone*:

> "Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result."[29]

It went on to add that no court should therefore shrink from the duty of declaring void 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."[30]

In grappling with this often difficult problem, the judgment continued, it must be borne in mind that public policy generally favours the utmost freedom of contract, and

[28] *Sasfin* above n 17 at 8-9.

[29] *Eastwood v Shepstone* 1902 TS 294 at 302.

[30] *Sasfin* above n 17 at 9B-C.

requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. A further relevant, and not unimportant, consideration was that "public policy should properly take into account the doing of simple justice between man and man".[31]

[160] More recently the Supreme Court of Appeal was called upon to deal with the implications for public policy of a contractual term that inhibited access to the courts. In *Bafana Finance*[32] Cachalia AJA, writing for a unanimous Court, said:

> "That a court may not enforce an agreement because the objective it seeks to achieve is contrary to public policy is firmly part of our law. And in this determination 'public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> . . . .
>
> [O]ur Courts have had no difficulty in declaring contracts contrary to public policy where their *tendency* . . . is to restrict or prevent a person from vindicating his or her rights in the courts. Thus in *Schierhout v Minister of Justice* Kotze JA stated:
>
> > 'If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.'
>
> . . . .
>
> There can be no doubt that the *tendency* of the clause [in the present matter] is to deprive the respondent of his right to approach the court for redress from his parlous financial position. To deprive or restrict anyone's right to seek redress in court, as the

[31] Id at 9G quoting Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544. Today we would say between "person and person".

[32] *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

> cases cited above make clear, is offensive to one's sense of justice and is inimical to the public interest."[33] (Footnotes omitted.) (Emphasis in the original.)

[161] While establishing the importance of contractual terms being compliant with public policy, these cases do not in themselves indicate whether, or to what extent, standard form contracts raise public policy concerns. I will accordingly seek to establish relevant objective factors that might provide pointers to what public policy requires with regard to standard form contracts in general, and to terms limiting access to court in particular. I will look at the following: international practice with regard to the status and reviewability of standard form contracts; research done and proposals made by the South African Law Reform Commission (SALRC),[34] leading to the recent publication of the Consumer Protection Bill; academic opinion; and relevant statutory provisions regarding prescription and time limits for the bringing of civil proceedings.

Guidance from international practice

[162] In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies.[35] As Collins

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[33] Id at paras 11, 20-1. In that matter the clause stated that the debtor agreed not to seek an administration order in the Magistrate's Court if unable to pay his debts. Although distinguishable on the facts from the present case, *Bafana Finance* emphasises the importance that public policy attributes to keeping open the right of access to court.

[34] In January 2003 the South African Law Commission was re-named the South African Law Reform Commission. I will use the acronym SALRC to cover reports of the Commission both before and after the name change.

[35] Section 39(1) of the Constitution provides that—

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

points out, one of the foremost general challenges for legal regulation of markets during the twentieth century was the requirement to limit the advantages which businesses could obtain against consumers by deploying standard form contracts.[36] This has been a world-wide concern.

[163] The SALRC has stated that "public policy . . . is more sensitive to justice, fairness and equity than ever before."[37] It added that—

> "With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through 'interpretation' of contractual terms were sufficient, and that legislative action was required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, the Federal Republic of Germany, the Netherlands, and Australia as well. They are all based on the principle of good faith in the execution of contracts."[38]

[164] The United Kingdom standard form contracts are governed by a consumer protection statute of 1977[39] and Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts,[40] which provides:

(b) must consider international law; and

(c) may consider foreign law."

[36] Collins above n 5 at 2-3.

[37] SALRC "Unreasonable Stipulations in Contracts and the Rectification of Contracts" Project 47 (April 1998) at para 1.44.

[38] Id.

[39] Unfair Contract Terms Act 1977. See too The Unfair Terms in Consumer Contracts Regulations 1999 which implements the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts. The latter can apply to almost any type of term that was not individually negotiated and will invalidate the term if it is unfair.

[40] Council Directive 93/13/EEC OJ L 095/29 (5 April 1993), http://www.crw.gov.uk/resources/unfair%20terms%20 directive7.pdf, accessed on 27 March 2007.

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

This broad provision is restricted in its scope by Article 4(2):

> "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, insofar as these terms are in plain intelligible language."

[165] Collins observes, however, that when attention is focused on ancillary terms, the conception of fairness undergoes a shift. Instead of fairness being measured against a fair price, usually the ordinary market price, the criterion of assessment becomes one of a mixture of balancing reciprocal ancillary obligations and conformity to reasonable expectations. The idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damages for breach, should be matched by corresponding benefits to the other party. Conformity to reasonable expectations suggests that the ancillary terms should not deviate from a reasonable package of terms for transactions of that type unless the parties have expressly negotiated the point. The courts are not permitted, then, to uphold a challenge to the fairness of a contract on the ground that the main subject matter of the contract represented a poor bargain. For challenges to ancillary terms, however, a combination of the ideas of balance of advantage and conformity to reasonable expectations will suffice.[41]

[41] Collins above n 5 at 253. In 2001 the Department of Trade and Industry asked the Law Commission and Scottish Law Commission to rewrite the law of unfair contract terms in a single regime in a clear and accessible

[166] It appears that a number of South American countries have also enacted legislation since 1990 providing for consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statues were heavily influenced by the Mexican Consumer Protection Law of 1975 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law.[42]

[167] It is noteworthy, too, that in the case of long-term international commercial transactions reasonableness rather than purely formal compliance is regarded as the yardstick against which duties of requisite good faith are tested. This renders the issue of good faith one of discretion and understanding, rather than one of formalistic principles.[43] What is reasonable depends on the circumstances of the case and the normative inquiry of how one should conduct oneself. The process is not a mechanical one of interpreting the parties' intentions in light of formalistic principles.

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style. In recommendations published in 2005, the Commissions produced a draft Bill aimed at preserving the existing level of consumer protection, rounding up rather than down, when there was a discrepancy between the 1977 Act and the Directives. It is interesting to note that the Bill distinguishes between consumers, very small businesses and other businesses. The protections given to businesses in their dealings with each other in relation to standard contract terms are not as extensive as those given to consumers. However, very small businesses will be able to challenge any standard term of the contract which has not been altered throughout negotiations and is not the subject matter of the contract or the price. An interesting recommendation in favour of consumers, contained in para 9(4) of the Commission's Summary, is that:

> "[I]n claims brought by consumers, the burden of proof lies on the business to show that the term is fair. Again this follows the 1977 Act. The business will generally have far greater resources than the consumer so, where fairness of a term is in issue, it should be required to justify its position."

[42] SALRC Report above n 37 at para 2.2.2.1.

[43] Nassar *Sanctity of Contracts Revisited: a Study in the Theory and Practice of Long-term International Commercial Transactions* (Marthinus Nijhof, Dordrecht 1995) at 167-8 quoted in the SALRC Report (see above n 37 at para 2.5.2.25). For the United Nations Guidelines on consumer protection see generally Resolution Adopted by the General Assembly, UN Department of International Economic and Social Affairs, A/RES/39/248 (1985).

Rather, it is more an attempt to determine what is deemed to be proper conduct. Nassar explains that:

> "Acknowledging a duty to cooperate, in situations where it is thought to best serve the contractual relationship and its goals, moves the contractual model away from a classical conceptualization — where individuals are free to conduct their businesses as they please, their agreements being the only self-imposed limitation — towards a relational one. Under the latter conceptualization, one is expected to conduct his affairs in conformity with an existing set of values, or what one may call a code of conduct. As is the case with the general standard of good faith, reasonableness, as opposed to honesty, requires sincere efforts to further the contractual relationship and achieve its goals. By falling short of the behavioural standards required under the circumstances, one can wind up in breach of his contractual obligations, regardless of whether one has acted in bad faith — that is, dishonestly. The criterion to test the reasonableness of questioned activity is whether the conduct conforms to reasonable business judgment. A party's motivations for his conduct do not affect the determination of the standard of good faith performance."[44]

[168] The last word in this section belongs to an observation by the Hong Kong Law Commission that sums up much of the relevant argument:

> "As Lord Atkin put it, 'finality is a good thing but justice is better'. Certainty is a pragmatic rather than a principled consideration craved by lawyers so that they can advise their clients upon their rights. We do not belittle certainty, but we do not feel it is paramount. Certainty in this context is sometimes sought to be justified by the principle of sanctity of contract, that a party must abide by his agreement. This assumes of course that a piece of paper signed by that party is truly his agreement. But in reality that party has not genuinely consented to the terms on that paper, which are in standard form and have not been read (or been expected to be read) by him, let alone been the subject of negotiation. The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining. Unfortunately, in modern life, there is rarely

[44] Id.

> the time or the opportunity for such bargaining; it has been replaced by the convenient form and the standard clause."[45]

Official proposals for statutory reform in South Africa on consumer protection

[169] The whole question of the reviewability of allegedly unfair terms in contracts has been subjected to extensive research by the SALRC.[46] Its conclusion was that the common law as it was being applied was inadequate for providing appropriate remedies in relation to contract terms that were unconscionable, oppressive or unreasonable. In its Report[47] it pointed out that opinion had shifted substantially since the time (1981) when Professor Hahlo of the University of Witwatersrand could write—

> "Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."[48]

[170] In modern contract law, the Report stated, a balance had to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other. Its view was that there was a need to legislate against contractual unfairness,

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[45] Law Reform Commission of Hong Kong "Report on Sale of Goods and Supply of Services" at 37-8 quoted in the SALRC Report above n 37 at para 2.2.2.8.

[46] Above n 37.

[47] Id at para 1.8.

[48] Hahlo "Unfair Contract Terms in Civil-Law Systems" (1981) 98 *SALJ* 70.

unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced.

[171] It acknowledged that the main objection to the said proposal was based on the uncertainty argument.[49] This argument was a straightforward one: the main aim of a contract is to regulate the future relationship between the parties as regards a specific transaction. The very foundation of contract law was to create certainty, to protect the expectations of the parties, to secure to each the bargain made. That was why the idea of contract, based on autonomy of the will of freedom of contract, was the very basis of all commercial and financial dealings and practices, from the simple supermarket purchase to the most involved building contract. If a court was given a review power, it meant in practical terms that the court could re-make the contract, relieve one party of his or her obligations, wholly or partly, and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract, whether or not that contract was going to be re-written by a court, using as its yardstick vague terms such as "good faith", "fairness", "unconscionability".

[172] The Commission, however, was not persuaded by these arguments. It accepted that any change effected by the proposed legislation would produce a measure of legal uncertainty and consequent litigation, at least in the short term, when many contracts might be challenged.[50] The Commission was nevertheless of the view that this was a

[49] See SALRC Report above n 37 at para 1.27.

[50] Id at para 2.2.3.2.

price that must be paid if greater contractual justice was to be achieved; that certainty was not the only goal of contract law, or of any other law; and lastly, in any event, that the fears provoked by the proposed Bill were exaggerated in the light of the experience of countries that had already introduced such legislation.[51]

[173] The Commission consequently recommended the enactment of legislation addressing the issue.[52] Unreasonableness, unconscionability or oppressiveness should be the yardstick, and guidelines should be included in the proposed legislation. The Commission concurred with the view, however, that a court would apply more flexible criteria when a contract concluded by so-called business people was being considered, than would be the case where other contracting parties were involved.[53]

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[51] Id.

[52] Id.

[53] Id at para 2.7.4.4. In keeping with the broad proposals of the Commission, the Consumer Protection Bill (Government Gazette 28629 GN R489, 15 March 2006) was recently published by the Department of Trade and Industry for public comment. The preamble states that:

> "The people of South Africa recognise—
>
> . . . .
>
> That it is necessary to develop and employ innovative means to—
>
> (a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
>
> (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
>
> (c) give effect to the internationally recognised customer rights".

Section 3(1) goes on to provide that—

> "The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa by—
>
> (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible".

In Chapter 2, which deals with fundamental consumer rights, special attention is given to the question of notice to the consumer of clauses which provide for exemption from liability. Section 50(1) provides that any provision in an agreement in writing that purports to limit in any way liability of the supplier is of no force and effect unless:

> "(a) the fact, nature and effect of that provision is drawn to the attention of the consumer before the consumer enters into the agreement;

[174] To my mind, the findings of the Commission and the publication of the draft Bill provide strong evidence that public policy has moved radically away from automatic application of standard form contracts towards a more balanced approach in keeping with contemporary constitutional values. What public policy seeks to achieve is the reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition.

Academic opinion

[175] Few issues seem to have united academic commentators as much as a jointly perceived need to ensure that courts refused on grounds of public policy to enforce contracts, or contractual terms, that were unfair or unconscionable. Aronstam's book published in 1979[54] was the precursor of a great body of literature calling for the updating of contract law in this respect.[55] Leading writers on contract law commented on the unfairness of the manner in which standard form contracts operated.[56] The

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(b) the provision is in plain language . . . ; and

(c) if the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it."

Further provisions require that the attention of the consumer be drawn to similar exemptions from liability at an early stage and in a conspicuous manner and in a form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances (section 50(2)(b)(i)). The section dealing with determination of whether a term of a contract is unfair or unreasonable provides that a court must have regard to all the circumstances of the case and in particular, the bargaining strength of the parties relative to each other, and whether the consumer knew or ought reasonably to have known of the existence and extent of the term, having regard to any custom of trade and any previous dealings between the parties (section 58(1)(a) and (c)).

[54] Above n 4.

[55] See for example Woolfrey above n 4; McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis *Fairness in South African Contract Law* (2003) 120 *SALJ* 330; Bhana and Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 and articles quoted therein.

[56] Id.

judgment of the Supreme Court of Appeal which is being appealed against in this Court,[57] observes the dismay amongst many academic commentators at the failure of that Court to develop the common law in a more robust manner so as to deal with perceived unfairness.[58] It must be granted that it would be self-referential and inconclusive to take the views of academics as to what the legal convictions of the community are, as evidence of what actually constitutes these convictions. Nevertheless, taken with the other indices mentioned in this part of the judgment, I believe that the near-unanimity of scholarly opinion on the need for fairness in contracts, at the very least reinforces the approach that I am developing, and is manifestly in keeping with the constitutional values of human dignity, equality and freedom.

Statutory regulation as an indicator of public policy in respect of time limits

[176] In determining the legal convictions of the community attention should also be paid to the manner in which the legislature has dealt with appropriate time periods with regard to when civil claims prescribe, as well as time limits for the institution of proceedings against the State. The declared purpose of the Institution of Legal Proceedings Against Certain Organs of State Act,[59] as stated in its preamble, is to regulate and harmonise periods of time within which to institute legal proceedings against certain organs of State and to give notice of such proceedings. Under section 2(2)(b), debts which became due after the commencement of this statute are

[57] Reported as *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

[58] Id at para 8.

[59] Act 40 of 2002.

governed by Chapter III of the Prescription Act.[60] The effect of this is that the prescription period for delictual debts against the State organs governed by the Act is now three years. Similarly the Road Accident Fund Act[61] provides for prescription of a claim after three years in a case where the identity of the driver or owner of a motor vehicle has been established,[62] and after five years where the claim has been lodged in terms specified by the Act.[63] It is doubtful whether public policy would not require us to look askance at the ability of large private firms that dominate the short-term insurance industry unilaterally to impose onerous rules against consumers, when these rules are forbidden to State organs dealing with public funds in the public interest.

The enforceability of Clause 5.2.5

[177] Bearing in mind the above indicators as to what the legal convictions of the community are in relation to consumer protection generally, and the status of one-sided terms in standard form contracts in particular, I turn to consider the enforceability of Clause 5.2.5 in the light of public policy as currently infused with constitutional values.

[178] This Court has on different occasions upheld appeals from decisions of the Supreme Court of Appeal on the ground that that Court had failed to take due account

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[60] Section 2(2) provides:

> "Subject to section 3 and subsections (3) and (4), a debt which became due—
>
> (b) after the fixed date, will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act No. 68 of 1969), read with the provisions of that Act relating thereto."

[61] Act 56 of 1996.

[62] Section 23(1).

[63] Section 23(3) read with section 24.

of the duty to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights.[64] In the present matter however, Cameron JA, writing for a unanimous court, forcefully underlined the principle that—

> "[T]he courts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus 'public policy' now derives 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."[65]

Given this clear awareness of the duty, I would ordinarily be reluctant to cavil at the evaluation made by the Supreme Court of Appeal of how best to fulfil that duty and ensure that the common law is imbued with, rather than alien to, constitutional values.

[179] Because of the line of reasoning he followed, however, Cameron JA did not in the end find it necessary to consider the possible effect of the Bill of Rights on the enforceability of Clause 5.2.5. He held that the applicant had no rights at all that needed to be viewed through the optic of the Constitution, summarising his reasoning as follows:

> "On the evidence before us, there is nothing to suggest that the plaintiff did not conclude the contract with the insurer freely and in the exercise of his constitutional rights to dignity, equality and freedom. This leads to the conclusion that constitutional norms and values cannot operate to invalidate the bargain he concluded. That bargain contained at its heart a limitation of the rights it conferred.

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[64] See *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); 2002 (1) SACR 79 (CC); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC). See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2006 (8) BCLR 883 (CC).

[65] *Napier v Barkhuizen* above n 57 at para 7.

> The defendant's plea invokes that limitation, and there is nothing before us to gainsay its defence."[66]

While respecting the elegance of the reasoning, I cannot support it.

[180] As I see it, the bargain did not in reality contain at its heart a limitation of the rights it conferred. At its heart was an agreement that covered the use to which the car could be put, the damage to be insured against and the premiums to be paid. Possibly because of the manner in which the matter was argued, Cameron JA did not deal with what I believe to be the most salient feature of the contractual arrangement in dispute in this matter, namely, that the time-bar was contained in an ancillary clause buried in the dense standard form text of the added-on Lloyd's Certificate of Insurance. Indeed, Clause 5.2.5 was as far removed as one could get from the heart of the contract, obscurely located in the fourth document of the bundle annexed to the Particulars of Claim. It appears not to have been part of the actual bargain concluded, and not to be a provision of the kind which a reasonable car-owner renewing an insurance policy could be expected to read, let alone digest.

[181] Thus, after having followed due procedures in reporting the accident, the applicant undoubtedly had a right given to him under the contract and buttressed by section 34 of the Constitution, to sue Hamford for the damage to his car. The matter at issue, then, is the one posed by virtue of the laconic pleadings to be resolved as a matter of law: in the light of the importance that considerations of public policy, now animated by section 34 of the Constitution, give to the right of access to court, should

[66] Id at para 28.

Mr Barkhuizen's right to proceed with his claim be taken away at all by Clause 5.2.5 which was tucked away in the small print of the added-on Certificate of Insurance?

[182] It is not, of course, the smallness of the print itself that is significant, though its minimalism may be symptomatic of a deeper malady. Whether small print is legally innocuous or legally obnoxious will depend not so much on the font as on the subject matter. Thus, absent evidence to the contrary, one may assume that even when in small print, provisions which clearly and directly define the extent of the risk and hence influence the premium to be charged, merely record what has actually been agreed upon between the parties. In the present agreement, the Schedule contains boxes to be filled in so as to distinguish insured drivers on grounds of age and gender, and whether the insured vehicle is used for business or private purposes only. It is in a document provided to Mr Barkhuizen at a time when he was invited to consider the terms. One may fairly infer that the information recorded is descriptive of the bargain actually struck. There is nothing intrinsically unreasonable or hostile to the consensual nature of contract law in an open and democratic society, in the idea of determining the premium on grounds which the insurer may believe are statistically or actuarially significant, to which both parties have agreed and in respect of which no question of offensive stereotyping or demeaning profiling arises.[67]

[67] Thus, in the present case there is no indication on the face of the documents to suggest that the substantive term on which the insurer relied to repudiate liability, namely that which limited coverage to private use of the car, was open to challenge on grounds of violating public policy, even if, notionally, it could be shown that Hamford had in fact driven an extremely hard bargain against Mr Barkhuizen.

[183] In the case of Clause 5.2.5, however, the position is different. And this is not because it is in small print, nor merely because it bears harshly on the applicant. Its enforceability is open to challenge because on its face it—

- was contained in a standard form document;
- was not part of the actual terms on which reliance was placed by the parties when the agreement was reached;
- was prepared with legal expertise on behalf of insurers who specialise in handling insurance claims and routinely engage in litigation, for use on a general basis in relation to people usually without legal expertise and who in the ordinary course of events could not be expected to get a legal opinion on the document in which it appears;
- wholly favours the party that drafted it without any apparent reciprocal benefit for the insured;
- lies buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent on to the insured after negotiations had been completed;
- is not highlighted in the text so as visually, and in keeping with internationally accepted standards of consumer protection, to bring the consequences of non-compliance to the attention of the insured at the time the contract was entered into;
- similarly, is not accompanied by a requirement that its import be timeously brought to the attention of the insured at the moment of repudiation, when the

time period begins to run against the insured who stands to be prejudiced by non-compliance with its provisions;

- is for a time period less than ten per cent of that in respect of which either an ordinary contractual claim, or else a claim against the Road Accident Fund, would prescribe;
- has the effect of significantly limiting a right to have a dispute settled by a court, a right long recognised by the common law and now guaranteed as a fundamental right by the Constitution;
- is not subject to express qualifications in case of impossibility or difficulty of compliance, nor apparently permissive of condonation where considerations of justice would require that its harshness be tempered by prolongation of the time;
- impacts in an unbalanced way, not generally permitted in open and democratic societies, on the relationship between insured and insurers in respect of an activity of considerable public interest; and finally,
- when invoked does not simply limit or qualify the insurance claim, but wipes the claim out altogether, enabling the insurer to keep the premium, while the insured loses the right to find out if he or she should in fact have been paid for the damage done to his car.

Taken together, as they must be, I believe that these factors establish convincingly and on an objective basis, and without more being required, that Clause 5.2.5 in and of itself offends against public policy in our new constitutional dispensation and should not be enforced.

Conclusion

[184] Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world. Yet just as the best should not be the enemy of the good, so the worst should not be the friend of the bad. As our society normalises itself, issues that were once relatively submerged now surface to claim full attention. In this way achievement of the larger constitutional freedoms enables us to attend to and develop the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society. People should not feel that arcane, lawyer-made and highly technical rules beyond their ken, leave them with a sense of having been cheated out of their rights by the big enterprises with which they perforce have to do business. And as long as government and the legislature continue to be preoccupied with major questions of social transformation, and only now begin to tackle consumer protection in a comprehensive way, the common law, under the impulse of the values of our new constitutional order, is called upon to shoulder the burden of grappling in its own quiet and incremental manner with appropriate legal regulation to ensure basic equity in the daily dealings of ordinary people.

[185] I would hold, then, that in the particular contractual circumstances of this case, considerations of public policy animated by the Constitution dictate that the time-bar clause in question limiting access to court, should not be enforced, and that the insured should not be deprived of his right to proceed with his claim on the merits. On this basis, and leaving open for future consideration 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, I would uphold the appeal and dismiss the special plea.

LANGA CJ:

[186] I concur in the judgment of Ngcobo J, with the exception of one matter on which I prefer not to express an opinion at this time. To the extent that Ngcobo J's judgment holds that the only acceptable approach to challenging the constitutionality of contractual terms is indirect application under section 39(2),[1] I disagree. While I agree that indirect application may ordinarily be the best manner to address the problem, I am not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them. Fortunately, I find it unnecessary to decide the matter at this time as, to my mind, what public policy requires in this case is exactly the same as what a direct application of section 34 would demand. Indeed, the distinction between direct and indirect application will seldom be outcome determinative. I would therefore prefer not to preclude the possibility that the Bill of Rights may, in some circumstances, apply directly to contracts.

[1] Above at para 30.

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