The impact of *Beadica* on the public policy doctrine in South African contract law

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ABSTRACT

The Constitutional Court's judgment in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (*'Beadica'*) sought to settle a long-standing debate in South African contract law concerning the proper scope of the public policy doctrine. This thesis traces the historical development of the doctrine and then critically evaluates the *Beadica* decision, firstly by clarifying what it held and, secondly by identifying certain doctrinal questions that remain unresolved post-*Beadica*, particularly questions relating to the application of the test developed by the Constitutional Court in *Barkhuizen v Napier*. The thesis contends that *Beadica* held that the public policy doctrine does not permit courts to override contracts on the stand-alone basis that they are unreasonable or contrary to some other abstract value. It did not, however, take the more far-reaching view, ascribed to it by the dissenting judgment, that abstract values can never be directly applied as override grounds under the public policy doctrine. Instead, it held that abstract values can be directly applied, contingent on certain conditions being met. Drawing on various historical and conceptual arguments developed during the thesis, possible avenues for the further rationalisation and constitutionalisation of the public policy doctrine are proposed and assessed.

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CHAPTER 1: INTRODUCTION

1.1 *Introduction to the public policy doctrine and the goals of this thesis*

Since at least the early 1900s, South African courts have maintained that they are obliged to invalidate voluntarily concluded contracts whenever they are contrary to 'public policy'. Although this fundamental proposition has been expressed in different ways and given rise to several different permutations, in broad terms one can justifiably refer to a 'public policy doctrine' that encapsulates this judicial power under a single umbrella. This thesis traces the history of the public policy doctrine, with a view to critically engaging various aspects of its status in modern South African contract law, particularly after the Constitutional Court's landmark decisions in *Barkhuizen v Napier*[1] ('*Barkhuizen*') and *Beadica 231 CC v Trustees for the time being of the Oregon Trust* (*'Beadica'*).[2]

One of the basic principles underlying all modern systems of contract law is that, barring some sort of mitigating factor, obligations arising from seriously concluded agreements should be enforced. This is usually referred to as the *pacta sunt servanda* or 'sanctity of contract' principle. South African courts have frequently emphasised that this principle is a demand rooted in public policy,[3] and it is often itself referred to as a 'policy consideration'.[4] There are a number of well-known normative justifications for the general enforcement of freely and seriously concluded contracts in a market economy.[5] In no modern legal system, however, is the principle treated as absolute.

Under Roman-Dutch law, an important restriction on *pacta sunt servanda* consisted in a refusal to enforce agreements that were *contra bonos mores* (contrary to good morals) or contrary to public policy. As applied in modern South African law, this restriction came to find its doctrinal resting place under the broad requirement of 'legality', in terms of which all illegality in contract is prohibited. The public policy doctrine is a branch of 'common law illegality', in terms of which agreements that are contrary to public policy or *contra bonos mores* are deemed illegal at common law.[6] An agreement can also be illegal because a statute expressly or impliedly prohibits it ('statutory illegality'). In both categories a contract is considered to 'violate a legal rule' and is on this basis unenforceable.[7]

After the advent of South Africa's democratic Constitution, the proper scope and interpretation of the common law public policy doctrine emerged as the central battleground for an increasingly divisive debate concerning the extent to which judges should be permitted to override the enforcement of contracts that are deemed to fall foul of fundamental values, including constitutional values. It was to

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[1] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.
[2] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).
[3] *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598.
[4] Dale Hutchison & Chris Pretorius (eds.) *The Law of Contract in South Africa* 3 ed (2017) 181.
[5] See Daniel Markovits & Emad Atiq 'Philosophy of Contract Law' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition), Edward N Zalta (ed.), at 1.1 to 1.4, available at <https://plato.stanford.edu/archives/win2021/entries/contract-law/>accessed on 5 January 2024.
[6] RH Christie & Graham Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) 392.
[7] Ibid.

this debate that the Constitutional Court's decision in *Beadica* sought to bring some finality. One of the chief goals of this thesis is to critically evaluate the *Beadica* decision: to clarify both what it held and achieved (which will require some interpretive work), and what it left for later courts to decide, particularly in relation to the *Barkhuizen* decision, which remains a central prong of the post-constitutional public policy doctrine.

In Chapters 2, 3 and 4, I deal extensively with the history of the public policy doctrine (both prior to and after the Constitution) and *Beadica* is tackled head on only in Chapter 5. In the three historical chapters, I will identify certain legal phenomena that I take to be important, draw some distinctions between phenomena that can easily be conflated, and develop terminology and concepts that I think ultimately assist when it comes to assessing *Barkhuizen*, *Beadica* and certain aspects of the modern public policy doctrine that still call for resolution. My historical treatment of the doctrine therefore serves as a ground-clearing exercise for my ultimate attempt to engage the modern law.

The public doctrine contains various different strands but in my view our courts are still quite far away from connecting these strands in a rational and unified manner. A further aim of this thesis is to try to tease out some structural elements of a broader doctrinal framework that I think can be derived from both pre- and post-constitutional public policy case law and which might provide a way forward regarding the rationalisation of this difficult and often elusive area of law.

I will begin my discussion of the public policy doctrine's historical evolution in Chapter 2. The remainder of this chapter will introduce certain historical, methodological and substantive debates that underpin a number of issues investigated in the body of the thesis.

1.2 *Equity in the law of contract: historical overview*

The heated post-constitutional debate concerning the public policy doctrine can plausibly be viewed as a continuation of a lengthy, robust and broader debate that has existed in South African contract law since at least the beginning of the twentieth century. This debate, which in fact has its roots in pre-classical Roman law, concerned the extent to which judges should be permitted to rely on so-called 'equity' as a basis to refuse to enforce contracts or, more broadly, to develop the law of contract in 'equitable' directions in order to keep pace with changing social conditions. All modern legal systems have grappled with what Alistair Price describes as the 'the inevitable tension between the need for contracts to be both reasonably predictable and reasonably fair'.[8] It is vital for both commerce and wider society that contracts can be relied on. However, 'if unconscionable contracts are enforced in particularly inequitable circumstances, the legitimacy of contract law is eroded.'[9]

[8] Alistair Price 'Contractual Fairness: Conflict Resolved?' (2021) *Acta Juridica* 321 at 322.
[9] Ibid at 322.

Prior to the Constitution, South African courts had generally held that Roman-Dutch law was inherently equitable.[10] Reinhard Zimmermann explains that a 'great variety of rules and legal institutions find their origin in this kind of "built-in" equity'.[11] Although it is beyond the scope of this thesis to engage in detail South Africa's rich pre-constitutional grappling with the various manifestations of equity in contract, I provide a very broad overview of certain elements below. It bears mentioning that, prior to the Appellate Division's 1988 decision in *Bank of Lisbon v De Ornelas* (*Bank of Lisbon*),[12] the public policy doctrine was by no means the central focus of this debate.

Firstly, South African courts embraced the Roman-Dutch law notion that all contracts are *bonae fidei* (i.e., governed by good faith). The potential vitality of this notion was forcefully demonstrated by Justice E.L. Jansen in a number of judgments in which he sought to develop the common law of contract in 'equitable' directions by invoking the proposition that all contracts are *bonae fidei*.[13] It will become apparent during the course of this thesis that the notion that all contracts are in some way wedded to the principle of good faith has continued to play an important role in post-constitutional case law and academic commentary.

A further equitable legal tool that our courts often relied on was a device of classical Roman law pedigree, namely the *exceptio doli generalis*, which in Roman law was initially relied on as a defence to the enforcement of *stricti iuris* contracts, in cases where certain types of injustice or bad faith could be sufficiently established. In modern South African law, it came to serve two main functions. Firstly, as thoroughly documented by Zimmermann, the *exceptio* was invoked as a basis for 'legitimising the introduction' of several equitable doctrines derived from English law (including estoppel, rectification and innocent misrepresentation).[14] Secondly, and more rarely, our courts also applied the *exceptio* 'in its own right' (i.e., directly, as a self-standing rule).[15] The high-water mark of the Appellate Division's acceptance of such direct application of the *exceptio* was an *obiter* remark by Tindall JA in *Zuurbekom Ltd v Union Corporation Ltd*, in which he appeared to imply that a defendant could, relying on the *exceptio*, escape the enforcement of a contract if, in the particular circumstances of the case, such

[10] Wessels JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292 referred to the 'inherent equitable jurisdiction' of the courts to refuse 'to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law'.
[11] Reinhard Zimmermann 'Good Faith and Equity' in Reinhard Zimmermann & Danie Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 218.
[12] *Bank of Libson and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A).
[13] See, for example, *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) at 802–4 and *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) ('*Hovis*') at 651–2. For commentaries on Jansen JA's jurisprudence, see DL Carey Miller, 'Judicia Bonae Fidei: A New Development in Contract' (1980) 97 *SALJ* 531, who (at 536) speculated that *Hovis* may have been 'the first step towards the exercise of a general equitable jurisdiction in the South African law of contract', and Carole Lewis, 'Towards an Equitable Theory of Contract: the Contribution of Mr. Justice E.L. Jansen in the South African Law of Contract' (1991) 108 *SALJ* 249, who (at 264) said that Justice Jansen had 'made us aware of the need for a general equitable jurisdiction in contract law'.
[14] Zimmermann op cit note 11 at 221–31.
[15] Ibid at 232–3.

enforcement 'would cause some great inequity and would amount to unconscionable conduct on his part'.[16]

In *Bank of Lisbon*, however, a majority of the Appellate Division famously cast aside the *exceptio doli generalis*, finding that it had no application in modern South African contract law.[17] It was arguably only after this watershed decision that South African courts increasingly turned towards the public policy doctrine as the chief common law device capable of serving as a 'counterweight' to the strict enforcement of contracts.[18] After *Bank of Lisbon*, another issue that was increasingly discussed was the extent to which the principle of good faith might play an important role in driving legal developments *as part of the public policy doctrine*.[19] Although in 1996, Zimmermann noted that '[n]o comprehensive analysis has yet appeared of how the principle of good faith operates and what its various functions are',[20] he presciently stated that it was inevitable that, irrespective of the particular legal vehicle deployed, South African courts would need to find new avenues for ensuring that the law keeps pace with the demands of equity 'to prevent its death by sclerosis'.[21] In Chapter 3, it will be seen that under the Constitution, and due principally to the Constitutional Court's *Barkhuizen* decision, the judicial focus on the public policy doctrine as the primary 'safety valve' or vehicle for driving equitable developments in a 'constitutionalised' contract law became even more pronounced.

I now turn to consider two issues of judicial methodology that underlie several of the questions dealt with in the body of the thesis, and which will resurface in different forms. Firstly, I examine certain features of the law-applying and law-making functions of courts. Secondly, I deal with the so-called 'rules versus standards' distinction.

1.3 *Judicial law-applying and law-making functions*

The public policy doctrine has been a slippery area of law. This is perhaps unsurprising, given that the concept of 'public policy' is itself notoriously difficult to get a grip on. Nonetheless, the notion of 'public policy' had a deep impact on the development of South African private law well before the enactment of the Constitution. Contract law's public policy doctrine is arguably just one manifestation of a much broader common law legal phenomenon.

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[16] *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 537. In support of this claim, Tindall JA cited the judgment of Wessels JA in *Weinerlein* supra note 10 at 292. This test came to be applied in a number of subsequent High Court judgments, most successfully as a 'general defence' in *Rand Bank Ltd v Rubenstein*1981 (2) SA 207 (W) at 214H. See also *Paddock Motors (Pty) Ltd v Igesund* 1975 (3) SA 294 (D) at 297D-F and *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 157A–B.

[17] *Bank of Lisbon* supra note 12 at 607A.

[18] See Dale Hutchison 'Good Faith in the South African Law of Contract' in Roger Brownsword, Norma J Hird & Geraiunt G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) at 225, who examined how the public policy doctrine might serve this purpose, informed by the principle of good faith.

[19] See Chapter 3, subsection 3.3.

[20] Zimmermann op cit note 11 at 241 (footnotes omitted).

[21] Ibid at 260.

Judges, for obvious reasons, are usually more comfortable 'applying' law than 'making' it. The latter task is naturally the central domain of the legislature. Some judges have, on occasion, suggested that law-application is their *only* task.[22] As Francois du Bois explains:

> [C]ourts are staffed by people selected for their expertise in ascertaining the law and their aptitude for dispassionate reasoning and impartiality, and court procedures are aimed at reinforcing the accurate and fair application of the law, whereas legislatures are designed to reflect and facilitate the promotion of partisan views and have procedures to match.[23]

According to the 'traditional' understanding of the judicial law-applying function, law has 'authority over what people's rights and obligations are in a particular instance' and a judge's task is to treat this as authoritative 'without second-guessing the law-making process'.[24] This thesis proceeds from the assumption that the law can and indeed often does constrain judges in precisely this way, such that judges regularly apply legal precedents simply because they consider them binding and authoritative, even if they might personally find the precedent or particular outcome unfortunate. As PS Atiyah says: 'The concept of a system of precedent is that it constrains judges in some cases to follow decisions they do not agree with.'[25]

That said, during the course of the twentieth century it became virtually trite in most common law legal systems, including South Africa's pre-constitutional system, that judges also have a law-*making* function in a variety of case categories.[26] To provide some prominent examples: firstly, in novel or hard cases, the reach of a legal norm may be unclear, even if its linguistic meaning is clear;[27] secondly, it is often difficult to determine whether a previous ruling, and the facts on which it was based, should or should not serve as binding precedent in relation to a different set of facts, given that no two cases are exactly alike;[28] thirdly, settled rules may seem to conflict or give rise to contradictory consequences;[29] fourthly, judges are frequently required by established legal norms to apply open-ended value concepts such as 'reasonableness', 'unfairness' or 'public policy'. As Du Bois explains: 'Being expressed in evaluative language, such laws can only be applied by employing evaluative reasoning.'[30] He seems correct in stating that both law-applying and law-making 'may involve drawing on moral and other evaluative considerations, because law-applying reasoning frequently requires more than finding the

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[22] See, for example, Kotze CJ in *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202 at 216: 'Our notions of morality may differ, but the simple question for a Court of Justice is "what is the law?"'.
[23] Francois du Bois 'Law' in Francois du Bois et al (eds) *Wille's Principles of South African Law* 9 ed (2007) 24.
[24] Ibid.
[25] PS Atiyah 'Form and Substance in Legal Reasoning: The Case of Contract' in Neil MacCormick & Peter Birks (eds.) *The Legal Mind: Essays for Tony Honore* (1986) 27.
[26] I refer here to how South African courts describe their judicial powers. I do not adopt a position regarding theoretical viewpoints which hold that the judicial function never involves law-making (for example, see Ronald Dworkin *Law's Empire* (1988)).
[27] Du Bois 'Law' op cit note 23 at 24.
[28] See Frederick Schauer *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009) 44–54, for a comprehensive and lucid discussion.
[29] Annel Van Aswegen 'The Implications of a Bill of Rights for the Law of Contract and Delict' (1995) 11 *SAJHR* 50 at 60.
[30] Du Bois 'Law' op cit note 23 at 26.

law'.[31] The fourth context for judicial law-making will be an important and recurring issue in this thesis, and I will deal with it in more detail in 1.4 below.

Finally, during the course of the twentieth century, our courts came openly to recognise that judges are sometimes required to develop the common law in order to adjust to evolving social and political conditions. This is arguably an inherent feature of common law systems based on a system of precedent.[32] In the South African context, the notion of 'public policy' was often explicitly invoked as a basis for this law-making function of judges. In 1987 MM Corbett (writing extra-curially) analysed a number of difficult and novel cases, *inter alia* in the law of delict and contract, in order to demonstrate the 'policymaking role' of judges in the evolution of the common law.[33] In the constitutional era, as will be seen, this law-making process is now of course guided by the over-arching constitutional framework, including constitutional values and the Bill of Rights.

1.4 *Evaluative reasoning and the rules versus standards distinction*

As just discussed, courts are often drawn into evaluative reasoning when called upon to apply norms that are inherently evaluative in nature, such as 'reasonableness' or 'unfairness'. The application of these types of value concepts will form a pivotal part of this thesis, as this issue came to the foreground in post-constitutional contract law. Although I will primarily try to engage these issues on a doctrinal, rather than a theoretical level, there has been a great deal of illuminating academic work that has analysed some of the benefits and pitfalls of these types of widespread legal norms. I would like briefly to engage some of the scholarly work dealing with the distinction between so-called 'rules' and 'standards'.[34] The distinction is one that South African contract law academics have on occasion sought to draw on in the post-constitutional era. Frederick Schauer, despite describing the distinction as 'tediously familiar',[35] has written particularly lucidly on the matter, and I will rely on some of his central insights as a basis for discussing the distinction. I will also draw on recent work of Michael Coenen concerning the 'rulification' of standards. In my view, the rules-standards distinction has sometimes been misused, or given rise to red herrings, in the South African contract law context.

The distinction is based on the varying degrees of *specificity* or *precision* attached to legal norms. Legal norms range from the general, imprecise, open-ended and indeterminate to the specific, precise,

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[31] Ibid.

[32] See Schauer *Thinking Like a Lawyer* op cit note 28 at 112–7. As Innes CJ put it in *Blower v Van Noorden* 1909 TS 890 at 905: "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions."

[33] MM Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' (1987) 104 *SALJ* 52.

[34] Some well-known articles are Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; Antonin Scalia 'The Rule of Law as a Law of Rules' (1989) *University of Chicago Law Review* 1175; and Kathleen M Sullivan 'The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22.

[35] Frederick Schauer 'Tyranny of Choice and the Rulification of Standards' (2004-5) 14 *Journal of Contemporary Legal Issues* 803 at 804.

concrete and determinate. As a shorthand for capturing this particular dimension of legal directives, the latter have often been referred to as 'rules' and the former as 'standards'. Schauer contrasts a law that requires drivers to observe a speed limit of 60 km/h with one that requires driving at a 'reasonable speed'.[36] The former is highly specific, and hence a paradigmatic rule, whereas the latter is far more indeterminate, and a paradigmatic standard. Rules and standards are pervasive across all areas of law. Although the distinction has often been presented as a binary choice between 'precise rules', on the one hand, and 'vague standards', on the other, I will follow Schauer in conceiving the difference as being a matter of degree. We can view legal norms as falling on a continuum between these two opposing poles, rather than as an 'either-or' distinction.[37] Law-makers, including judges, are often tasked with deciding between crafting a norm that is more rule-like or standard-like. This issue has played a key role in post-constitutional contract law debates.

Schauer's treatment of the rules-standards distinction is particularly helpful in understanding the necessary trade-offs that exist in deciding whether to formulate a legal norm on one pole of the rules-standards spectrum, as opposed to the other. Standards can be seen as reflecting a choice by the norm-maker to leave many of the important choices and decisions for later decision-makers, and they generally allow room for those later decision-makers to base their decisions in light of all the relevant circumstances of the particular case.[38] Rules, on the other hand, tend to entail a higher level of future-determining choices which are made by the norm-maker *now*. It is worth noting, therefore, that when a judge develops the law with the intention of creating a 'bright-line' rule, although this may avoid *subsequent* judicial discretion, the judge developing the law assumes far more of the decision-making role *in the present*, assuming more discretion for themselves at the time of norm-creation. This will in all likelihood limit the decision-making scope of later judges tasked with applying the rule. In a sense, the choice between rules and standards is a means of 'allocating discretion' *and* a means of 'allocating decision-making between the present and the future'.[39] What rules and standards have in common is that some type of value judgement by the crafter of the legal norm lies behind both of them.

An obvious attraction of rules is that they maximise certainty, uniformity, predictability and judicial constraint.[40] They can be useful in order to avoid errors that might arise from individualised judgments. However, they do so at the expense of flexibility and the ability of future law-appliers to make more individualised, context-specific and case-by-case determinations, which may be appropriate for certain types of decisions or areas of the law. Conversely, an obvious drawback of standards is the potential

[36] Frederick Schauer 'The Convergence of Rules and Standards' (2003) *New Zealand Law Review* (2003) 303 at 304.
[37] Schauer 'Tyranny of Choice' op cit note 35 at 808.
[38] Ibid at 804.
[39] Schauer *Thinking Like a Lawyer* op cit note 28 at 194.
[40] Michael Coenen 'Rules against Rulification' (2014) 124 *Yale Law Journal* 644 at 646.

lack of predictability regarding how the standard will come to be applied by later judges, given the indeterminacy inherent in the standard itself.[41] I agree with Schauer, who asserts:

> [T]here is no strategy that will be best in all contexts, and thus the lesson may be that the determination of how much officials should be allowed to look at the particular context of a particular instance – how much the official should be operating under a standard rather than a rule or vice versa – will itself be a contextual determination.[42]

In a system based on precedent, many have also observed the potential tendency for standards to naturally 'rulify' over time.[43] Schauer argues that interpreters and enforcers of standards have often 'sharpened the soft edges of standards … Whether it be by importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three and four-part tests, interpreters and enforcers of standards have tried to convert those standards to rules by a surprising degree'.[44] I agree with Coenen that this is not altogether surprising:

> In a precedential system, the initial pronouncement of a legal norm marks only the beginning of its development. As cases begin to arise under a non-specific standard, courts must decide whether a particular set of facts satisfies the standard's triggering criteria. By rendering such decisions – which carry precedential force – courts will begin to elaborate on the content of the norm itself. To be sure, the extent of elaboration depends on the initial specificity of the norm.

This elaboration could be via 'bright-line boundaries, safe harbor presumptions, categorical exceptions, multi-factor tests and the like'.[45] Coenen goes on to state: 'For less specific standards … common law adjudication stands ready to convert an open-ended pronouncement into a far more specific patchwork of rules.'[46] He also says: 'This process of "rulifying" a standard is common and unobjectionable; indeed it is a natural and recurring consequence of issuing opinions with precedential effect'.[47] Unless law-makers specifically try to create 'rules against rulification', it is usually 'simply through the process of applying the norm to case after case that courts nudge the norm up the specificity spectrum and increase its rule-like character'.[48] Although, as Coenen himself points out, there is perhaps

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[41] Schauer *Thinking Like a Lawyer* op cit note 28 at 194. See also Coenen op cit note 40 at 646.
[42] Schauer op cit note 28 at 194.
[43] See Coenen op cit note 40 at 653 and 'Tyranny of Choice' op cit note 35 at 805–6. In the context of South African law, and referring to the so-called Fallgruppen methodology of German law, Gerhard Lubbe stated: 'Here the experience has been that open norms such as that embodied in S242 BGB often yield large numbers of decided cases. In order to reduce the resulting complexity, these decisions are initially loosely classified into sub-groups on the basis of perceived factual commonalities. Further analysis of such provisional classificatory schemes often brings to light deeper fact patterns and variable features that are normatively significant. These refined distinctions in turn yield legal principles underlying the cases, which then form the bases for the development of new juridical categories and detailed technical rules.' See Gerhard Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law' (2004) 121 *SALJ* 395 at 404–5.
[44] Schauer Tyranny of Choice' op cit note 35 at 806.
[45] Coenen op cit note 40 at 648.
[46] Ibid at 654.
[47] Ibid.
[48] Ibid at 655.

an inevitable degree of simplification to the above account, I find it broadly intuitive and will draw on it later.[49]

1.5 *Substantive unfairness inter partes (i.e., as between the contracting parties)*

During the course of the last century our courts have on occasion considered whether they should be allowed to refuse to enforce contracts based merely on the unfairness or unreasonableness of a bargain struck between contracting parties (which I will refer to as 'substantive unfairness *inter partes*').[50] Prior to the Constitution, our courts fiercely resisted this type of judicial power. Such a 'mere unfairness' override would, of course, be a paradigmatic example of an open-ended 'standard', and in the context of contract law, a particularly invasive and controversial one. In *Burger v Central South African Railways*, Innes CJ said that contracting parties cannot escape the consequences of their agreements 'merely because a contractual provision appears to be unreasonable'[51] or, as he put it in a subsequent case, merely because it is 'hard and onerous'.[52] Public policy, he found, demands that such provisions be enforced.[53] In *Rashid v Durban City Council*, the Court held that the *exceptio* did not permit courts to override contracts 'merely on the ground that the Court considered that one party had driven a hard, harsh bargain'.[54]

Our courts, including the Appellate Division, steadfastly held this line for the entire pre-constitutional era.[55] Whether this should continue to be accepted in the post-constitutional era came under intense scrutiny and is a question that will occupy much of Chapters 3, 4 and 5. Although this thesis proceeds from the starting-point that contract law should be modified and developed in accordance with constitutional norms,[56] I will ultimately support the Constitutional Court's decision in *Beadica* to effectively maintain the pre-constitutional position that mere unfairness or unreasonableness ought not to be stand-alone grounds for overriding the enforcement of contracts. This support is by no means grounded in an aversion to standards or value-based reasoning *as such* (various branches of the public policy doctrine, for example, have standard-like dimensions that appear essential to their vitality), but rather because I agree with the Court that this *particular* type of extremely far-reaching standard would do more harm than good in the contracting context, and is not demanded by the Constitution.

1.6 *Thesis overview*

I will conclude this Introduction by briefly summarising what lies ahead. A central goal of this thesis is to interpret the *Beadica* judgment, to distil what I take to be its 'core finding' and to analyse its impact

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[49] Ibid at 660–2.
[50] See Steven Smith *Contract Theory* (2004) 228.
[51] *Burger v Central South African Railways* 1903 TS 571 at 576.
[52] *Wells v South African Aluminite Co* 1927 AD 69 at 73.
[53] Ibid at 73.
[54] *Rashid v Durban City Council* 1975 (3) SA 920 (D) at 927C.
[55] See, for example, *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893H–I.
[56] As in any event demanded by ss 8(2), 8(3) and 39(2) of the Constitution of the Republic of South Africa, 1996.

on the public policy doctrine. A further, more tentative goal is to offer some proposals, as well as build on existing proposals, that might assist our courts in untangling some of the knots that currently seem to exist in the modern public policy doctrine. The thesis takes the 'long path' to both these goals by engaging extensively with both pre and post-Constitution case law and commentary dealing with the doctrine. I will try to pinpoint key legal findings and consider their doctrinal implications for the public policy doctrine considered as a whole. I will highlight certain ambiguities or doctrinal gaps that I think have arisen in the case law and I will try to develop terminology for describing various legal phenomena, including phenomena which are closely related, but easily conflated. In the course of my 'historical' work in Chapters 2 to 4, I will seek to draw out certain concepts and distinctions that I think might be useful in unpacking the modern law. I think that scholars and judges have on occasion spoken past each other when dealing with the public policy doctrine, owing to a failure to pin down certain phenomena, concepts and legal findings in sufficiently precise terms.

The thesis is focused chiefly on doctrinal questions, such as the historical development of the applicable rules and principles concerning the public policy doctrine, the coherence and rationality of these rules and principles, and the different ways in which they might be interpreted. In Chapter 2 I will trace the development of the public policy doctrine prior to the advent of the Constitution. In Chapter 3 I will examine the impassioned judicial and academic debate concerning the extent to which so-called 'abstract values' should be allowed to serve as 'direct' contractual overrides in light of constitutional imperatives. In Chapter 4, I will canvass differing interpretations that have been given of the Constitutional Court's *Barkhuizen* judgment and I will defend what I term a 'constitutional limitation' interpretation of the public policy test the Court developed. I will also agree with Leo Boonzaier that when the Supreme Court of Appeal interpreted *Barkhuizen* in *Bredenkamp v Standard Bank of South Africa Ltd* ('*Bredenkamp*'),[57] it signalled an important shift in that Court's approach to the role of abstract values as contractual overrides.[58]

In Chapter 5, I will interpret the *Beadica* decision and make a case for what I take to be its 'core finding'. This finding, I will argue, is immensely significant, and one which should be welcomed. I will argue that *Beadica* clarifies the scope of the public policy doctrine in a critical respect, by rejecting the existence in South African contract law of any legal norm, *including under that doctrine*, that permits courts to invalidate or refuse to enforce contracts *merely* on the basis that they are unfair, unreasonable or contrary to some other abstract value (i.e., these values cannot serve as *stand-alone* override grounds). It is a 'negative' finding in the sense that it tells us what the law is *not*. However, I will also argue that the Beadica majority did not take the more far-reaching view, ascribed to it by Froneman J's dissenting judgment, that abstract values can never be directly applied as override grounds under the doctrine. Instead, the majority should be understood as holding that abstract values *can* be directly applied,

[57] *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).
[58] Leo Boonzaier 'Contractual Fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 229 at 251.

contingent on additional conditions being met. Although much of my interpretation draws impetus from some of the challenging points raised by Froneman J, I ultimately offer an interpretation of the majority judgment that diverges from the Justice Froneman's – one that I think renders *Beadica* defensible, coherent and a much-needed intervention in our law.

Finally, in Chapter 6, I will seek to re-appraise certain aspects of the public policy doctrine in light of the arguments advanced in the thesis, including my reading of *Beadica*. I will raise some questions that I think remain unresolved and which call for judicial intervention, particularly in relation to the ongoing applicability of the *Barkhuizen* test. I will argue that the Constitutional Court, including in *Beadica*, has not sufficiently addressed these issues. Drawing on the historical, conceptual and doctrinal work covered in Chapters 1 to 5, I will offer some proposals as to how some of these issues might be approached from a rational and holistic perspective. I will try to connect different strands of the public policy doctrine and show how they might fit into a broader doctrinal structure immanent in pre- and post-constitutional case law. Chapter 6 is partly aimed at stimulating further thought, which I hope might promote the development of a more rigorous public policy doctrine under a constitutionalised contract law.

A final goal of the thesis is to demonstrate that some of the implications of *Beadica* for the role of abstract values as open-ended override standards are more nuanced than one might at first glance suppose. I will argue that the judgment does not, contrary to certain appearances and initial interpretations of the judgment, represent a straightforward victory for the famous line of Supreme Court of Appeal cases that began with *Brisley v Drotsky* ('*Brisley*'). *Beadica* without doubt put the brakes on a type of over-arching standard that may have done more harm than good in our law, and which the Supreme Court of Appeal indeed rejected from the outset of the constitutional era. However, I do not think that *Beadica* should be understood to have rejected the direct application of value-based override standards *generally* or to have embraced a conservative approach towards the ongoing constitutionalisation of contract law.

CHAPTER 2: THE PUBLIC POLICY DOCTRINE PRIOR TO THE CONSTITUTION

2.1 *General approach*

In the decade leading up to South Africa's democratic constitutional dispensation, a number of important common law developments concerning the public policy doctrine occurred. However, the seeds for these developments were planted well before then. A number of pre-constitutional features of the public policy doctrine maintain a currency in South Africa's post-constitutional contract law, and in my view a close reading of them can help us to make sense of the modern law. In this chapter I propose to trace some key features of the pre-constitutional development of the public policy doctrine and to use them as a springboard for developing some more general points, distinctions and theses that remain instructive today. I will ultimately rely on these when considering how to conceptualise and understand the modern, post-constitutional public policy doctrine.

2.2 *The origins of the public policy doctrine and established* '*heads*' *of public policy*

In Chapter 1, I explained that the public policy doctrine is one of the key components of common law illegality in South African contract law. Among the early Appellate Division authorities, two cases proved seminal in the development of the public policy doctrine. In *Eastwood v Shepstone*,[59] (*Eastwood*) a contract between certain farm owners, on the one hand, and a traditional leader and council, on the other, was found to produce a 'system of forced labour', which the Court held was contrary to public policy. Innes CJ explained the legal position concerning common law illegality as follows:

> 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.[60]

In *Robinson v Randfontein Estates GM Co Ltd*[61] *(Robinson*), Innes CJ further explained that the '[t]he principle that the Courts will not enforce contracts which are contrary to good morals or against public policy has its roots in the Civil Law' and he affirmed that 'an agreement will not be enforced which springs from an immoral or dishonest cause, or is contrary to public policy or general law'.[62] Our courts found certain agreements to be illegal on public policy or public interest grounds; others were said to be *contra bonos mores*. Whereas agreements contrary to public policy were sometimes described in Roman-Dutch law as agreements opposed to the interests of the state, or of justice, or of the public,[63]

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[59] *Eastwood v Shepstone* 1902 TS 294.
[60] Ibid 302.
[61] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173
[62] Ibid 204.
[63] D 28.7.15 and Grotius 3.1.42. The chief classes of such agreements in South African law have been further sub-divided by scholars into those which tend to (i) injure the state or the public service; (ii) defeat or obstruct the administration of justice; or (iii) interfere with the free exercise by persons of their rights (see, for example, Dale

agreements *contra bonos mores* were traditionally said to be based more closely on morality, conscience or social mores (such as the norms governing sexual morality or honest conduct).[64] The value and clarity of this distinction has often been questioned. Some courts and scholars pointed out, for example, that prohibiting immoral conduct could itself be a matter of public interest or public policy.[65] As will be seen, the distinction gradually receded and our courts ultimately came to view common law illegality through the over-arching prism of public policy.[66]

By the second half of the twentieth century, a number of specific *categories* of common law illegality had become firmly established. As JW Wessels put it in 1951, South African courts had generally 'found it convenient to deal with the illegality of contracts under different heads'.[67] Even today, South African contract law textbooks often cover the topic of legality at least partly by working through the well-established heads of common law illegality, category by category.[68] Any given category can naturally trace its roots to normative considerations of some kind, and in the application of these various heads, considerations of 'policy' are regularly referred to.[69] Within each category, distinctive tests and inquiries have developed over time, with the result that it usually makes sense to treat these categories on their own terms and in light of the distinctive principles and considerations that our courts tend to apply to them. One way of putting this is that in respect of a particular head of public policy, 'a certain type of agreement is subject to particular rules of enforceability'.[70]

I think it is nonetheless worth noting that among the established heads of public policy, some categories of agreement are categorically prohibited (i.e., across the board and without qualification), whereas others admit of exceptions or simply trigger the application of a particular test or standard to determine their ultimate enforceability. The 'categorically prohibited' heads of public policy (as I will refer to them) are *necessarily* contrary to public policy and the mere classification of an agreement as falling under one of these heads is sufficient to establish illegality. Examples would be agreements to commit a criminal offence[71] or agreements for forced labour or slavery.[72]

Hutchison & Francois Du Bois 'Contracts in General' in Francois du Bois et al (eds.) *Wille's Principles of South African Law* 9 ed (2007) 764.

[64] See Schalk van der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 3 ed (2007) 193 and Hutchison & Du Bois op cit note 63 at 768.

[65] See, for example, *Kiely v Dreyer* 1916 CPD 603 at 606; Hutchison & Du Bois op cit note 63 at 768; and LF Van Huyssteen, GF Lubbe & MFB Reinecke *Contract: General Principles* 5 ed (2016) 189.

[66] See Jacques du Plessis 'Some Thoughts on the Consequences of Illegal Contracts' (2021) *Acta Juridica* 177 at 178.

[67] JW Wessels *The Law of Contract in South Africa* 2 ed (1937) 150.

[68] See GB Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022) 430–66; and LF Van Huyssteen, GF Lubbe, MFB Reinecke & JE Du Plessis *Contract: General Principles* 6 ed (2020) 232–59.

[69] See, for example, *Karp v Kuhn* 1948 (4) SA 825 (T) at 827–9.

[70] JT Schoombee 'Agreements in Restraint of Trade: The Appellate Division Confirms New Principles' (1985) 48 *THRHR* 127 at 133. See also Gerhard Lubbe 'Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktreg' (1990) 1 *Stellenbosch Law Review* 7 at 11.

[71] See *Findlay and Sullivan v Brown & Co* 1926 AD 272.

[72] *Eastwood* supra note 59; *Raubenheimer v Paterson & Sons* 1950 (3) SA 45 (SR).

By contrast, some heads of public policy concern agreements that, although falling within an established category, are not necessarily contrary to public policy. We can call these 'conditionally prohibited' heads of public policy. Some, while generally invalid, may admit of exceptions;[73] others are presumptively enforceable or unenforceable, with ultimate enforceability turning on the application of some further standard or test. For example, later in this chapter I will explain that agreements in restraint of trade are not necessarily unenforceable; rather, if they are challenged on public policy grounds, they are subjected to a specific legal enquiry that, notwithstanding evolution over the years, has always required courts to balance competing factors to determine enforceability in any given case. In the context of a public policy challenge, being deemed an 'agreement in restraint of trade' thus serves as a trigger for a particular test that, when applied, may or may not lead to the agreement being upheld. This test imposes a heightened degree of scrutiny on agreements in restraint of trade, but the reasons *in favour of* their enforcement still enter into the balance. By contrast, a noteworthy feature of categorically prohibited heads is that, whatever the reasons may be for enforcing the agreement, they necessarily yield once it is determined that the agreement falls under the relevant head. For example, if an agreement is deemed to be one for forced labour, it is necessarily invalid and no judicial balancing of competing considerations occurs. Such balancing has in effect already been 'built into' categorically prohibited agreements: they mark out a boundary at which the *pacta sunt servanda* principle necessarily gives way.

2.3 *The creation of new heads of public policy*

The present thesis explores certain 'dynamic' questions concerning the different ways in which legal developments can take place by way of the judicial application of public policy.[74] In an influential study, Dennis Lloyd expressed the 'dynamic' viewpoint by asking how common law judges 'employ this instrument of public policy … to extend and develop legal principle and adapt it to the multifarious and complex circumstances of modern society'. He asked whether judges possess a 'creative faculty' or whether the judicial task is 'no more than the application in detail of heads of policy long since settled and defined' by previous courts.[75] This is a broad framing of the issue, and it will be seen that there are a number of more specific sub-questions that one can ask in this vicinity. For now, however, I would like to focus on just one, namely the question as to whether South Africa's pre-constitutional courts were permitted to create new heads of public policy.

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[73] For example, an agreement that seeks to restrict a person's freedom of testation (a *pacta successorium*) is generally invalid (see *Barman & De Vos NNO v Potgietersrusse Tabakkorp Bpk* 1976 (3) SA 488 (A) at 501D, but a succession agreement contained in an antenuptial contract, or a *donatio mortis causa* executed in accordance with testamentary formalities, constitute exceptions to the rule. See Chuma Himonga, 'Marriage' in Francois du Bois et al (eds.) *Wille's Principles of South African Law* 9 ed (2007) 292–3.

[74] For the 'dynamic' element of public policy, see Dennis Lloyd *Public Policy* (1953) 111.

[75] Ibid.

Until the 1980s, there seemed to be some uncertainty regarding whether the established heads of public policy were fixed or whether judges could invent new categories.[76] In *Karp v Kuhn*,[77] the Transvaal Provincial Division referred approvingly to the House of Lords decision in *Janson v Driefontein Consolidated Mines Ltd*, in which the Earl of Halsbury had stated: 'I deny that any Court can invent a new head of public policy'.[78] The Court also endorsed the view of *Cheshire and Fifoot's Law of Contract* to the effect that 'although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the courts to invent a new head of public policy'.[79] One can clearly distinguish, as these authors did, legal developments that occur *within* established heads of public policy, on the one hand, and the judicial creation of entirely new heads, on the other. The Transvaal Provincial Decision decided to follow the then-prevailing 'closed' English approach to public policy heads.[80]

This approach appeared to contradict the Appellate Division's framing of the legal position in the *Eastwood* and *Robinson* decisions. Innes CJ's dicta in these two early cases appeared to entail a broad-based power available to courts to strike down *any* contract on public policy grounds.[81] These cases implied, as Gerhard Lubbe and Christina Murray put it, that 'principles and policies competing with freedom of contract are not restricted to a numerus clausus'.[82] Indeed Innes CJ had stated unequivocally that if a contract is contrary to public policy, a court has no choice but to strike it down. The use of the phrase 'any arrangement' in *Eastwood* appeared to make this clear. The existing Appellate Division authority thus implied that courts *could* invent new heads of public policy in appropriate circumstances; if they could not do so, their supposed ability to strike down 'any' type of contractual arrangement would seem hollow.[83]

The question of whether South Africa's pre-constitutional courts could create new heads of public policy was authoritatively settled by the Appellate Division's decisions in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* ('*Magna Alloys*')[84] and *Sasfin v Beukes* ('*Sasfin*').[85] Later in this chapter I will deal with both cases in more detail and in service of different goals; for now my focus is only on the 'new heads' issue. *Magna Alloys* involved a challenge to an agreement in restraint of trade. In setting out the legal principles applicable to such agreements, Rabie CJ repeated the 'well-known' principle of South

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[76] See, for example, Aquilius, 'Immorality and Illegality in Contract' (1941) 58 *SALJ* 337 at 345 and Leon E Trakman 'The Effect of Illegality in South African Law' (1977) 94 *SALJ* 327 at 334.
[77] *Karp* supra note 69.
[78] *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491.
[79] *Karp* supra note 69 at 840.
[80] Ibid at 839–40.
[81] See *Eastwood* supra note 59 at 302; *Robinson* supra note 61 at 204.
[82] Gerhard Lubbe & Christina Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* (1994) 240.
[83] This 'open' approach to new heads of public policy also seemed mainly to accord with the interpretation of judges sitting in a majority of the provincial divisions. See, for example, *Hurwitz v Taylor* 1926 TPD 81 at 92 and *Couzyn v Laforce* 1955 (2) SA 289 (T) at 292C.
[84] *Magna Alloys* supra note 55.
[85] *Sasfin v Beukes* 1989 (1) SA 1 (A).

African law that the common law does not permit agreements contrary to the public interest.[86] It was clear from the Court's reliance on *Robinson,* which used the terminology of 'public policy' rather than 'public interest', that Rabie CJ was *not* seeking to draw a meaningful distinction between these concepts. The Court went on to affirm that as views about the public interest and its demands change over time, there cannot be a *numerus clausus* of the types of agreements that are considered contrary to the public interest.[87]

In *Sasfin* a majority of the Appellate Division noted that 'it is convenient to deal with unenforceable contracts, as most writers do, under various heads'.[88] However, it endorsed the *Magna Alloys* finding that there can be no *numerus clausus* of the types of agreements that are contrary to public policy.[89] *Magna Alloys* and *Sasfin* thus put it beyond doubt that pre-constitutional South African courts could create new heads of public policy when faced with novel situations. It seems reasonable to conclude that the courts thus acknowledged a 'general' or 'residual'[90] power to strike down any contract found to be contrary to public policy. In a common law system based on precedent, the exercise of this power has, as will be seen later, the potential over time to give rise to new heads of public policy. These are critical points to which I will return when considering the modern law.

I now turn to explain why the *Magna Alloys* and *Sasfin* decisions were important for other reasons as well. I deal with each judgment in turn, highlighting the features of each that are relevant for the purposes of this thesis. Although the signal contribution of *Magna Alloys* was to alter significantly the public policy test in relation to agreements in restraint of trade, it also gave rise to more general questions about the nature of the public policy doctrine that are relevant to this thesis. *Sasfin*, meanwhile, ultimately gave rise to a new head of public policy, and it also usefully clarified certain principles that judges should consider before exercising their residual power to override contracts on public policy grounds. *Sasfin* and its interpretation by subsequent courts constituted a key development in the public policy domain that also remains important in the modern law.

2.4 *The Magna Alloys decision*

2.4.1 Overview of the judgment

South African law's pre-constitutional response to agreements in restraint of trade had become a hotly contested matter by the time of the *Magna Alloys* decision. South African courts had broadly adopted the English approach to such agreements, according to which restraints of trade were *prima facie* contrary to public policy and void, subject to the exception that if, in the particular circumstances of a case, the restraint was reasonable as between the parties, it was valid and enforceable.[91] By the time of

[86] *Magna Alloys* supra note 55 at 891F–G (citing Voet 2.14.16 and *Robinson* supra note 61).
[87] Ibid at 891G–H.
[88] Ibid at 8G.
[89] *Sasfin* supra note 85 at 8H–I.
[90] Matthew Kruger 'The Role of Public Policy in the Law of Contract, Revisited' (2011) 128 *SALJ* 712 at 715.
[91] See *Van de Pol v Silbermann* 1952 (2) SA 561 (A) at 569 and *Magna Alloys* supra note 55 at 887A–C.

Magna Alloys, various court decisions[92] and scholarly articles[93] had challenged this approach, with some calling for an abandonment of the position that restraints are *prima facie* void.[94]

In *Magna Alloys* the Appellate Division rejected the applicability of the English law approach to South African law and held instead that restraints of trade should be regarded as in principle enforceable.[95] The Court nonetheless affirmed that if a restraint of trade amounts to an unreasonable curtailment of the freedom to assert oneself in the commercial and professional world, or a restraint that harms the public interest, it should not be enforced.[96] The Court clarified that the singular question facing a court when considering whether to enforce a restraint is whether its enforcement would harm the public interest.[97] When an *unreasonable* restriction is placed on someone's freedom of trade or profession, it 'probably' ('*waarskynlik*') harms the public interest when enforced.[98] But this no longer follows as a matter of course; rather it is the public interest that now forms the 'touchstone' ('*toetssteen*') of enforceability when dealing with restraints of trade.[99] Whether or not a restraint would harm the public interest depends on the particular facts of the case.[100]

Rabie CJ then set out certain consequences that followed from regarding the 'public interest' as the touchstone of enforceability. The Court affirmed that when deciding whether to enforce a restraint of trade, courts ought to take into account the circumstances existing at the moment when it is asked to enforce the restraint, rather than just those prevailing when the agreement was concluded (the latter approach being derived from English law).[101] Critically, in rejecting the English approach, the Appellate Division held that a restraint of trade agreement is not *per se* void or invalid *ab initio*; rather it is only unenforceable if it is contrary to the public interest in light of the circumstances prevailing at the time of enforcement.[102]

The Court stated that two main considerations typically need to be considered. The first is that an agreement cannot ordinarily be challenged in South African law on the mere ground that it operates unreasonably or is unfair to one of the parties.[103] I dealt with this well-established pre-constitutional

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[92] See, for example, *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N); *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T); and *Drewtons (Pty) Ltd v Carlie* 1981 (1) SA 305 (C).
[93] See Arthur Suzman 'The Contribution of English Law to South African Law' (1968) 85 *SALJ* 90 at 90–2 and Ellison Kahn, 'The Rules relating to Contracts in Restraint of Trade – Whence and Whither?' (1968) 85 *SALJ* 371 at 391–99.
[94] See *Roffey* supra note 92.
[95] *Magna Alloys* supra note 55 at 891A–B.
[96] Ibid at 891C-D.
[97] Ibid at 898B.
[98] Ibid at 894A–D and 898A–B.
[99] Ibid at 893B.
[100] Ibid at 892A. See also 892D–F.
[101] Ibid at 894E–G and 895B–D.
[102] Ibid at 895C–D and 895G–I. As Schoombee op cit note 70 puts it at 147, the 'emphasis is now on the factual *nexus* between covenantor, covenantee and the public at the time of enforcement, rather than the contractual *nexus* between covenantor and covenantee, as was the case under the traditional doctrine'.
[103] At 893H–I. For this proposition the Court cited *Wells* supra note 52 at 73 and *Marlin v Durban Turf Club and Others* 1942 AD 112 at 131.

dictum in 1.5 above. The second consideration, referred to already above, is that it 'probably' harms the community and the public interest if an *unreasonable* restriction is placed on someone's freedom of trade or profession and is then enforced.[104]

I do not intend to engage the normative issues raised by agreements in restraint of trade or discuss whether the shift away from the English approach was justified. My intention is rather to reflect on some of the issues raised by the judgment that have more *general* application to the public policy doctrine. In addition to the Appellate Division's important 'no *numerus clausus*' finding explained above, I turn now to other issues of general application.

2.4.2 Restraints of trade as 'valid but unenforceable': a basis for a broader discretion?

A significant feature of the *Magna Alloys* judgment was its finding that agreements in restraint of trade are not void or invalid, but are rather valid but unenforceable. For convenience, I will follow JT Schoombee in calling this finding 'the enforceability thesis'.[105] Contracts that are valid but unenforceable still tend to be treated as 'illegal contracts'.[106] Although a party to such a contract cannot institute proceedings on the contract, the ordinary *consequences* of invalidity do not apply.[107] Prior to *Magna Alloys*, the most prominent class of contracts falling under this category was wagering and gambling contracts. The category of valid but unenforceable contracts has generated much academic debate, in particular regarding whether there is a principled reason for treating a minority of illegal contracts in this distinctive fashion.[108] As explained above, until *Magna Alloys*, restraint of trade agreements had previously been deemed void *ab initio* when they ran foul of public policy.

Schoombee criticised the *Magna Alloys* enforceability thesis partly on the basis that the distinction between enforceability and unenforceability was 'neither well-developed nor obvious'.[109] The potential justification for the enforceability thesis is not particularly relevant for my purposes. I will simply note that Rabie CJ affirmed the enforceability thesis as part and parcel of his finding that courts should be entitled to consider the circumstances in existence at the moment they are asked to enforce the restraint.[110] It seems that if the Court thought that a restraint might be enforceable in one set of circumstances, and yet unenforceable in another, the finding that an unenforceable restraint was 'in principle valid', rather than being void *ab initio*, makes intuitive sense.[111]

More importantly for my purposes, I would like to highlight the fact that some courts and scholars viewed the *Magna Alloys* enforceability thesis as a basis for asserting the existence of a *general* power

[104] Ibid at 894A–D and 898A–B. See Schoombee op cit note 70 at 130.
[105] Schoombee op cit note 70 at 146-7.
[106] See, for example, Dale Hutchison & Chris Pretorius (eds) *The Law of Contract in South Africa* 4 ed (2022) 216.
[107] Ibid at 217.
[108] See Ferdinand Marthinus Botha *Determining the Consequences of Illegal Contracts* (unpublished LLM thesis, Stellenbosch University, 2022) 9–15. See also Van Huyssteen, GF Lubbe & MFB Reinecke op cit note 65 at 198.
[109] Schoombee op cit note 70 at 148.
[110] *Magna Alloys* supra note 55 at 894E–G.
[111] For a similar point, see Schalk van der Merwe et al *Contract: General Principles* 2 ed (2003) 185.

not to enforce otherwise valid agreements whenever such enforcement would fall foul of public policy. In *J Louw and Co (Pty) Ltd v Richter*,[112] Didcott J held (albeit *obiter*): 'Covenants in restraint of trade are valid. *Like all other contractual stipulations*, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy.'[113] AJ Kerr cited this decision and another Full Bench decision in support of the proposition that *Magna Alloys* had given rise to a broad judicial discretion to 'to refuse to allow a contract to be enforced in whole or in part if the court considers that enforcement would be against the public interest at the time enforcement is sought'.[114] In Kerr's view, the *Magna Alloys* approach to restraints had rightly been 'extended' by some courts to include such a general discretion[115] and, as per *Magna Alloys*, 'the main test' should be reasonableness *inter partes*.[116]

Kerr defended two separate propositions and it is worth paying both some critical attention. The first was that *Magna Alloys* did not just rule out a *numerus clausus* in relation to agreements that are objectively *invalid* on public policy grounds; *in addition*, *Magna Alloys* meant that there is no *numerus clausus* in relation to agreements that are, on public policy grounds, *valid but unenforceable in light of the circumstances prevailing at the time of enforcement*. Although the Court did not expressly lay out such a dictum, Kerr's interpretation contains an undeniable logic: the *Magna Alloys* Court emphasised the absence of a numerus clausus *precisely* in the context of creating a new 'valid but enforceable' category of public policy and in setting out a new test for that category. The Court thus certainly seemed to have such scenarios in mind when it made its 'no *numerus clausus*' finding. Indeed, it relied on this finding as support for the conclusion that a restraint of trade is unenforceable if its enforcement would harm the public interest. It seems to follow that the *Magna Alloys* Court's 'no *numerus clausus*' finding in relation to the Court's residual power to expand public policy into new domains indeed applied both to (i) the invalidation of contractual provisions and (ii) the refusal to enforce contractual provisions that, while not objectively invalid, would offend public policy if enforced in the particular circumstances.

Kerr's second proposition was that in exercising its general power to refuse to enforce objectively contracts when to do so would harm the public interest in the circumstances prevailing at the time of enforcement, the main test should be 'reasonableness *inter partes*' because that was the approach taken in *Magna Alloys*. His reasoning here is difficult to follow. Because I regard this as a problematic interpretive move that still rears its head in other public policy contexts today,[117] it deserves further scrutiny. Leaving aside the question of whether it was correct to say that reasonableness was the 'main test' laid down by *Magna Alloys*, the reasonableness test in question was developed in the *specific* context of restraint of trade agreements and the legal principles our courts have developed to adjudicate

[112] *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N).
[113] Ibid at 243B (emphasis added).
[114] AJ Kerr (*The Principles of the Law of Contract* 4ed (1989) 477. In addition to citing *J Louw* supra note 64, Kerr cited the Full Bench decision in *Rentokil (Pty) Ltd v Appollis* 1987 2 PH A41.
[115] Ibid at 477, 490, 500.
[116] Ibid at 477, 500.
[117] See 6.4 below.

this head of public policy. It is by no means clear why courts should apply the restraint of trade reasonableness test to other *future* categories of valid but unenforceable contracts. As we have seen (and indeed *Magna Alloys* is a good example of this), a court may decide to develop specific tests or inquiries in relation to particular heads of public policy, ones which are specifically crafted to suit the particular category of agreement. I do not mean to say that a reasonableness *inter partes* test could not in principle have been adopted by our courts as a general test to guide the exercise of the court's residual power in 'valid but unenforceable' public policy cases. My point is rather that this would be a highly significant legal development that would require express and careful consideration by the relevant court. The adoption of such a test in *Magna Alloys* provides no reason *in itself* to think that such a test should be adopted in the context of 'valid but unenforceable' scenarios as a general rule. It is therefore possible to agree with Kerr that *Magna Alloys* provided weighty authority for his first proposition that courts had a general, residual power to refuse to enforce valid agreements on public policy grounds, without accepting that they should apply the *Magna Alloys* 'reasonableness' test whenever they exercised that power.

2.4.3 Public interest as the touchstone

I will now try to establish another more general thesis, again using *Magna Alloys* as a reference point: within a particular head of public policy, courts can choose to develop enforceability tests that either do or do not require judges to 'directly' apply the notion of 'public policy' (or the 'public interest') to the facts at hand. The notion of 'direct application' can itself be an ambiguous one, and I will need to address this in further detail in Chapters 3 to 5 of this thesis. For current purposes, the phenomenon I have in mind can be demonstrated in a fairly intuitive manner by observing the shift away from the English approach to restraint of trade agreements brought about by *Magna Alloys*. Prior to *Magna Alloys*, courts did not have to directly ask whether a restraint was contrary to public policy in determining its enforceability; rather, they asked simply whether the restraint was reasonable *inter partes*.[118] The *Magna Alloys* decision appeared to replace the 'reasonableness' test with the overriding standard of the 'public interest' as the 'touchstone' (again, in this context we have good reason to treat the 'public interest' as synonymous with 'public policy').[119] An unreasonable restraint, according to *Magna Alloys*, is only 'probably' contrary to the public interest. Unreasonableness was thus no longer the decisive test, as it was under the English approach. Rather, the public interest (i.e., public policy) was elevated to the status of being the directly governing and ultimately decisive benchmark or standard.[120]

It bears noting that this type of 'direct application' of the notion of public policy seems closely tied to the legal exercise in which a court is engaged when applying the residual power to expand public policy by applying the *Eastwood* and *Robinson* dicta, as clarified by *Magna Alloys* and *Sasfin* (i.e., there

[118] See 2.4.2 above.
[119] See 2.3 above.
[120] Commentators have considered potential examples of unreasonable restraints that might nevertheless not fall foul of public policy, but these are controversial. See, for example, Hutchison & Pretorius op cit note 106 at 199.

being no *numerus clausus*). This is due to the fact that being 'contrary to public policy' is the very test applied by the court when exercising its residual power. The Appellate Court did not seek to cash out this notion in terms of other more specific inquiries. *Magna Alloys* therefore demonstrates that this type of direct application of public policy 'at large' can occur both when the court applies its residual power *and* within an established head of public policy.

In the aftermath of the *Magna Alloys* judgment, scholars pointed out some of the difficulties associated with this type of direct application. Schoombee said that the public interest is a 'very wide concept which requires specification and determination in the field of restraints of trade'.[121] For one thing, a court needs to determine which interests and public policy considerations it is permitted to consider, and how much weight ought to be ascribed to each. To make matters even more complex, the standard applied is inevitably one that can shift over time. I will return to some of these difficulties later in this chapter. Some believe that *Sasfin* went some way towards setting out guidelines that can assist courts when engaging these questions, and it is to that case and its pre-constitutional aftermath that I now turn.

2.5 *Sasfin v Beukes*

In *Sasfin*, a financier ('Sasfin') and an anaesthetist ('Beukes') had concluded a deed of cession whose terms were extraordinarily skewed in Sasfin's favour: two of the contractual terms had provided Sasfin with immediate and effective control over Beukes' income; on notice of the cession to Beukes' debtors, Sasfin was entitled to recover all Beukes' book debts and to retain the amounts, regardless of whether Beukes was indebted to Sasfin for a lesser amount or at all; and Beukes was expressly denied the ability to bring this state of affairs to an end. A majority of the Appellate Division agreed with the Court *a quo* that several clauses in the deed of cession were invalid on public policy grounds. I will first summarise the relevant findings of law and fact made by the majority, before considering how our courts tried to extract some broader principles from the judgment.

After stating that South Africa's common law does not recognise agreements that are contrary to public policy, Smalberger JA posed twin questions: first, what is meant by public policy?; second, when can it be said that an agreement is contrary to public policy?[122] Smalberger JA noted that public policy is an expression of 'vague import'.[123] He then proceeded to review some of the traditional descriptions of public policy: (i) acts contrary to the interests of the community are contrary to public policy (citing Wessels); (ii) acts that courts, on grounds of expedience, will not enforce because performance will detrimentally affect the interests of the community (citing an article by Aquilius); and (iii) agreements

[121] Schoombee op cit note 70 at 141–2.
[122] *Sasfin* supra note 85 at 7H–I.
[123] Ibid at 7I, citing *Law Union and Rock Insurance* supra note 3 at 598.

that are opposed to the interests of the state, or of justice, or of the public (citing *Wille's Principles of South African Law*).[124] In an important formulation, he concluded as follows:

> The interests of the community or the public are therefore 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.[125]

After affirming the 'no *numerus clausus*' finding made in *Magna Alloys*,[126] he then expounded what might be thought of as two competing poles of the public policy analysis. On the one pole, he stated firstly that no court should shrink from its duty of declaring a contract contrary to public policy when the occasion so demands.[127] Secondly, he said that a relevant and 'not unimportant' consideration is that 'public policy should properly take into account the doing of simple justice between man and man'.[128] Smalberger JA's recognition of the relevance of substantive *inter partes* fairness in the public policy context was an important development to which I will return. On the other pole, Smalberger JA stated that: (i) the court's power to declare contracts contrary to public policy should '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';[129] (ii) courts should not strike down a contract on public policy grounds 'merely because its terms (or some of them) offend one's individual sense of propriety and fairness';[130] (iii) when invalidating a contract on public policy grounds, 'the impropriety of the transaction should be convincingly established in order to justify the exercise of the power';[131] and (iv) public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.[132] For convenience, we can call this second set of principles '*Sasfin's* cautionary principles'.

Smalberger JA then turned his attention to the deed of cession, which he noted was 'heavily biased' in Sasfin's favour: it 'sought to ensure maximum protection of Sasfin's rights while at the same time subjecting Beukes to the most stringent burdens and restrictions'.[133] He then struck down a number of provisions on the basis that they were contrary to public policy. As the majority's reasoning towards these conclusions provides a window into the nature and scope of the 'general' or 'residual' public

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[124] Ibid at 7J–8C.
[125] Ibid at 8C–D.
[126] Ibid at 8G–H.
[127] Ibid at 9A–B.
[128] Ibid at 9F–G, citing *Jajbhay v Cassim* 1939 AD 537 at 544.
[129] Ibid at 9B.
[130] Ibid at 9B–C. In support of this statement, Smalberger JA cited Lord Atkin's assertion in *Fender v St John-Mildmay* (1938) AC 1 at 12 to the effect that 'the [public policy] doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'.
[131] *Sasfin* supra note 85 at 9D.
[132] Ibid at 9E–F, citing *inter alia* Innes CJ in *Law Union and Rock* supra note 3 at 598.
[133] Ibid at 10A–B.

policy power, and is also relevant to the debate concerning *Sasfin's* precedential reach, it is worth summarising the key findings.

Firstly, reading two of the contract's clauses together, Smalberger JA found that Beukes could be 'deprived of his income and means of support for himself and his family' and in that respect 'virtually be relegated to the position of a slave, working for the benefit of Sasfin'.[134] Beukes was unable to escape from this predicament as one of the clauses stated that 'this cession shall be and continue to be of full force and effect until terminated by all the creditors'. Smalberger JA held that an agreement having this type of effect is 'clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.[135] In relation to a clause that provided for *parate executie*, Smalberger JA found that its terms were framed so broadly that it was open to abuse, gave Sasfin 'carte blanche in regard to the sale of Beukes' book debts' and '[went] to such lengths that it offends against the public interest and is contrary to public policy'.[136]

Turning to a further two clauses, Smalberger JA held that, read together, they permitted Sasfin at any time to terminate Beukes' mandate to collect book debts from his debtors, while placing no obligation on Sasfin to take any steps against Beukes' debtors. As Beukes was expressly barred from recourse against Sasfin, the majority concluded that this 'manifestly constitutes exploitation of Beukes to a degree which, in the public interest, cannot be countenanced'. These clauses thus also ran counter to public policy. A 'certificate of indebtedness' clause, meanwhile, provided that the amount owing by Beukes to Sasfin at any time, the fact that it was due and payable, and the rate of interest applicable 'shall be deemed to be determined and proved by a certificate under the signature of any of the directors of any of the creditors'; the consequence was that such certificate could not be challenged on any ground other than fraud. The majority held that the clause 'ousted the Court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud'. These clauses, too, were therefore contrary to public policy. Lastly, Smalberger JA examined a clause that allowed Sasfin to claim a five percent commission on the gross value of all outstanding ceded claims every time that Sasfin sent a letter of demand or took any steps to recover any of the ceded claims from Beukes' debtors. He held: 'The iniquity of the situation is immediately apparent. It is grossly exploitative of Beukes and must inevitably offend against the mores of the public to such an extent that it should be struck down on the grounds of public policy.'[137] He accordingly upheld the High Court's order to the effect that the entire deed of cession was invalid and unenforceable.

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[134] Ibid at 13F–H.
[135] Ibid at 13I–14A.
[136] Ibid at 14D.
[137] Ibid at 15D–E.

2.6 *Extracting a broader principle from Sasfin*

One of the significant features of the *Sasfin* decision was the way in which reasons apparently rooted in substantive *inter partes* unfairness served as public policy grounds that led directly to the invalidation of various contractual provisions under the public policy doctrine.[138] This was a novel application of public policy, and the case thus provides an illuminating window into the means available to judges to extend public policy into a new domain. After laying out certain cautionary principles, the Appellate Division nonetheless then set aside various contractual provisions on grounds of, *inter alia*, 'clear unconscionability', 'exploitation' and 'gross exploitation'. These reasons, which clustered broadly around the exceptionally unfair and skewed nature of the contractual bargain and focused on the *individual* interests of the parties to the contract, appeared sufficient by themselves to override the public policy considerations speaking in favour of enforcement. It must be emphasised that, aside from the particular finding in relation to Beukes being relegated to the position of a slave, this approach was not locatable within an existing head of public policy; all the other public policy considerations relied on were novel, and it was therefore unsurprising that the majority expressly referred to the *Magna Alloys* 'no *numerus clausus*' finding. The case demonstrates that, even when a case does not fall within an existing head of public policy, our pre-constitutional courts (i) were entitled to directly apply the standard of 'public policy' to novel cases (confirming the existence of the 'residual' public policy power that is always in principle available to judges) and (ii) in exercising this power, novel public policy considerations could be recognised, relied on and ultimately prove decisive in overturning a contract or one of its clauses.

Later courts were faced with the important question as to whether *Sasfin* gave rise to a new head (or several new heads) of public policy or generated a precedent or 'principle' that could be applied to future cases. The majority did not expressly try to frame a precise *ratio* for its decision or explain how its findings might affect future litigants seeking to avoid contracts on public policy grounds. Smalberger JA's explication of the cautionary principles was useful in highlighting the *exceptionality* of exercising the public policy's doctrine residual power, but the task was left for later courts to determine a possible *ratio.* Although the majority broadly referred to the relevance of 'simple justice between man and man' as a relevant public policy factor, this did not give rise to a general principle that explained or justified the *Sasfin* findings. To make matters trickier, the Court seemed explicitly to support the age-old South African position that courts will not set aside bargains *merely* because they are unfair or improper.[139] The pertinent question thus remained: under what circumstances could courts set aside harsh or unfair contractual terms on the authority of *Sasfin*?

[138] See Smith op cit note 50 at 352.

[139] As explained above, in *Sasfin* supra note 85 at 9B–C, Smalberger JA held that courts should be careful not to strike down a contract on public policy grounds 'merely because its terms (or some of them) offend one's individual sense of propriety and fairness'.

The aftermath of the *Sasfin* case was complicated and controversial. Interpreting its precedential effect was not straightforward and it led to a flurry of litigation, in which debtors increasingly sought to challenge various types of clauses in standard suretyship agreements in the High Court.[140] Instead of thoroughly describing this history, I propose to jump ahead to how *Sasfin* was finally interpreted by our courts. The Appellate Division, in *Botha (Now Griessel) v Finanscredit (Pty) Ltd*,[141] attempted to encapsulate the *Sasfin* Court's approach by asking whether the clauses at issue were 'plainly improper and unconscionable' or 'unduly harsh or oppressive'.[142] In *Standard Bank of South Africa Ltd v Wilkinson*,[143] a Full Bench of the Cape High Court emphasised *Sasfin's* cautionary principles and held that a court will not declare a contractual clause contrary to public policy 'unless it is so clearly inimical to the interest of the community as a whole, having regard to the mores of the times, that the harm to the public is substantially incontestable'.[144] In *Sasfin* the struck down clauses were 'clearly *so oppressive* as to render them inimical to the interests of the community'.[145]

Thus, the leading Appellate Division and High Court decisions tended to emphasise the exceptional nature of the facts in *Sasfin* and the *degree* of unreasonableness or oppressiveness that warranted the Court's public policy override in that case. To see where the appellate court ultimately landed on this issue, we need to peek briefly into the constitutional era. In *Brisley v Drotsky* ('*Brisley*'),[146] the Supreme Court of Appeal held that *Sasfin* stood for the principle that contract terms that are *so* unfair ('*wat dermate onbillik is*') as to be contrary to the public interest are invalid. In *Afrox Healthcare Bpk v Strydom*[147] (*'Afrox*') the Court repeated this statement[148] and also made the observation that the test is one of exceptional unfairness ('*uiterste onbillikheid*').[149] *Sasfin* thus ultimately came to be regarded as precedent for a type of 'gross' or 'exceptional' substantive *inter partes* unfairness test: contractual terms are deemed to be contrary to the interests of the public when they are grossly or exceptionally unfair. Some scholars nowadays refer to this as the '*Sasfin* principle'.[150] The exceptional nature of the circumstances required to justify a contractual override on the basis of *Sasfin* essentially 'builds in' a high degree of protection for the *pacta sunt servanda* principle, which does not yield easily. The *Sasfin* principle is very different from a *mere* unfairness or unreasonableness test, which would amount to a far more invasive override and would treat the *pacta sunt servanda* principle with a far greater degree of indifference.

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[140] See *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 381F and FDJ Brand, 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71 at 76 for further commentary.
[141] *Botha (Now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A).
[142] Ibid at 783B.
[143] *Standard Bank of South Africa Ltd v Wilkinson Ltd* 1993 (3) SA 822 (C).
[144] Ibid at 828F.
[145] Ibid at 832E (emphasis added).
[146] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 31.
[147] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[148] Ibid para 8.
[149] Ibid para 10.
[150] See Hutchison & Pretorius op cit note 106 at 204–5.

To conclude, *Sasfin* can ultimately be viewed as giving birth to an 'exceptional unfairness' head of public policy, one which was clarified over time by our courts. It therefore demonstrated the vitality of the courts' residual power under the public policy doctrine to recognise novel public policy considerations, as well as the capacity for the exercise of that power to lead, over time, to the creation of new heads of public policy, which attract their own category-specific legal tests, and which can become more concretised over time. *Sasfin* arguably came to be interpreted in a way that makes it a 'categorically prohibited' head of public policy: if a clause is so exceptionally unfair as to meet the *Sasfin* threshold, that is the end of the matter; it is contrary to public policy and will not be enforced. No further balancing or recourse to other factors needs to occur if a clause meets the high threshold of the *Sasfin* principle.

2.7 *The balancing process when public policy is 'directly' applied*

We have seen that under some heads of public policy, judges are no longer required to apply the standard of 'public policy' directly but are instead required to apply some other type of bespoke test. Courts nowadays applying the *Sasfin* 'exceptional unfairness' standard, for example, arguably do so without directly applying the notion of public policy. In other words, the notion of public policy has often been 'cashed out' in terms of other concepts or standards that are deemed to embody the requirements of public policy in particular types of cases. However, we saw that, in other kinds of cases, public policy can still be applied 'at large' as the directly applicable standard. Firstly, courts seem forced to do this when they exercise their residual power to expand public policy into new territory. Secondly, as the *Magna Alloys* case demonstrated, even within a particular head of public policy, the concept of 'public policy' can be installed as the ultimate benchmark or test to determine enforceability.

At the risk of veering into particularly intractable territory, I would like briefly to dig a little deeper into the possible meaning and content of 'public policy'. We have seen that the concept was sometimes used interchangeably with the notion of the 'public interest' (already a broad and indeterminate notion) and we have also seen that the individual interests of the parties to a contract have, in certain circumstances, been deemed to be relevant to the public interest (both in the context of restraints of trade and when the *Sasfin* principle is applied). The concept of public policy is somewhat elusive and the factors and principles that courts draw on appear to be almost endlessly open-ended. Its application gives rise to a number of controversial questions concerning how judges are to balance competing considerations. Whose interests should they consider? How, in a diverse society, are the interests of the 'public' to be ascertained and to what extent are a judge's personal moral and political views relevant? When should a particular policy factor become judicially relevant? On what basis do courts determine the weight to be attached to competing interests in the balancing process?[151] These are highly contentious

[151] See Lubbe & Murray op cit note 82 at 241, who raise a number of similar questions.

issues of judicial methodology, ones which also raise deep jurisprudential questions,[152] and I will not endeavour to answer them in this thesis. I will merely note that the immense difficulty in answering these questions is one of the reasons that the public policy doctrine will always be a highly contentious and unpredictable area of the law. Given that public policy appears to serve as an extremely broad umbrella concept, one that is capable of housing a number of diverse considerations within its ambit, can we say anything illuminating about the overall meaning or content of 'public policy', when it is directly applied as an override? I agree with those who think that, at a high level of generality, and by observing the reasoning employed by our courts, we *can* shed some further light on its content.

Lubbe and Murray point out that when a contract or term is struck down on policy grounds, in effect 'the policy that contracts seriously concluded should be enforced is overridden by other policy considerations.'[153] Expressing this point in converse fashion, Hutchison & Pretorius explain: 'When an agreement is considered contrary to public policy and unenforceable, in effect, the policy consideration indicating that the agreement should not be enforced is given precedence over the policy consideration that agreements seriously concluded should be enforced.'[154] At a very general level, it seems we can say the following: when a court directly applies the concept of public policy, and reaches the conclusion that a contract is contrary to public policy, in substance this embodies a conclusion that, having regard to the public policy considerations that a court is entitled to consider (we can call these 'sanctioned considerations'), the factors speaking against enforcement are held to outweigh the factors speaking in favour of enforcement. The content ascribed to the legal norm of 'public policy' by a court is perhaps best viewed as being constituted by the substantive conclusions that stem from this process of identifying and balancing sanctioned considerations.[155]

[152] For example, see Ronald Dworkin *Law's Empire* (1988) and Neil MacCormick *Legal Reasoning and Legal Theory* (1979) for contrasting accounts of the forms of legal reasoning potentially engaged in by judges when dealing with difficult and charged normative questions such as those posed above.
[153] Lubbe & Murray op cit note 82 at 241.
[154] Hutchison & Pretorius op cit note 4 at 175.
[155] See Kruger op cit note 90 at 716.

CHAPTER 3: FAIRNESS AND PUBLIC POLICY UNDER THE CONSTITUTION: THE SUPREME COURT OF APPEAL'S INITIAL APPROACH

3.1 *Overview*

The previous chapter sought to isolate certain features of the pre-constitutional public policy doctrine which I will ultimately argue remain relevant in the modern law. The first ground-clearing exercise has therefore been completed. The second ground-clearing exercise involves explaining and analysing some of the complex post-constitutional developments that encouraged a perception that the Supreme Court of Appeal and Constitutional Court had developed two competing and irreconcilable strands of jurisprudence in relation to contractual fairness under the Constitution. The public policy doctrine ultimately came to loom large in this controversial debate.

One of the central questions at stake concerned the extent to which courts should be able to rely on open-ended value concepts as grounds for intervening in the enforcement of contracts, including under the public policy doctrine. Whereas the Supreme Court of Appeal held that these notions should find only indirect application in the substantive law of contract, the Constitutional Court appeared to be of the view that open-ended value concepts could be employed on a more direct and expansive basis. I will deal with this jurisprudence during the next two chapters. Chapter 3 focuses on the Supreme Court of Appeal's initial approach to the role of abstract values as contractual overrides. Chapter 4 then investigates various possible interpretations of the Constitutional Court's *Barkhuizen* judgment, and the apparent shift this judgment led to in the Supreme Court of Appeal's approach in *Bredenkamp*. During the course of this discussion, I will draw some conceptual distinctions that I will continue to rely on as the thesis proceeds.

3.2 *Free-standing equitable overrides and their consequences*

In 1983 the South African Law Commission ('the SALC') began investigating whether to introduce legislation that would grant courts more extensive powers to invalidate contracts or grant other remedies in cases where, *inter alia*, contracts or their enforcement violated norms of fairness and good faith. The result of this investigation was a series of papers and reports in the mid-1990s, culminating in a final report in 1998.[156] Throughout this process, the SALC consistently recommended the introduction of a statutory framework conferring an over-arching judicial power to rescind, vary or refuse to enforce any contract or contractual term that contravened certain standards of equity. The precise equitable concepts recommended by the SALC for this purpose evolved during the course of the project: whereas the 1994

[156] South African Law Commission Report, Project 47 'Unreasonable Stipulations in Contracts and the Rectification of Contracts' (1998). In 1994 the Commission published a working paper for general comment that contained two alternative bills for consideration (see South African Law Commission, Working Paper 54 'Unreasonable Stipulations in Contracts and the Rectification of Contracts' (1994)). In 1996 it published a discussion paper for general comment containing a revised proposed bill (see South African Law Commission, Discussion Paper 65, Project 47 'Unreasonable Stipulations in Contracts and the Rectification of Contracts' (1996)).

working paper proposed that the principle of good faith serve as the relevant benchmark, the 1996 discussion paper put forward the notion of unconscionability, and the 1998 final report opted for the standards of unreasonableness, unconscionability and oppressiveness. Section 1 of the final proposed bill would have allowed courts to apply a range of interventionist remedies whenever they were 'of the opinion that (a) the way in which a contract between the parties or a term thereof came into being; or (b) the form or the content; or (c) the execution of a contract; or (d) the enforcement of a contract, is unreasonable, unconscionable or oppressive'.[157]

The legislature did not ultimately pass legislation to this effect. Nonetheless, the SALC's recommendations can be viewed as an important marker of a growing movement in post-apartheid South Africa, one which championed the introduction of what I will term a 'free-standing equitable override'. This is a type of judicial oversight power according to which judges are permitted to deny the validity or enforcement of contracts *directly* and *merely* on the basis that they run counter to certain open-ended, equitable values, such as reasonableness, conscionability, fairness or good faith. Variants of this idea gained increasing traction in post-constitutional academic debates and, as will be seen, they also found judicial support. The introduction of such a judicial oversight power could naturally be achieved by way of legislation. In the main, however, its advocates argued that the Constitution demanded a development to the common law along these lines.[158]

I will engage later with a number of academic and judicial statements that rely on a supposedly intuitive distinction between 'direct' and 'indirect' application of value concepts. I would like to use the SALC's proposal as a basis for teasing out certain 'legal-technical' features that would necessarily follow from a free-standing equitable override. I hope that this can later help cut through some of the ambiguities inherent in the 'direct' and 'indirect' terminology that ultimately came to the fore in our case law. Although it is instructive to refer to the statutory proposal for now, the substance of what I say applies equally to proposed common law free-standing equitable overrides.

3.2.1. Free-standing equitable overrides and the 'direct' application of value concepts

To recap: the SALC proposed that a statute should permit courts to deny the enforcement of contracts (among other remedies) whenever they were of the view that a contract's formation, form, content, execution or enforcement of the contract was unreasonable, unconscionable or oppressive. In applying such a provision, which is a paradigmatic 'standard', it is vital to recognise that much would obviously be left open to future courts to decide by way of interpretation and application. In Chapter 1, I referred

[157] SALC 1998 Report op cit note 156 at 208–9.
[158] See, for example, L Hawthorne, 'The principle of equality in the law of contract' (1995) 58 *THRHR* 157 at 172 (calling for a general duty of good faith to be developed) and AJ Barnard-Naudé, '"Oh, what a tangled web we weave …" Hegemony, Freedom of Contract, Good Faith and Transformation – Towards a Politics of Friendship in the Politics of Contract' (2008) *Constitutional Court Review* 155 at 174–5. Jonathan Lewis supported a legislative intervention, although he would have supported tests of substantive fairness only in relation to standard term contracts and tests of reasonableness in relation to particular kinds of clauses, such as exclusion and limitation clauses. See Jonathan Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330 at 330.

to the process of 'rulification' of standards. It is evident that judges can approach standards in a number of different ways. Some judges might strive to preserve the standard-like nature of the norm as far as possible by resisting rulification and by applying the notion of unreasonableness or unconscionability anew to each set of facts on an individualised and context-specific basis.[159] Alternatively, judges might consciously attempt to give these value-laden concepts more specific content or cash them out by way of other concepts, tests or criteria. They might develop a particular methodology for determining unconscionability or unreasonableness when applying the statute, thus 'rulifying' the standard over time. Therefore, under the proposed statute, the manner in which the concepts of unconscionability, unreasonableness and oppressiveness would be applied would be left open to future courts and would likely become more fully determined over time via a process of interpretation and refinement. The extent to which these abstract norms would be anchored within a more specified and tightly controlled legal framework would depend on the legal methodologies implemented by judges when applying these standards.

However, there is an important and intuitive sense in which one would, I think, say that judges would have been required by the proposed statute to apply the three value-laden concepts *directly* in applying the statute. This flows from their explicit inclusion in the formulation of the legal norm providing for the judicial oversight power. As these were the concepts referred to in the bill, it seems natural to say it would have permitted judges to intervene in contracts 'directly' on the grounds of unreasonableness, unconscionability or oppressiveness. Irrespective of the interpretation that later courts might give to these concepts, or the more 'rulified' tests or inquiries that might be developed for the purposes of their application, the express reference to these concepts in the statutory rule gave these concepts a necessary *legal* or *formal* significance in the application of the rule: as a corollary of their express inclusion in the statute's formulation, judges would have been required to reach legal conclusions or findings couched in the language of these concepts as a necessary component of deciding whether they are were entitled to intervene by way of a remedy. These value concepts would have acquired a technical-legal significance as the ultimate 'placeholders' for judicial findings. The point may seem obvious, but it is important to recognise this pervasive legal phenomenon and to have vocabulary in place for describing it.

It seems to me that the legal phenomenon I have just described has often aptly been described as a type of 'direct' application of value-laden concepts: it refers to the direct application that occurs when judges are required to employ these concepts (whether via statute or at common law) as express legal benchmarks as a result of their explicit inclusion in an officially sanctioned formulation of a law. It refers to a sense in which the concepts cannot be dispensed with – a 'directness' at the level of *norm-formulation* and, by corollary, *legal conclusion or finding*. This is a necessary feature of free-standing equitable overrides. If a concept such as reasonableness were to apply directly at this level, we could

[159] See Coenen op cit note 40 at 658.

also say – to adopt terminology that will become more relevant later – that it applies as a 'direct ground' for intervention in a contractual relationship. It is a 'direct' ground in that it serves as the ultimate legal benchmark against which contracts or contractual conduct are measured. In applying the proposed statute, a judge's legal finding or conclusion that a contractual provision was 'unreasonable' would ground the consequent remedy (e.g., non-enforcement), and it therefore makes intuitive sense to say that the notion of unreasonableness was applied 'directly' and served as a 'direct ground' for intervention.

3.2.2. Free-standing equitable overrides versus contingent equitable overrides

A further feature of the equitable override power under consideration relates to its 'free-standing' dimension. Under both the SALC's statutory proposal and several of the common law proposals, judges would have been entitled to intervene in contracts *merely* on the basis of their view about the applicability of an equitable concept. Under the SALC's proposal, for example, a court could intervene solely on the basis of a finding that the content of a contractual term was unreasonable. It is natural to refer to this phenomenon as the 'free-standing' application of equitable value concepts, as the concepts are capable of serving as stand-alone grounds for judicial interference.

It is important to distinguish between the direct and free-standing phenomena just discussed, as they can easily be conflated. Consider a hypothetical common law rule that allows judges to refuse to enforce contractual clauses whenever various conditions are *conjunctively* satisfied, and suppose that one of these conditions is that the parties had implemented the clause in a manner contrary to good faith. (Another condition might be, for example, that the contract was a long-term relational contract, but the precise nature of the other conditions is not currently important.) In applying this rule, the concept of good faith would apply in the 'direct' sense I discussed above: the express inclusion of good faith in the norm's formulation would require judges, as a *component* of the norm's application, to reach a legal finding or conclusion as to whether the parties had implemented the relevant clause in a manner contrary to good faith. If such a conclusion were reached (*and* the court found that the other relevant conditions were also met), good faith would constitute a *direct* ground of judicial intervention, but it would *not* serve as a *free-standing* override ground. Good faith's ability to ground a judicial override would be *contingent on other conditions being satisfied as well*, for example, that a long-term relational contract is at stake. We can call this type of judicial power a 'contingent equitable override', to contrast it with a free-standing equitable override.

3.3 *Olivier JA's minority judgment in Saayman*

I turn now to the first major post-constitutional case law development that has a bearing on the issues raised in this chapter. In the 1997 decision of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* ('*Saayman*'),[160] the Supreme Court of Appeal considered a challenge to a deed of suretyship and cession that had been signed in favour of a bank by an elderly and infirm Mrs Malherbe. She had signed the

[160] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

deed at her son's request and for the debts of his company and the bank sought to enforce the agreement after the company was liquidated. A majority of the Supreme Court of Appeal held that the suretyship should not be enforced because Malherbe had lacked contractual capacity at the time of signature.[161] Olivier JA wrote separately. He disagreed that Malherbe lacked contractual capacity, but he reached the same order by applying the 'modern, extended legal principles of *bona fides*'[162] to the circumstances surrounding the contract's conclusion.[163] On his distillation of the facts, Malherbe had signed a highly prejudicial agreement, in a confused state, and without the bank explaining its far-reaching implications.[164] Olivier JA seemed to take it for granted that the existing law required enforcement of the suretyship.[165] However, he found a path to nullifying the suretyship by crafting a new equitable rule based on good faith on two separate legal bases. His judgment merits close inspection, owing to its impact on later case law and academic commentary.

As a first basis for his approach, and with reference to a number of appellate court decisions (particularly those of Jansen JA discussed in Chapter 1), Olivier JA emphasised the active power of good faith to generate new equity-infused rules when the strict application of existing law would cause great unfairness.[166] He referred to this as the *bona fide* principle in its *creative* form[167] and he rejected the notion that the principle had already crystallised into a static, closed system of rules.[168] He agreed with Jansen JA that the concept of *bona fides* gave expression to and realised community beliefs regarding justice, reasonableness and fairness in contract law.[169]

Secondly, Olivier JA referred to some of the leading public policy cases, including *Magna Alloys* and *Sasfin*, which he said emphasised good faith, equity and the public interest.[170] Although neither *Sasfin* nor *Magna Alloys* explicitly referred to good faith,[171] Olivier JA's innovation was to find that good faith was nonetheless relevant under the public policy doctrine. He held that the concept of good faith was a component of the generally applicable public interest principle. He held: 'Die bona fides word toegepas omdat die openbare belang dit vereis.' (*The bona fides are applied because the public interest requires it*.) The public policy doctrine thus provided a second legal basis for the application of the concept of good faith to the case.

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[161] Ibid 318D–F.
[162] This is a translation from the Afrikaans: 'die moderne, uitgebreide regsbeginsels van die bona fides'.
[163] *Saayman* supra note 160 at 318G–I.
[164] Ibid at 330I–331C.
[165] Ibid at 331E.
[166] Ibid at 320D.
[167] Ibid at 320E.
[168] Ibid at 319I–320B.
[169] Ibid at 319A. In his discussion of good faith in *Hovis* supra note 13, Jansen JA held at 651E that 'in respect of the so-called *negotia bonae fidei* the court had wide powers of complementing or restricting the duties of parties, of implying terms, in accordance with the requirements of justice, reasonableness and fairness. These concepts, that constitute *bona fides*, were not static and immutable.'
[170] *Saayman* supra note 160 at 321A-B.
[171] Ibid at 323H.

Although Olivier JA extensively *justified* the applicability of good faith, he notably did not explicitly or directly apply a good faith standard to the facts at hand. Rather, his emphasis on good faith and the needs of the public interest led him to develop the common law by fashioning a novel defence to the enforcement of suretyship agreements involving certain classes of vulnerable sureties. He set down the following relaxation of *pacta sunt servanda* in order to give effect to good faith: where a surety is physically weak and displays possible confusion concerning the nature of the agreement, or where the creditor is aware that the surety is a spouse or elderly parent of the debtor, the creditor should attempt to ensure that the surety understands the full implications of the agreement.[172] It was clear that Olivier JA developed this exception on the basis that good faith and the public interest required it in the circumstances. Applying this new defence to the facts, he held that the bank had fallen short of the standard demanded, thus rendering the agreement unenforceable.[173]

The significance of Olivier JA's approach lay both in the prominence he gave to the value of good faith where the existing law seemed to grate against the demands of equity, as well as one of the pathways he found to this approach, namely the public policy doctrine. He embraced the notion, put forward by academics such as Schalk van der Merwe, Lubbe and Zimmermann, that good faith could find expression as part of the public policy doctrine.[174] Olivier JA explained that the public interest requires that 'the *bona fides* are applied'. Dale Hutchison situated Olivier JA's judgment within a broader trajectory in South African law, post-*Sasfin*, towards a renewed focus on substantive fairness and a movement away from merely 'paying lip service to the requirement of good faith instead of taking it seriously'.[175] The judgment seemed to accord with an argument made by some academics, including Hutchison, that good faith 'can better serve as a counterweight in the scales of public policy to the dominant principle of individual autonomy than the rather unsophisticated notion of "simple justice between man and man"'.[176]

That said, Olivier JA appeared to embrace a highly broad and unspecified concept of good faith, which contrasted with some of the recommendations made by academics. Olivier JA held, following in the footsteps of *Hovis*, that good faith realises 'community beliefs concerning justice, reasonableness and fairness'. By defining good faith in terms of a further set of open-ended values, good faith was arguably being deployed by Olivier JA as a placeholder for what was in substance intended as a fairly loose, 'catch-all' equity concept. Several scholars have emphasised the need to ascribe more definite content to good faith, for example, by addressing the issue of whether it is a subjective or objective standard, or by defining it as a standard of conduct that requires contracting parties to show a minimum

[172] Ibid at 331E–F.
[173] Ibid at 331C and 331G.
[174] See Schalk van der Merwe & Gerhard Lubbe 'Bona Fides and Public Policy in Contract' (1991) 2 *Stellenbosch Law Review* 91–101 and Zimmermann op cit note 11 at 259–60.
[175] Dale Hutchison, 'Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket?' (2001) 118(4) *SALJ* 720 at 741.
[176] Hutchison op cit note 18 at 225. See also Lubbe op cit note 70.

level of respect for each other and prohibits the 'unreasonable and one-sided promotion of one's own interest at the expense of another'.[177] Whereas Alfred Cockrell had cautioned that 'good faith is not some normative rag-bag into which we can stuff any moral values that happen to take our particular fancy',[178] Olivier JA's approach to the content of good faith arguably did precisely that. If the concepts of good faith, fairness, reasonableness and justice are treated as basically interchangeable, little room seems to be left for giving distinctive normative content to these concepts. The aim seems to have been to maximise the reach of the equitable function served by good faith, but such an approach arguably comes at the expense of a more precise application of value concepts.

I have paid Olivier JA's judgment close attention because of the influence it exerted on subsequent case law. The judgment soon spurred several further lower court decisions and interpretations.[179] It seemed briefly to receive the assent of the Supreme Court of Appeal in *NBS Boland Bank*, albeit in an *obiter* remark.[180] *Saayman* breathed life into the ongoing judicial and academic wrestling in our law concerning the *manner* in which good faith applies when it is invoked as a basis for intervening in contractual relations. It led to academic work that ultimately proved pivotal for the development of our case law, most notably in the important Supreme Court of Appeal decision in *Brisley*. *Brisley's* doctrinal findings were in large part a reaction to Olivier JA's judgment in *Saayman* and its knock-on effects in case law and academic writing. In what follows, I will pick out and critically engage the points I take to be most important in this trajectory from *Saayman* to *Brisley*. I deal first with the Cape Provincial Division's decision in *Miller and Another NNO v Dannecker*[181] ('*Miller*') and I will then examine some of the academic work that was cited extensively in *Brisley*, and which remains relevant today.

3.4 *Direct versus indirect? The judicial and academic aftermath of Saayman*

3.4.1. The approach of Ntsebeza AJ in *Miller*

Miller was handed down two years after *Saayman* and for my purposes is the most important of the decisions seeking to build on Olivier JA's judgment. Ntsebeza AJ was tasked with considering the enforceability of a non-variation clause in a franchising agreement. Mr Dannecker had purchased franchise rights to a guesthouse from Mr Thirion pursuant to a written agreement that obliged Dannecker, after making an initial payment, to pay two further instalments by agreed upon dates. It was

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[177] Lubbe op cit note 70 at 20; LF Van Huyssteen & S Van Der Merwe, 'Good Faith in Contract: Proper Behaviour Amidst Changing Circumstances' (1990) 1 *Stellenbosch Law Review* 244 at 248. See also Zimmermann op cit note 11 at 259-60. For a more recent discussion of the content of good faith, see Francois Du Bois 'Developing Good Faith: Equality, Autonomy and Fidelity to the Bargain' (2022) 12 *Constitutional Court Review* 223 at 235–6.

[178] Alfred Cockrell 'Second-Guessing the Exercise of Contractual Power on Rationality Grounds' (1997) *Acta Juridica* 26 at 42.

[179] See, for example, *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C); *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C); and *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C).

[180] *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at para 28.

[181] *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C).

common cause that Dannecker had failed to do this, apparently due to the under-performance of the guesthouse. Thirion subsequently ceded his contractual rights to a trust and the trustees instituted summary judgment proceedings against Dannecker for payment of the outstanding amounts. One of the defences raised by Dannecker was that before the cession, Thirion had orally agreed not to institute recovery for the outstanding amounts, and had instead agreed to allow him a period of a few months to sell his interest in the guesthouse. Dannecker said this amounted to a *pactum de non petendo* and that the agreement was violated when the plaintiffs prematurely instituted action against him.[182]

The trustees relied on a non-variation clause in the agreement, which they said precluded any oral variations and meant that the verbal agreement alleged by Dannecker was without legal force. Ntsebeza AJ acknowledged that pursuant to the Appellate Division's judgment in *SA Sentrale Ko-op Graanmaatskappy Bpk* v *Shifren* ('*Shifren*'),[183] a non-variation clause is valid and has the effect of entrenching itself and all other clauses in the contract from oral variation.[184] However, he also found that the principle of good faith could serve as a basis for Dannecker avoiding the clause's enforcement. He dealt briefly with some of the key statements made by Olivier JA in *Saayman* concerning the applicability of good faith, and then stated that he was obliged to assume that the oral agreement constituting the *pactum de non petendo* had been concluded in good faith.[185] This led to the striking conclusion that '[t]he dictates of public policy and the views of the community would never be served by a slavish adherence to a non-variation clause in the face of an agreement in the form of the *pactum*'[186] and, further, that '[t]he good faith basis of contract, after all, imposes an obligation on contractors not to exercise powers in ways which run counter to the concept of *bona fides*'.[187] Ntsebeza AJ clearly thought that Olivier JA's approach in *Saayman* permitted courts to refuse to enforce non-variation clauses by applying a test of good faith directly to the facts at hand (i.e., without attempting to craft a more specific rule of some sort). In his view, Dannecker could enforce the oral *pactum* on the basis that it was concluded in good faith, and this was one of the bases on which he refused the application for summary judgment.[188]

3.4.2. Academic discussion

I turn now to two articles written by Dale Hutchison concerning the manner in which good faith is and should be applied in South African contract law, one published after *Saayman*[189] and the other after *Miller*.[190] I will consider this work closely, not only because it raises pertinent issues, but also because

[182] Ibid at 932C to 933E.
[183] *SA Sentrale Ko-op Graanmaatskappy Bpk* v *Shifren* 1964 (4) SA 760 (A).
[184] *Miller* supra note 26 at 936D.
[185] Ibid at 938C–E.
[186] Ibid at 938F–G.
[187] Ibid at 938H.
[188] Ibid at 938G-H.
[189] Dale Hutchison 'Good Faith' op cit note 18.
[190] Dale Hutchison 'Non-Variation Clauses' op cit note 175.

our courts ultimately relied extensively on it, and its proper interpretation is relevant to interpreting key case law, including *Beadica*.

Hutchison sought to build on a distinction drawn by Alfred Cockrell. In an article considering possible judicial methods of reviewing the exercise of contractual powers, Cockrell distinguished two ways in which good faith might be applied in South African contract law: direct, 'free-floating' application and 'mediated' application.[191] Cockrell had argued that in the *Hovis* decision,[192] good faith had not been 'directly applied in a free-floating way' but had rather been 'mediated' by the doctrinal device of an implied term.[193] This device was 'interposed between' the open-ended standard of good faith, on the one hand, and the rule it generated (namely, that contractors are under a duty not to commit anticipatory breach), on the other.[194] Although Cockrell favoured a greater role for direct, free-floating application of good faith in South African contract law, he remarked that 'the standard of good faith will often be mediated by some other doctrinal device'.[195]

As Hutchison pointed out, the notion that good faith operates in an 'indirect' and mediated manner can be traced back to Lubbe and Murray's analysis of *Bank of Lisbon*. In grappling with the statement in that decision that South African law is 'inherently equitable', Lubbe and Murray argued that good faith and other normative considerations 'which cumulatively determine the demands of equity' are taken into account *indirectly*, finding expression in the rules of substantive law.[196] On this view, good faith is a 'controlling principle' that 'underlies the substantive law' and operates in conjunction and competition with other normative notions, such as individual autonomy and responsibility, the protection of reasonable reliance in commerce, and economic efficiency.[197] Hutchison, who agreed with this position, elaborated as follows:

> [T]he influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctrinal device. Thus, for example, while good faith does not empower a court directly to supplement the terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule.[198]

Good faith thus underlies and informs the substantive law of contract and it 'finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation'.[199] It thus has a 'creative, a controlling and a legitimating

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[191] Cockrell op cit note 178 at 41–2.
[192] See 1.2 above and *Hovis* supra note 13.
[193] Cockrell op cit note 178 at 41–2.
[194] Ibid.
[195] Ibid at 42.
[196] Lubbe & Murray op cit note 82 at 391.
[197] Ibid at 391. For a similar view, see also SWJ Van der Merwe, G Lubbe and L Van Huyssteen 'The Exceptio Doli Generalis: Requiescat in Pace' (1989) 106 *SALJ* 235 at 242.
[198] Dale Hutchison 'Good Faith' op cit note 18 at 231.
[199] Ibid at 230–1.

or explanatory function', in conjunction with other values.[200] This indirect application of good faith can be contrasted with the potentially direct and 'free-floating' application of good faith described by Cockrell, in which good faith might apply in an 'unmediated' fashion, i.e., directly and without finding expression through some more specific technical rule or device.

Hutchison and Cockrell made descriptive claims concerning how good faith in fact operates in our law and normative claims concerning how it should ideally operate. Descriptively, they agreed that South African law at the time favoured the indirect, mediated approach. Prescriptively, Cockrell appeared open to a greater role for unmediated, free-floating application, whereas Hutchison preferred the prevailing indirect approach.[201] In the wake of the *Miller* decision, Hutchison published a further article in which he expanded on his reasons for favouring the indirect approach. Ntsebeza AJ in *Miller* had interpreted Olivier JA's *Saayman* judgment to permit a directly applicable good faith test that could override a non-variation clause without the mediation of a more specific doctrinal device. Hutchison, while mindful of the need to ensure that non-variation clauses were not enforced in a manner destructive of good faith, criticised the *Miller* judgment on the basis that its brand of direct, unmediated application of good faith – where judges have a 'free hand to refuse to enforce a non-variation clause whenever it seemed to them that the party seeking to rely on the clause was acting in bad faith' – would create too much uncertainty, admitted 'a want of technical expertise or creativity' and led to 'palm-tree justice'.[202] Rather than allowing judges this type of 'equitable discretionary power', the correct approach, he proposed, was to view good faith as being 'always mediated by other, more concrete rules' and as operating indirectly, such that courts are justified or even *obliged* to develop the existing 'technical rules' of the common law (such as those relating to waiver and estoppel) to ensure that the *Shifren* principle is applied in a manner that is consistent with good faith.[203]

There are two points worth highlighting from the above discussion. The first is that Hutchison followed Lubbe and Murray in emphasising the active, dynamic function of good faith (and other values) when they operate indirectly. Thus, the academic proponents of the indirect application of good faith did not endorse a static view of the law, in terms of which equitable values had already come to fruition by finding expression in the existing body of rules and doctrines. Hutchison, for example, argued that on the indirect approach, 'the courts are obliged where necessary to develop the principles of the law of contract … to ensure that they conform to the requirements of good faith and thereby reflect the values underlying the Constitution'.[204] His critique of the *Miller* decision was not that it attempted to evade the operation of the non-variation clause on the basis of good faith, but rather that it tried to do so by applying good faith in a direct, free-floating manner, instead of by tweaking existing common law rules.

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[200] Ibid.
[201] Ibid.
[202] Hutchison 'Non-Variation Clauses' op cit note 175 at 745.
[203] Ibid at 746.
[204] Hutchison 'Non-Variation Clauses' op cit note 175 at 745. See also Lubbe and Murray op cit note 40 at 391.

Hutchison's approach thus amounted to a powerful defence of an indirect – but highly active, dynamic and creative – application of good faith.

The second and related point is that the type of 'indirect application' embraced by writers such as Hutchison does not rule out the application of values such as good faith *at the level of judicial reasoning*. The type of 'direct application' of good faith rejected by Hutchison appeared to concern directness *at the level of norm formulation*. We have seen that on Hutchison's conception of indirect application, values such as good faith actively inform the development of more concrete rules and doctrines; only the latter 'technical rules' apply 'directly'. I can now draw the link between the 'direct versus indirect' distinction that Hutchison and Lubbe and Murray seemed to have in mind and the conceptual issues raised at the outset of this chapter. In arguing that good faith was not applied directly but was rather given effect to indirectly by way of substantive law whose doctrines and legal devices were of a more 'technical' and 'concrete' nature, Hutchison had cited Lubbe and Murray, who had drawn parallels between the indirect application of good faith and contract law's indirect application of concepts such as economic efficiency, individual autonomy and responsibility. The substantive rules of contract law do not, *at the level of norm formulation*, make express reference to economic efficiency, individual autonomy or responsibility at all. These values are always mediated by *other* concepts which lend themselves more easily to direct application in substantive contract law. They are nonetheless underlying values which are taken into account, balanced, and given effect to in the process of creating or refining substantive law. Hutchison clearly agreed with Lubbe and Murray that the same could be said of the value of good faith.

In my view, the natural way to understand the 'direct versus indirect' distinction at play here is therefore as follows: when a value concept applies only indirectly, it is never applied at the level of an officially sanctioned legal norm which requires judges to reach express legal findings or conclusions in relation to that concept. In respect of certain types of value-laden norms (good faith included), the substantive rules and doctrines of contract law may *give effect to* these norms, but they do so by requiring judges to 'directly' apply *other* concepts, criteria and tests. On this vision of contract law, *certain* value-laden concepts are insulated from direct application at the level of norm formulation. Normative concepts such as autonomy, efficiency and (in Hutchison's view) good faith must *necessarily* inform the development of more concrete or technical legal norms which can (and should) be formulated without direct reference to these value-laden concepts at all. Judges therefore do not make direct findings couched in these concepts, and in this sense they are not applied 'directly'. In the context of non-variation clauses, for example, Hutchison rejected Ntsebeza's AJ's direct application of good faith and instead raised the concepts of waiver, estoppel and *pactum de non petendo* as the appropriate, more technical, vehicles through which the value of good faith should find expression.[205]

[205] Hutchison, 'Non-Variation Clauses' op cit note 175 at 745.

3.5 *The Supreme Court of Appeal takes charge: Brisley v Drotsky*

Shortly after the publication of Hutchison's article critiquing *Miller*, the Supreme Court of Appeal handed down its seminal decision in *Brisley*.[206] The case concerned an appeal from a lessee who had been evicted from a residential property after falling into rental arrears. The lessee sought to appeal the lower Court's eviction order by relying on an oral amendment to the lease that allegedly permitted a more flexible rental payment than that provided for in the standard form contract. The lease contained a non-variation clause and the lessee sought to evade the application of the *Shifren* principle on the basis, *inter alia*, of a good faith argument that closely resembled Dannecker's successful argument in *Miller*. The clause should not be enforced, the lessee argued (citing both *Miller* and Hutchison), because to do so would be unreasonable, unfair and contrary to good faith. The Court unanimously refused the appeal, but three separate judgments were handed down: a joint majority judgment by Harms, Streicher and Brand JJA, a judgment by Cameron JA concurring with the joint judgment, and a minority judgment by Olivier JA.

Olivier JA, who wrote first,[207] accepted that the application of the *Shifren* principle would be fatal to the lessee's case. The question was whether the application of the *Shifren* principle should be subject to a good faith override. The lessee's attempt to rely on Hutchison's work for this type of good faith exception was perplexing, as it would have amounted to precisely the *Miller*-type of direct application of good faith to non-variation clauses that Hutchison had so pointedly critiqued. Also surprising was the fact that, after considering and expressly endorsing Hutchison's championing of an 'indirect' approach to good faith,[208] Olivier JA proceeded to accept the lessee's argument that a good faith standard should be directly applied to non-variation clauses.

As he did in *Saayman*, Olivier JA located the lessee's good faith proposal within the broader framework of the public policy doctrine.[209] Although he quoted extensively from Hutchison's work and expressly endorsed the indirect approach to good faith,[210] he then approvingly cited other academic work labelling the indirect approach inadequate and calling instead for rapid progress with the direct approach.[211] As a result, the judgment appeared internally contradictory. Olivier JA held that courts should be permitted to refuse to enforce non-variation clauses in specific cases whenever it would be too unreasonable or too socially and ethically unacceptable to allow enforcement, or, as he put it later, contrary to the *boni mores* (based on the public interest and reasonableness).[212] Although Olivier JA

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[206] *Brisley* supra note 146.
[207] Writing extra-curially, Fritz Brand recently confirmed that Olivier JA had been the first to write, and it was Olivier JA's draft that in fact led Harms, Streicher and Brand JJA to issue a rebuttal on certain points of law, in particular those relating to good faith. See Fritz Brand 'Equity and Certainty in Contract Law' (2021) *Acta Juridica* 141 at 144.
[208] *Brisley* supra note 146 para 24.
[209] Ibid para 21.
[210] Ibid para 24.
[211] Ibid para 25.
[212] Ibid para 28.

appeared to endorse Ntsebeza AJ's judgment in *Miller*, whose approach seemed to entail precisely the type of direct application of good faith that Hutchison had rejected, Olivier JA held (without providing reasons) that his approach was compatible with *both* the direct and indirect approaches.[213] Applying his test directly to the facts, he held that enforcing the non-variation clause would not be too unreasonable in the circumstances.[214]

The joint judgment of Harms, Streicher and Brand JJA began by defending the *Shifren* decision and the various policy choices that underlay the judgment.[215] It then turned to the *Miller* decision, which it said had interpreted Olivier JA's judgment in *Saayman* to mean that 'considerations of good faith provide a self-contained, independent basis for the setting aside or the non-enforcement of contractual provisions and principles of contract law'.[216] The joint judgment clearly regarded this as an accurate framing of the *Saayman* approach[217] and, although I am sceptical whether this gloss accurately captured Olivier JA's approach in *Saayman*,[218] it does seem to capture his approach in *Brisley* in the context of non-variation clauses. As noted above, in *Brisley*, Olivier JA seemed to agree with the *Miller* Court that good faith could be applied as a direct override standard to any non-variation clause or set of circumstances surrounding its enforcement. The joint judgment unequivocally rejected this proposition and it also distanced itself from Olivier JA's *Saayman* judgment. Although the joint judgment was concerned with the application of good faith, its reasoning ultimately provided the seeds for a far-reaching approach to the application of open-ended value concepts *generally*, as set out by the Supreme Court of Appeal in two later cases that I will address shortly.

Streicher, Harms and Brand JJA came out strongly in support of Hutchison's views. They held that good faith is a value that underlies contract law and is reflected in its substantive rules, but is not an independent or 'free-floating' basis for the invalidation or non-enforcement of contractual provisions.[219] It was on this basis that they rejected *Miller* and Olivier JA's judgment in *Brisley*. The application of *Shifren* could not be made subject to a free-floating good faith override. The joint judgment agreed with Hutchison that good faith is best understood as an 'ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract' and 'finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation'. As Lubbe puts it: 'Good faith does not, on the view adopted by the court, operate on the *black-letter or doctrinal level* as an open

[213] Ibid para 27.
[214] Ibid para 32.
[215] Ibid paras 6–9.
[216] Ibid paras 14, 16–7.
[217] Ibid paras 16–7.
[218] In *Saayman*, Olivier JA did not frame the matter in these terms and, by contrast with his judgment in *Brisley*, in *Saayman* he applied good faith *indirectly* by developing 'a more concrete legal rule requiring a creditor in certain circumstances to ensure that the surety fully understands the terms and implications of the contract' (see Hutchison 'Good Faith' op cit note 18 at 230 n95.)
[219] *Brisley* supra note 146 para 22.

norm.'[220] The majority held that other values likewise perform a creative, controlling, legitimating or explanatory function, and it held that good faith is not necessarily the most important of these.[221] Courts must weigh these values and, when necessary, make incremental, gradual adjustments to the common law.[222]

The finding that good faith operates indirectly was not presented merely as an accurate descriptive statement of the common law. The Supreme Court of Appeal also defended the desirability of this position on rule of law, commercial certainty and individual autonomy grounds. The joint judgment explained that if judges had a discretion to disregard contractual principles whenever they are deemed unreasonable or unfair, the enforceability of contracts would depend on what a particular judge considers reasonable and fair in the circumstances. In that case, the yardstick or measure would no longer be the law but rather the particular judge, and the resulting uncertainty would undermine the needs of commerce.[223]

Cameron JA, concurring in the main judgment, clearly shared its concern regarding an unpredictable, value-laden judicial discretion. He noted: 'What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.'[224] Cameron JA also raised a constitutional autonomy-based justification for the prevailing position, stating that courts are required to approach the task of overriding contracts with 'perceptive restraint' because 'contractual autonomy is part of freedom' and informs the constitutional value of dignity.[225]

3.6 *The Supreme Court of Appeal's broader approach to abstract values*

A few months after *Brisley*, the Supreme Court of Appeal handed down *Afrox Healthcare Bpk v Strydom* ('*Afrox*').[226] The Court considered the enforceability of a standard-form exclusion clause that indemnified a hospital against liability in respect of the negligent conduct of its nursing staff. The respondent, Mr Strydom, had signed the contract and then suffered post-operative complications caused by the negligent conduct of a nurse. He instituted a claim for damages and the hospital sought to rely on the exclusion clause.

Brand JA, writing for a unanimous Court, acknowledged that, based on *Sasfin*, contractual clauses which are so extremely unfair as to be contrary to public policy are invalid.[227] However, Brand JA

[220] Lubbe 'Fundamental Rights' op cit note 43 at 397 (emphasis added).
[221] *Brisley* supra note 146 para 22.
[222] Ibid para 24.
[223] Ibid para 24.
[224] Ibid para 6.
[225] Ibid para 7.
[226] *Afrox* supra note 147.
[227] Ibid para 8.

rejected various arguments in support of the proposition that the exclusion clause was contrary to public policy.[228] Strydom, relying on Olivier JA's judgment in *Saayman*, had also argued that the clause should not be enforced because it was unreasonable, unfair and contrary to good faith. The Court's response to this argument was to expand *Brisley's* endorsement of the indirect application of good faith to a broader set of values. As Leo Boonzaier points out, this goes far beyond *Brisley's* finding in relation to good faith.[229] Brand JA held that abstract values such as good faith, reasonableness, fairness and justice do not constitute independent or free-floating grounds for the setting aside or non-enforcement of contractual provisions. They are not in themselves legal rules but can only spur the formation and amendment of legal rules.[230] When enforcing a contract, a court does not have a discretion; it does not act on the basis of abstract ideas, but rather on the basis of crystallised and laid-down legal rules.[231] While Brand JA said that *Brisley* had come to these conclusions, *Brisley* had actually only done so in respect of good faith.[232] The *Afrox* Court's expansion of the good faith finding to other values is, as will be seen, a much bolder proposition.

The *Brisley* and *Afrox* judgments were soon consolidated by the Supreme Court of Appeal in *South African Forestry Company Ltd v York Timbers Ltd* ('*SAFCOL*'),[233] in which Brand JA again wrote for a unanimous bench. The appellant had contended that the Court should imply a term *ex lege* into all contracts according to which contracting parties are obliged to act in accordance with the dictates of reasonableness, fairness and good faith. The Supreme Court of Appeal rejected this proposal. Citing *Brisley* and *Afrox*, Brand JA held that abstract values 'do not constitute independent substantive rules that courts can employ to intervene in contractual relationships' and that they 'cannot be acted upon by the courts directly'.[234] If judges could refuse to enforce a contractual provision 'merely because it offends their personal sense of fairness and equity', it would lead to legal and commercial uncertainty.[235] Brand JA remarked that 'it has been said that fairness and justice, like beauty, often lie in the eye of the beholder'.[236] While courts will indeed be guided by abstract values in deciding whether to develop a new implied term, the appellant's argument 'confuses the rationale for implying a term with the contents of the term to be implied'.[237] To allow abstract values to operate directly via an implied term would defeat the purpose and effect of *Brisley* and *Afrox*, and it would allow the outcome to depend 'on the individual judge's perception of what is just and fair'.[238]

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[228] Ibid paras 8–30.
[229] Boonzaier op cit note 58 at 247–8.
[230] *Afrox* supra note 147 para 32.
[231] Ibid.
[232] See Boonzaier op cit note 58 at 248–9.
[233] *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).
[234] Ibid para 27.
[235] Ibid.
[236] Ibid.
[237] Ibid para 28.
[238] Ibid para 31.

The Supreme Court of Appeal's approach in the three cases just discussed was criticised from a number of different angles by academic commentators.[239] Deeksha Bhana and Marius Pieterse, for example, accepted the need for the court to apply abstract values indirectly but they argued that the Court could have done more in these cases to do precisely that.[240] This raised the question whether the Court was paying lip-service to the dynamic and creative function of abstract values without really taking this function seriously. Relatedly, Lubbe pointed out that the Court had not attempted to give any content to good faith (or the other values) and that its vision of indirect application of values therefore seemed to 'entail no more than that the courts in the enunciation of legal doctrine should have regard to undefined and undifferentiated equitable considerations'.[241] My chief concern for now, however, is simply this: was the Supreme Court of Appeal's finding that abstract values are never *directly* applied as contractual override grounds compatible with the prevailing law?

3.7 *No direct stand-alone application versus no direct application: interpreting the Supreme Court of Appeal's approach in Brisley, Afrox and SAFCOL*

At the very least, it seems crystal-clear that the Supreme Court of Appeal rejected the applicability or desirability of free-standing equitable overrides in the sense discussed at 3.2 above. The notion that a contract's validity or enforcement could depend *solely* on the question of whether it violates some type of value-laden concept was decisively rejected by the Court. However, *Brisley*, *Afrox* and *SAFCOL* seemed to go much further than this. As the Court drew directly on Hutchison's work, it seems fair to assume that it sought to embrace the 'direct versus indirect application' distinction whose natural meaning I elaborated in 3.4.2 above. These cases, I will argue, held that value-laden concepts play no direct role as contractual overrides at the level of norm-formulation (or what Lubbe described as the 'black-letter or doctrinal level') *at all*.

I would like to try and formalise a distinction between what I will call 'no direct stand-alone application' approaches to abstract values and 'no direct application' approaches.[242] Both approaches reject the existence of free-standing equitable overrides and in *this* sense they overlap. However, as will be seen, a 'no direct application' approach goes much further. This distinction will be vital to my interpretation of the *Beadica* decision.

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[239] See, for example, Tjakie Naude & Gerhard Lubbe, 'Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare BPK v Strydom'* (2005) 122 *SALJ* 441 and Deeksha Bhana & Marius Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited' (2005) 122 *SALJ* 865

[240] See Bhana & Pieterse op cit note 239 at 892. See also Lubbe 'Fundamental Rights' op cit note 43.

[241] Lubbe 'Fundamental Rights' op cit note 43 at 397.

[242] I am indebted here to Boonzaier op cit note 58, who (at 249) proposed the similar notion of a 'no application' understanding of the idea that fairness and reasonableness are not 'free-standing'. On his 'no application' account, '[a] court's assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is never a ground for invalidating it'. He contrasted this with a 'conditional application' understanding, in terms of which '[a] court's assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is a ground for invalidating it, but only if certain prior requirements are satisfied' (see 249–50).

> **No direct stand-alone application:** on this approach, courts cannot invalidate or refuse to enforce contractual terms directly *and solely* on the basis that a term, or its enforcement, is unfair, unreasonable, unjust or contrary to good faith. Courts cannot rely directly on abstract values in a *free-standing* or *stand-alone* manner. A finding that a contractual term, or its enforcement, is unreasonable, for example, can never, by itself, be a *sufficient* direct ground for the judicial invalidation or non-enforcement of that term. The same principle would apply, *mutatis mutandis*, to the other abstract values. On this view, there are no free-standing equitable overrides in contract law.

As discussed at the outset of this chapter, a legal system might, however, permit abstract values to operate as direct override grounds *contingently* – i.e., only if certain other factors or circumstances are also met (for example, only on the fulfilment of some prior condition).[243] In such a legal system, courts would not be permitted to refuse enforcement of a contract *whenever* to do so would be contrary to good faith, but only if certain other prescribed circumstances are satisfied as well. That would be perfectly consistent with a 'no direct stand-alone approach' to values, which rejects only the *stand-alone* application of values as direct contractual override grounds.

As mentioned above, it seems to me that that the Supreme Court of Appeal, at the stage of its jurisprudence currently under consideration, rejected the direct application of abstract values as contractual overrides *per se* – i.e., irrespective of whether they are applied in a free-standing or contingent manner. It thus adopted the following approach:

> **No direct application**: on this approach, courts cannot invalidate or refuse to enforce contractual terms directly on the stand-alone *or* contingent basis that a term, or its enforcement, is unfair, unreasonable, unjust or contrary to good faith. On this approach, courts cannot directly rely on abstract values as grounds *at all* for the purposes of invalidating or refusing to enforce contractual terms: it does not matter whether such values are relied on as stand-alone grounds or as grounds contingent on other conditions or circumstances being met. A finding of unreasonableness, for example, can serve neither as a sufficient nor contingent ground for the judicial invalidation or non-enforcement of a clause. Direct reliance on abstract values as override grounds is, on this approach, simply ruled out *across the board*. Of course, as emphasised by the Supreme Court of Appeal, this approach is consistent with the idea that abstract values operate indirectly, for example, as background normative considerations which inform the application or development of legal doctrines that do not explicitly refer to these values.

It is worth elaborating on why I believe the Supreme Court of Appeal adopted the more far-reaching 'no direct application' approach to abstract values in *Brisley-Afrox-SAFCOL*. Firstly, as explained in the

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[243] To recap, I gave the example of a rule that permits judges to refuse to enforce contracts if they were implemented in a manner contrary to good faith, but strictly contingent on various other factors or conditions being conjunctively met. See also Boonzaier op cit note 58 and the quoted portion in note 242 above.

first paragraph of this sub-section, the Supreme Court of Appeal relied on Hutchison's work and it is thus makes sense to ascribe the natural meaning of his 'direct versus indirect application' distinction to the *Afrox-Brisley-SAFCOL* line of cases. Hutchison denied that good faith could ever apply directly in the substantive law of contract and this attracted *Brisley's* support. *Afrox* and *Brisley* then expanded this finding to abstract values more broadly. *Afrox and SAFCOL* are therefore naturally read as denying that these values ever apply as direct contractual overrides but must always find *indirect* expression in doctrines that do not expressly refer to these values. Secondly, when the Court denied the direct application of abstract values, it did so in sweeping statements on the basis of which a 'no direct application' approach can be inferred: (i) in *Afrox*, Brand JA stated that abstract values *can only spur the formation and amendment of legal rules*,[244] and he further held that, when enforcing a contract, a court *does not act on the basis of abstract ideas*, or exercise any 'discretion', but rather enforces crystallised legal rules;[245] and (ii) in *SAFCOL*, Brand JA held that abstract values 'cannot be acted upon by the courts directly',[246] partly because values such as fairness and justice often lie in the eye of the beholder.[247] The implication of these statements appears unequivocal: we are to understand that abstract values are not directly applied as overrides at the level of norm-formulation *at all*, free-standing *or otherwise*. In my view, this is the only plausible interpretation of these wide-ranging statements, which appear to rise to the level of an attack on the application of value-laden concepts as direct contractual override grounds *per se*.

It will be seen in Chapter 4 that the Constitutional Court's judgment in *Barkhuizen* appeared to collide with the interpretation I have just provided of the Supreme Court of Appeal's approach to abstract values. However, even prior to *Barkhuizen*, the Supreme Court of Appeal's 'no direct application' approach seemed to be plagued by a serious difficulty. While it may certainly have been the case, as Hutchison argued, that good faith found no direct application in the substantive law of contract at the time, the proposition that the various other abstract values identified by the Supreme Court of Appeal were never directly applied as contractual override grounds seems far harder to sustain.

The law applicable to determining the enforceability of restraints of trade (surveyed briefly in Chapter 2) provides an immediate counter-example: in deciding whether to enforce such agreements, courts frequently directly apply a 'reasonableness' test at the level of express legal doctrine. Prior to *Magna Alloys*, reasonableness was in fact the *very test* applied, provided that a restraint of trade agreement was genuinely at issue. Even after *Magna Alloys*, reasonableness remained (and to this day remains) a key component of the public policy test applied by our courts under this head of policy.[248] At the time when

[244] *Afrox* supra note 147 para 32.
[245] Ibid.
[246] *SAFCOL* supra note 233 para 27.
[247] Ibid.
[248] See, for example, *Basson v Chilwan* 1993 (3) SA 742 (A).

Afrox and *SAFCOL* were delivered, a reasonableness test was frequently directly applied at the level of express legal doctrine (albeit *contingent on* the agreement qualifying as a restraint of trade agreement).

Moreover, a similar problem with the Court's 'no direct application' approach seemed to arise in relation to South African courts' general discretion to refuse specific performance with reference to equitable considerations that are not subject to a *numerus clausus* or curtailed in any way (other than the discretion not being exercised capriciously).[249] Importantly, the discretion is based squarely and expressly on the notion of injustice, albeit contingent on a contracting party seeking specific performance (as opposed to some other type of remedy). As the Appellate Division held in *Benson v SA Mutual Life Assurance Society*:

> [C]ases do arise where *justice* demands that a plaintiff be denied his right to specific performance – and the basic principle thus is that the order which the Court makes should not produce an *unjust result* which will be the case, eg, if, in the particular circumstances, the order will operate *unduly harshly* on the defendant.'[250]

It is difficult to reconcile this type of express doctrinal override, one based directly on the application of notions of an 'unjust result' or an order operating 'unduly harshly', with a no direct application approach to abstract values. For these reasons alone, the Supreme Court of Appeal had arguably inaccurately captured the state of South African law at the time: reasonableness and justice surely *were* abstract values that our courts, at least on occasion, applied as direct (albeit contingent) override grounds. They were not always 'mediated' via rules or doctrines that were formulated in terms of *other* (directly applicable) concepts, criteria or tests. Reasonableness and justice, in other words, seem to be very different from the value-laden norms mentioned by Lubbe and Murray (such as autonomy, efficiency or responsibility), which indeed seemed not to find any direct application in contract law doctrine at all (whether as contractual overrides or otherwise). As will be seen in Chapters 4 and 5, the Supreme Court of Appeal's initial position became even harder to sustain after the Constitutional Court's judgment in *Barkhuizen.* I turn to that litigation now.

[249] See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783A–C.
[250] Ibid at 783C–E (emphasis added).

CHAPTER 4: FROM *BARKHUIZEN TO BEADICA*

4.1 *The Barkhuizen litigation*

In 2007 the Constitutional Court delivered its first major decision concerning contract law in *Barkhuizen*[251]. The case involved a constitutional challenge to a litigation time bar clause in a motor vehicle insurance contract that required the insured party, Mr Barkhuizen, to serve summons within 90 days of the insurer rejecting a claim under the policy. Barkhuizen had served summons more than two years after his claim was rejected. He sought to evade the time bar clause on the basis of a constitutionally-grounded public policy argument, claiming the clause unreasonably and unjustifiably limited his constitutional right of access to courts, guaranteed in s 34 of the Constitution.[252] He argued that contractually-imposed limitations of a constitutional right should, as in the vertical context, trigger a limitations enquiry in terms of s 36 of the Constitution.[253] The High Court accepted these submissions. It held that the clause limited Barkhuizen's s 34 right and, applying a limitations analysis, it held that the insurer failed to justify such limitation.

The High Court's decision was overturned by Cameron JA, writing for a unanimous Supreme Court of Appeal in *Napier v Barkhuizen.*[254] He agreed with the High Court that the law of contract is subject to the Constitution[255] and he held that public policy can now be derived from constitutional values.[256] This did not mean, however, that these values provide an 'all-embracing touchstone' for overriding a contract and '[n]or does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle'.[257] Whereas previously successful constitutional challenges to time limitation clauses had involved limitations of *pre-existing* rights to legal redress, Barkhuizen's rights arose from the contract alone.[258] The Supreme Court of Appeal held that section 34 does not prohibit the contractual creation of rights that is subject to a time limit for their enforcement.[259]

In the Constitutional Court, Ngcobo J's majority judgment in *Barkhuizen* reached the same result as the Supreme Court of Appeal via a different path. The judgment set out to provide the 'proper approach' to resolving constitutionally-grounded challenges to contracts.[260] Having found that the litigation time bar clause did limit Barkhuizen's right to seek judicial redress, the majority laid down a novel two-part test ('the *Barkhuizen* test'), to be used in determining whether the contract should be enforced. Applying

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[251] *Barkhuizen* supra note 1.
[252] The parties' written submissions can be accessed at the Constitutional Court's website, available at <https://collections.concourt.org.za/handle/20.500.12144/2513?show=full> (accessed on 5 January 2024).
[253] Barkhuizen's Heads of Argument at para 61ff.
[254] *Napier v Barkhuizen* [2005] ZASCA 119.
[255] Ibid para 6.
[256] Ibid para 7.
[257] Ibid paras 11–2.
[258] Ibid paras 18–23.
[259] Ibid paras 24–8.
[260] *Barkhuizen* supra note 1 para 22.

this test, Ngcobo J found the time limitation clause to be consistent with public policy and enforceable. Although Barkhuizen's appeal was unsuccessful, the significance of the majority judgment lay in its attempt to authoritatively set out a novel structured approach for resolving constitutional challenges to contracts, one which gave fairness and reasonableness a prominent, albeit rather elusive role. *Barkhuizen* remains applicable today and it contains some interpretive problems that have still not been resolved. At first glance, the judgment also seemed to collide in certain respects with the Supreme Court of Appeal's approach to abstract values. For the purposes of this thesis, it is a highly important judgment that I will discuss in detail. As a first step to this, I provide a detailed account of the Court's reasoning below.

Ngcobo J began by rejecting the High Court's approach of testing contracts 'directly' against provisions in the Bill of Rights, finding instead that constitutional challenges to contracts should be resolved by applying the common law's public policy doctrine (which he viewed as a form of 'indirect' horizontal application of the Bill of Rights, citing s 39(2) of the Constitution as the basis for his development of the common law).[261] I will briefly explain Ngcobo J's reasoning on this matter, as it will become relevant again in Chapter 6 of this thesis. Section 39(2) of the Constitution requires courts, when interpreting legislation or developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. This form of 'indirect' horizontal application of the Bill of Rights is driven by constitutional *values*.[262] As Barkhuizen's claim was based on the alleged infringement of a constitutional *right*, several scholars have questioned why the majority did not examine the constitutionality of the time bar clause – and develop the common law – by relying on ss 8(2) and (3) of the Constitution (often referred to as 'direct' horizontal application), which appear tailor-made for *rights*-based developments to the common law in the horizontal context.[263] Ngcobo J reasoned that he could not rely on section 8(2) because a contractual provision was not a law of general application and so could not be subjected to a limitations analysis, which applies only to laws of general application.[264] Several commentators view this as mistaken: it is the potentially rights-encroaching nature and effect of the relevant *contract law norms*, such as *pacta sunt servanda* (i.e., a 'law of general application') that are at issue when a contract is subjected to a constitutional challenge.[265] Ngcobo J's finding that constitutional challenges to contracts should be resolved via the public policy doctrine therefore seemed

[261] Ibid para 30.
[262] For an instructive discussion, see Francois Du Bois 'Contractual Obligation and the Journey from Natural Law to Constitutional Law' (2015) *Acta Juridica* 281 at 287–9.
[263] Section 8(2) of the Constitution provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' Section 8(3) in turn states: 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'
[264] *Barkhuizen* supra note 1 paras 23–6.
[265] See Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 123 *SALJ* 762 at 772-–5 and recently Nurina Ally & Daniel Linde '*Pridwin:* Private School Contracts, the Bill of Rights and a Missed Opportunity' (2021) 11 *Constitutional Court Review* 275 at 290–1.

compatible with direct application under sections 8(2) and 8(3). We will see later that the majority's finding in this regard has, in a sense, come to haunt more recent case law and some commentators think it is now holding back the constitutionalisation of South African contract law.[266]

In any event, Ngcobo J found that constitutionally-based challenges to contracts should be dealt with by developing the public policy doctrine. Public policy is now deeply rooted in the underlying values of the Constitution and a contract term that is 'inimical' to those values is contrary to public policy and unenforceable.[267] The majority disagreed with the Supreme Court of Appeal's finding that the time limitation, being sourced in a contract rather than a statute, did not limit Barkhuizen's right to judicial redress. As in the case of vertical limitations of constitutional rights, however, such limitation might still be constitutional 'subject to the considerations of reasonableness and fairness'.[268] In the vertical context, in *Mohlomi v Minister of Defence*,[269] the Constitutional Court had, according to Ngcobo J, broadly asked whether a time limitation 'affords a claimant an adequate and fair opportunity to seek judicial redress'.[270] It was this test that should be applied in the horizontal contractual context as well.[271] Ngcobo J explained:

> Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. 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.[272]

Having framed the issue at this high level of generality, Ngcobo J then articulated a two-stage test for the purpose of 'determining fairness' in this context. The first 'objective' inquiry permits judges to invalidate contractual clauses that are *per se* invalid and contrary to public policy. This, he said, turns on an assessment of the clause's *reasonableness*. Reasonableness is in turn is determined by way of a balancing analysis that weighs the public policy considerations in favour of the *pacta sunt servanda* principle against the threatened constitutional right.[273] Ngcobo J said that '*[p]acta sunt servanda* is a profoundly moral principle' that 'gives effect to the central constitutional values of freedom and dignity'.[274] Should a court find under this first inquiry that the clause is consistent on its face with public policy, the validity of the clause should then be reconsidered in light of the relative bargaining power of the contracting parties.[275] The second inquiry, meanwhile, permits judges to consider the circumstances that prevented compliance with the clause and to refuse to enforce reasonable (i.e. *per se* valid) contractual clauses when it would be 'unfair and unreasonable' to insist on compliance, having particular

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[266] Ally & Linde op cit note 265 at 291–300. See also Boonzaier op cit note 58 at 273.
[267] *Barkhuizen* supra note 1 paras 28–30.
[268] Ibid para 48.
[269] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)
[270] *Barkhuizen* supra note 1 para 51.
[271] Ibid paras 16, 50–2.
[272] Ibid para 51 (footnotes omitted).
[273] Ibid paras 56–7, 59.
[274] Ibid paras 57, 87.
[275] Ibid para 59.

regard to the reason given for non-compliance.[276] The second inquiry thus permits scrutiny of the particular circumstances prevailing at the time of enforcement and it falls squarely into the 'valid but unenforceable' category of public policy heads identified in Chapter 2.

When it came to the first inquiry, Ngcobo J rather anomalously applied a more stringent test than the mere reasonableness standard he had initially set out: he asked whether the time limitation clause was *so manifestly* unreasonable that it offends public policy. This was after earlier noting that 'there may well be time limitation clauses that are so unreasonable that their unfairness is manifest'.[277] It is not clear, however, why in applying the first leg of the test, the more onerous standard of *manifest* unreasonableness was applied.[278] It is also not clear whether there is a meaningful difference between this more onerous standard and the *Sasfin* test. Moreover, Ngcobo J did not apply the balancing test that he had set out for the purposes of determining reasonableness. After finding that a ninety-day litigation time bar was not manifestly unreasonable,[279] Ngcobo J then held that a situation of unequal bargaining power had also not been established. Barkhuizen was therefore unable to obtain relief under the first leg of the test. Turning to the second inquiry, Ngcobo J omitted the 'manifest' qualifier and asked simply whether enforcement of the clause would be 'unfair and unreasonable' in the circumstances. In applying this leg of the test (and adding the norm of 'justice' to the inquiry), he explained: 'Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair.'[280] Ngcobo J pointed out that Barkhuizen had failed to provide a reason for his non-compliance with the time bar clause, or shown that it was caused by factors beyond his control. Ngcobo J was thus unable to find that the enforcement of the time bar clause was unfair and contrary to public policy.[281] The clause was consequently deemed valid and enforceable.

Ngcobo J also briefly considered the role of good faith in contract law in response to an argument by the insurer that the time bar clause should be read in light of an implied term to act in accordance with good faith. The insurer argued that this implied term prevented it from unjustly enforcing the time bar clause, thus saving the clause from a charge of 'inflexibility'. Ngcobo J briefly discussed the 'limited role' accorded to good faith by the Supreme Court of Appeal in *Brisley*. However, he expressed his relief at the fact that, given his approach to the facts, he did not need to decide whether the *Brisley* Court's approach to good faith was, in the final analysis, appropriate.[282]

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[276] Ibid paras 58, 69.
[277] Ibid para 60.
[278] The anomaly is noted by Patrick Sutherland in Patrick Sutherland, 'Ensuring Contractual Fairness in Consumer Contracts After *Barkhuizen v Napier* 2007 5 SA 323 CC – Part 2' (2009) 20(1) *Stellenbosch Law Review* 50 at 57.
[279] *Barkhuizen* supra note 1 para 63.
[280] Ibid para 73.
[281] Ibid para 84.
[282] Ibid para 82.

4.2 *Interpreting* Barkhuizen

The majority judgment in *Barkhuizen* raises a number of interpretive questions. I have already noted the inconsistency between Ngcobo J's description of the first leg of the *Barkhuizen* test and the test he ultimately applied. This appeared to be part of a broader issue, namely, the judgment's rather loose and imprecise reliance on the concepts of fairness, reasonableness and justice. It seems that the extent to which these concepts were intended to do independent normative work was quite limited. Although the first leg of the test was at least quite clearly framed as entailing a reasonableness assessment, under the second leg the concepts of fairness and justice were incorporated too. For convenience, for the most part I will follow others in referring to both legs of the *Barkhuizen* test as a type of 'fairness and reasonableness' assessment.[283] In Chapter Six, I will return to discussing the content of both parts of the test in greater detail. The remainder of this chapter will focus on two related interpretive issues: firstly, *when* does the *Barkhuizen* test apply? Secondly, was the *Barkhuizen* test compatible with the Supreme Court of Appeal's then-prevailing approach to abstract values in contract law?

4.2.1. Free-standing interpretations of *Barkhuizen*

Some early judgments seemed to think that, on the strength of *Barkhuizen*, fairness and reasonableness could be applied as direct, self-sufficient bases for overcoming the enforcement of a contract. In the *Bredenkamp* litigation, two separate High Court decisions took this approach. In the first, Jajbhay J held that *Barkhuizen* 'is authority for the proposition that a party to the contract cannot, first, impose a term on another party if it would, if applied, operate unfairly and, secondly, cannot enforce a term in a manner that is unfair'.[284] In the second, Lamont J appeared to interpret *Barkhuizen* to lay down a general constitutional 'standard of fairness' in terms of which contracts can be directly evaluated without recourse to other considerations.[285] In addition to other High Court judgments,[286] some scholars offered similar interpretations.[287]

It seems to me that these interpretations of *Barkhuizen*, which I will broadly label 'free-standing interpretations', shared the following features. They all interpreted the judgment to entail a 'free-

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[283] See, for example, Boonzaier op cit note 58 at 249. See also Sutherland op cit note 278 at 57.
[284] *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ) at 315E.
[285] *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (6) SA 277 (GSJ) para 31.
[286] See *Absa Bank v Coe Family Trust & others* 2012 (3) SA 184 (WCC) at 189C–191C; *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 45–7.
[287] Graham Glover, for example, stated simply that '[t]he majority held that there were two questions to be asked in determining whether the time-bar clause was enforceable', the first being whether the clause itself was unreasonable and, if the clause is reasonable, the second being whether it should be enforced in light of the circumstances that prevented compliance with it (see Graham Glover, 'Lazarus in the Constitutional Court' (2007) 124 *SALJ* 449 at 454). Glover does not mention that the Court applied this test only *after* determining that Barkhuizen's section 34 right had been limited, and he implied that the test could be applied, without more, to any contract. In a similar vein, Jaco Barnard-Naudé interpreted *Barkhuizen* to mean that 'the enforcement of contractual rights must be fair' (see Jaco Barnard-Naudé, 'Deconstruction is What Happens' (2011) 22(1) *Stellenbosch Law Review* 160 at 167.) See also Andrew Hutchison, 'Agreements to Agree: Can There Ever Be an Enforceable Duty to Negotiate in Good Faith?' (2011) 128 *SALJ* 273 at 280–1, in which he stated that *Barkhuizen* 'seemed to provide an overarching requirement of fairness in contracting'.

standing equitable override' in the sense explained at 3.2 above. This is because they all interpreted *Barkhuizen* to mean that a court can invalidate a contractual provision whenever it is on its face unfair and/or unreasonable (under the first leg), or decline to enforce an objectively valid contractual provision whenever its enforcement in the circumstances would be unfair and/or unreasonable (under the second leg). On this understanding, *Barkhuizen*'s fairness and reasonableness test can be applied to *any* contractual clause without prior or any other conditions needing to be met. This interpretation would make *Barkhuizen* a radical judgment indeed. It would mean that, after more than a century of established case law to the contrary, mere unfairness or unreasonableness would now constitute sufficient grounds for overriding the enforcement of a contract. It also would make *Barkhuizen* manifestly inconsistent with the Supreme Court of Appeal's approach to abstract values. For the reasons given in 3.7 above, even if the Supreme Court of Appeal's approach was itself capable of differing interpretations, on *any* reasonable interpretation of that Court's approach, it ruled out the applicability of free-standing equitable overrides.

4.2.2. Constitutional limitation interpretations of *Barkhuizen*

In my view, free-standing interpretations of *Barkhuizen* were based on a selective reading. The majority certainly made several statements during its application of the *Barkhuizen* test which, *viewed in isolation*, might support such an interpretation.[288] However, although Ngcobo J's judgment may have been opaque in some respects, one structural feature of the judgment appeared rather clear: Ngcobo J accepted the proposal put forward in Barkhuizen's written submissions of following a multi-stage inquiry that mirrored, to a degree, the scrutiny of potential constitutional rights infringements in the vertical context. That is, he *first* asked whether the time limitation clause limited a constitutional right of Barkhuizen's, and it was only *after* having decided that his section 34 right had been limited, that he turned to the further inquiry embodied in the two-part *Barkhuizen* test. As he put it, public policy might 'tolerate time limitation clauses in contract *subject to considerations of reasonableness and fairness*'.[289] Reasonableness and fairness were not considerations applied in a vacuum to the contract at hand; they were applied *in light of the constitutional limitation* and as a means of testing the overall constitutionality of that limitation. I will maintain that any plausible interpretation of *Barkhuizen* has to reckon with this 'if-then' structure of the judgment: *if* a time bar clause limits a party's right to seek judicial redress, *then* the question turns to the clause's reasonableness. A recent scholarly example of such an interpretation

[288] Ngcobo J held that (i) 'In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy' (para 51); (ii) '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' (para 73); and (iii) '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' (para 70).

[289] *Barkhuizen* supra note 1 para 48 (emphasis added).

is provided by Boonzaier.[290] It will become apparent that some later Supreme Court of Appeal and Constitutional Court decisions held that a constitutional limitation *of some kind* (for example, a limitation of a constitutional value) was indeed a prerequisite for the application of the *Barkhuizen* test, without committing to the view that the limitation of a constitutional *right* has to be at stake. We can broadly call these 'constitutional limitation' interpretations of *Barkhuizen*.[291] It is noteworthy that none of the judicial or academic sources cited above that embraced a free-standing interpretation of *Barkhuizen* mentioned the rights limitation that had triggered the *Barkhuizen* test, nor considered the possibility that such a limitation was a prerequisite for its application.

I will later consider in detail whether the Supreme Court of Appeal's prevailing abstract values jurisprudence was consistent with *Barkhuizen* on a constitutional limitation reading of the case. For now, I simply wish to note that, although *Barkhuizen* would not be as radical on a constitutional limitation interpretation as on a free-standing interpretation, the judgment would still have introduced a critically important and novel public policy ground into South African contract law. In contrast to vaguer statements concerning the impact of the Constitution on public policy (for example, the often-mentioned claim that public policy is now rooted in the Constitution and its values), on this view *Barkhuizen* introduced an over-arching reasonableness and fairness test that should be applied as an override standard to contracts *provided that* a constitutional limitation is at stake. *Barkhuizen* also explicitly introduced inequality of bargaining power as a consideration that can lead to the non-enforcement of contracts in constitutionally-grounded cases. A constitutional limitation interpretation of *Barkhuizen* should thus not be viewed as an attempt to downplay the significance of the judgment or, worse, to render it redundant. Rather, the *Barkhuizen* test would be a 'contingent equitable override', as abstract values would serve as direct override grounds contingent on a constitutional trigger-point being satisfied. Contracts amounting to a 'constitutional limitation' would constitute a conditionally prohibited head of public policy, with their ultimate enforceability depending on the outcome of the *Barkhuizen* test.

4.2.3. The *Bredenkamp* Court's interpretation of *Barkhuizen*

I turn now to the Supreme Court of Appeal's treatment of *Barkhuizen* in the highly important judgment of *Bredenkamp*.[292] The matter came to it on appeal from the two High Court judgments referred to above, which both relied on *Barkhuizen* as a basis for applying fairness as a free-standing benchmark against which contractual provisions could be directly tested.[293] The Supreme Court of Appeal accepted that it was bound by *Barkhuizen* but it did not interpret the case as laying down a free-standing equitable

[290] Boonzaier op cit note 58 at 255-7. At 270, he states: 'As I have said many times before, it was only after the Court had found that the clause infringed that right that it invoked its fairness test at the second step; indeed it was this infringement of a constitutional right that triggered the public policy test's application.'

[291] For reasons that will become apparent in Chapter 6, I am deliberately employing the more general notion of a 'constitutional limitation', as opposed to a more specific notion, such as a 'constitutional right limitation'. Boonzaier has recently defended a version of a constitutional limitation interpretation of *Barkhuizen* on which I will expand in Chapter 6.

[292] *Bredenkamp* supra note 57.

[293] *Bredenkamp* supra note 284 at 315E; *Bredenkamp* supra note 285 para 31.

override. Instead, the Court essentially provided a constitutional limitation reading of *Barkhuizen* – one which it clearly thought was not at odds with the *Brisley-Afrox-SAFCOL* approach to abstract values. I say 'essentially' for reasons that will soon become clear. *Bredenkamp* turned on the question of whether a bank's termination of a banking relationship was valid. The Court considered whether, as the appellants contended, (i) the benchmark for constitutional validity of a contractual term is fairness and (ii) even if a contract is fair and valid, its enforcement must also be fair in order to pass constitutional muster.[294]

Harms DP, writing for a unanimous Court, rejected the free-standing approach taken by the two High Court judgments. He held that fairness is not an over-arching principle, a broad requirement of the law generally, or a 'free-standing requirement for the exercise of a contractual right'.[295] Nor is it the benchmark for the constitutional validity of a contractual term. Harms DP emphasised that the *Barkhuizen* test had been applied by Ngcobo J only after he had established that Barkhuizen's constitutional right to judicial redress had been limited. This constitutional limitation was not *per se* contrary to public policy; rather, the limitation was contrary to public policy only if it was unreasonable or unfair.[296] It was thus the limitation of the right to judicial redress that triggered *Barkhuizen's* inquiry into fairness and reasonableness. Harms DP explained that when the *Barkhuizen* test does apply, at the first stage the question is whether the clause itself is *ex facie* unreasonable.[297] If it is not unreasonable, at the second 'enforcement stage' of the test, the question is whether 'the limitation of the identified constitutional value' is 'fair and reasonable in the circumstances'.[298] *Bredenkamp*, then, recognised that the *Barkhuizen* test involved a fairness and reasonableness inquiry; this inquiry hinged, however, on a constitutional limitation of some kind. The Supreme Court of Appeal then went on to say that *Barkhuizen* did not lay down 'that the enforcement of a valid contractual term must be fair and reasonable *even if no public policy consideration found in the Constitution or elsewhere is implicated*'.[299] In *Bredenkamp*, no such public policy consideration had been established.[300] The High Court accordingly should not have reached the stage of applying a fairness test to the clause at issue. It was clear that the Supreme Court of Appeal viewed *Barkhuizen* as being compatible with its existing approach to abstract values, since it cited the relevant case law (such as *Brisley*) approvingly. However, it did not seek to explain how the direct application of fairness and reasonableness under the *Barkhuizen* test was compatible with its prior holdings that these values are applied only indirectly.[301]

The Supreme Court of Appeal seemed in essence, then, to adopt a constitutional limitation reading of *Barkhuizen*. However, the Court muddied the waters by implying, rather cryptically, that other types of

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[294] *Bredenkamp* supra note 57 para 1.
[295] Ibid paras 27, 30, 50–3.
[296] Ibid para 44.
[297] Ibid.
[298] Ibid paras 46–8.
[299] Ibid para 50 (emphasis added).
[300] Ibid para 30.
[301] See 3.7 above.

non-constitutional public policy considerations might also trigger the *Barkhuizen* fairness and reasonableness assessment. The Court held that *Barkzhuizen* did not stipulate a fairness and reasonableness test if no public policy consideration found in the Constitution 'or elsewhere' is implicated, but it did not elaborate on the phrase 'or elsewhere'. The apparent extension suggests that the Court's view was that constitutional limitations are not the only public policy considerations that trigger the *Barkhuizen* test. I will need to reconsider this surprising – and in my view misguided – statement when I reappraise *Barkhuizen* in light of *Beadica* in Chapter 6. If it is correct, it would be wrong to describe the *Bredenkamp* judgment as laying down a constitutional limitation interpretation of *Barkhuizen*. For this reason, I have discussed the *Bredenkamp* judgment under a separate sub-heading, although I will ultimately argue that the *Bredenkamp* Court *was* providing a constitutional limitation interpretation and that the 'or elsewhere' phrase should be overlooked. For present purposes, however, the key point is simply that the Supreme Court of Appeal acknowledged the 'if-then' structure and logic of Ngcobo J's judgment and it rejected the free-standing interpretation of *Barkhuizen* adopted by the courts below. Moreover, the *Bredenkamp* Court appeared to see no conflict between *Barkhuizen* and the Supreme Court of Appeal's existing abstract values jurisprudence, though it seemed to take this for granted, and did not expressly consider the issue.

4.3 *The significance of Bredenkamp and the shift in the Supreme Court of Appeal's position*

The free-standing and constitutional limitation interpretations canvassed in 4.2 above diverge on the question of *when* the *Barkhuizen* test applies. Whether the Supreme Court of Appeal's *Bredenkamp* interpretation extended the reach of *Barkhuizen's* trigger conditions beyond a constitutional limitation (which would amount to a third interpretation) is a question I will return to in 6.2. Critically, however, all three interpretations accept that when the two-leg test *does* apply, it requires a court to make some type of direct reasonableness (or other type of value-laden) assessment. The precise contours of this value-laden assessment are still debatable (hence my 'other type of value-laden' qualifier), but *none* of the interpretations I considered deny that abstract values are directly applied as part of the test. This was for good reason, given that Ngcobo J's judgment clearly set out a reasonableness criterion when formulating the first leg (i.e., at the level of norm formulation) and he then expressly relied on the norms of reasonableness, fairness and justice when applying the two legs of the test. On any plausible interpretation, then, it seems that these values play a profound and *direct* role as contractual overrides. It is surely impossible to reconcile this aspect of *Barkhuizen* with a 'no direct application' approach to abstract values.

In accepting that the *Barkhuizen* test entails a directly applicable 'fairness and reasonableness' assessment, the *Bredenkamp* Court's approach to abstract values therefore carried particular significance, as it represented an abandonment of the Supreme Court of Appeal's 'no direct application' approach, as elaborated in 3.7 above.[302] The Court plainly accepted that the values of fairness and

[302] As emphasised by Boonzaier op cit note 58 at 251.

reasonableness *are* directly applied under *Barkhuizen* but contingent on prior trigger conditions being met. This amounted to a crucial shift in the Supreme Court of Appeal's position. As Boonzaier puts it, Harms DP 'accepts that *Barkhuizen* has effected a significant change, since it allows contract terms to be tested for fairness. But it contains the fairness test by insisting on a precondition.'[303] Although this shift in approach was never *expressly* acknowledged by the Court in *Bredenkamp* – or by the Supreme Court of Appeal in subsequent cases leading up to *Beadica*[304] – this by no means eradicated the shift *in substance*.

I argued in Chapter 3 that the Supreme Court of Appeal's 'no direct application' approach did not sit easily alongside existing contract law tests in which reasonableness and justice appeared to play a key and direct override role. It appears that the *Barkhuizen* decision, which was binding on the Supreme Court of Appeal, served as the catalyst for Harms DP accepting, at the very least, the direct (albeit contingent) application of the values of fairness and reasonableness under *Barkhuizen*. It is therefore unfortunate – and in my view contributed to confusion – that this shift in position was never transparently recognised by the Court. In a number of post-*Bredenkamp* decisions leading up to the Constitutional Court's decision in *Beadica*, the Supreme Court of Appeal frequently cited *Bredenkamp* and its pre-*Bredenkamp* jurisprudence as if they formed a coherent body of case law and as if no change had occurred.[305] I will return to consider this issue in greater detail in Chapter 5.

4.4 *The apparent divergence between the approaches of the Supreme Court of Appeal and Constitutional Court*

Post-*Barkhuizen* judgments of the Constitutional Court, meanwhile, appeared to give further reason to conclude that its approach to the role of abstract values was increasingly divergent with that of the Supreme Court of Appeal.[306] In particular, the Court's decision in *Botha v Rich*[307] was widely interpreted as holding that a breaching party can avoid the termination of a contract whenever such termination is a disproportionate or unfair response to the breach in the circumstances.[308] The Constitutional Court in *Beadica* ultimately gave a narrow reading to *Botha*, diluting some of the major concerns that several commentators had raised regarding the case. For this reason (and for reasons of space), I will not deal with it in detail in this thesis. Suffice it to say that it was a highly criticised judgment that created the

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[303] Ibid at 235.
[304] See 4.4 below.
[305] For example, see *Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* [2011] ZASCA 100 para 23; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) para 28; *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA) paras 33–4; *Roazar CC v The Falls Supermarket* [2017] ZASCA 166; *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) paras 24–5; *AB and Another v Pridwin Preparatory School and Others ('Pridwin SCA')* 2019 (1) SA 327 (SCA) para 27; and *Trustees for the time being of Oregon Trust v Beadica 231 CC and Others* 2019 (4) SA 517 (SCA) paras 34–5.
[306] See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 22, 72.
[307] *Botha v Rich* 2014 (4) SA 124 (CC).
[308] See, for example, Malcolm Wallis 'Commercial Certainty and Constitutionalism: Are they Compatible?' (2016) 133 *SALJ* 545 at 557.

impression that the Court had indeed embraced something akin to a free-standing equitable override in contract law.[309] Moreover, in *Botha,* the Court did not even engage the Supreme Court of Appeal's jurisprudence, which increased the sense that the gulf between the two Courts' approaches was becoming unbridgeable.[310]

Although, for the reasons given above, the Supreme Court of Appeal's *Bredenkamp* decision arguably amounted to a change in that Court's approach, one brought about by the need to accommodate the *Barkhuizen* test, I noted that the Supreme Court of Appeal did not recognise this expressly, and that its post-*Bredenkamp* jurisprudence relied heavily on *Bredenkamp* while continuing to cite its seminal pre-*Bredenkamp* cases approvingly. When the Supreme Court of Appeal heard *AB and Another v Pridwin Preparatory School* ('*Pridwin*'),[311] Cachalia JA attempted to summarise the most important six principles applicable to the public policy doctrine, after going so far as to assert that '[t]he relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now *clearly established'*.[312]

By way of brief factual background, it was common cause that the conduct of the parents of two boys at Pridwin, an independent primary school, had been frequently egregious and caused severe ructions at the school over a period of years. The boys themselves appeared to be model learners. The central question before the Court was whether Pridwin could invoke clause 9.3 of the schooling contract it had concluded with the parents (the 'Parent Contract'), which was a termination by notice clause that did not provide either the parents or the boys the right to a hearing or an opportunity to make representations. Both the High Court and the Supreme Court of Appeal held that the school was entitled to cancel the contract and that such cancellation was not contrary to public policy or unconstitutional.

Cachalia JA summarised the 'established' key principles of public policy as follows:

(i) Public policy demands that contracts freely and consciously entered into must be honoured;
(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

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[309] In addition to Wallis op cit note 308 at 557, see Dale Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99 at 119–20. For a more restrictive (and supportive) reading of the *ratio* in *Botha*, see Leo Boonzaier 'Rereading *Botha v Rich*' (2020) 137 *SALJ* 1 at 6–10.

[310] A number of extra curial writings by Supreme Court of Appeal judges sought to justify the Supreme Court of Appeal's position. See Fritz Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment' (2016) 27 *Stellenbosch Law Review* 238; Malcolm Wallis op cit note 308; and Carole Lewis, 'The Uneven Journey to Uncertainty in Contract' (2013) 76 *THRHR* 80. For a more critical view of the Supreme Court of Appeal's stance, see Du Bois 'Contractual Obligation' op cit note 262 at 282–3. For a discussion of the increasing sense that the two appellate courts were following a diverging trajectory, see Alistair Price & Andrew Hutchison, 'Judicial Review of Exercises of Contractual Power' (2015) *The Rabel Journal of Comparative and International Private Law* 822 at 846–51.

[311] *AB and Another v Pridwin Preparatory School & Others* 2019 (1) SA 327 (SCA).

[312] Ibid para 27 (emphasis added).

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose. [313]

Although in 6.4 I will raise certain questions regarding the adequacy of this summary, it is worth bearing in mind that the Supreme Court of Appeal was clearly trying to achieve some clarity in relation to the operation of the public policy doctrine at a time when the Constitutional Court's judgments (in particular, *Botha*) were displaying a worrying lack of rigour or engagement with prior case law. When the Supreme Court of Appeal handed down its *Pridwin* judgment, the Constitutional Court could rightly be criticised for having provided insufficient guidance in relation to the role of abstract values under the Constitution, and for that reason, Cachalia JA's attempt to achieve a level of certainty was commendable. After *Botha*, the two appellate courts had appeared to have reached an impasse. I will now finally turn my attention to the the *Beadica* litigation which, as will be seen, ultimately broke this deadlock.

[313] Ibid (footnotes omitted).

CHAPTER 5: THE CONSTITUTIONAL COURT'S CORE FINDING IN *BEADICA*

5.1 *The Western Cape High Court Judgment*

The applicants in the *Beadica* litigation were four black-owned close corporations and franchise owners of the 'Sale's Hire' brand ('the Beadica parties'), whose main business consisted in the rental and sale of builders' equipment. The relationship between the parties was governed by franchise agreements and each of the Beadica parties operated out of separate premises governed by four materially similar lease agreements, which they had concluded with the Oregon Trust ('the trust'). The franchising scheme was part of a black economic empowerment initiative funded by the National Empowerment Fund. The franchise agreements granted the franchise for an initial period of ten years. The leases commenced on 1 August 2011 for an initial period of five years, terminating on 31 July 2016, and each agreement afforded the lessee the right to renew the lease for a further five years, provided that the lessee gave notice to exercise the renewal option at least six months before the initial termination date of 31 July 2016. Mr Sale negotiated and signed the leases on behalf of the trust and the franchise agreements on behalf of Sale's Hire.

The Beadica parties did not exercise their rights of renewal by the agreed deadline. The first, third and fourth applicants attempted to do so in writing in March 2016, albeit through rather informal means. The trust initially responded to say that Mr Sale was out of the office and that it would respond after discussing the matter with him. The Beadica parties did not hear further from the respondents until July 2016, when the first and third applicants received a termination letter noting their failure to exercise the renewal option on time and requesting that they vacate the various premises by 31 July 2016. This set in motion a process in which the trust attempted to have all the applicants evicted.

The Beadica parties approached the Western Cape High Court for a declaration *inter alia* that the options to renew the lease agreements for a further five years were validly exercised. They argued that the leases should be interpreted and enforced with the ten-year franchise agreements in mind, which they said reflected an expectation that the leases would be renewed for a further five years. The Beadica parties emphasised their lack of business experience. They contended that to strictly enforce the contract in these circumstances would be unfair, unconstitutional and contrary to public policy.[314]

As my focus will be on the Constitutional Court's judgment, I will deal only briefly with the High Court and Supreme Court of Appeal judgments. Davis J wrote the judgment in the High Court. After framing the dispute as being whether 'in substance' the applicants had in fact complied with the renewal provisions,[315] Davis J applied several legal doctrines to the facts and concluded that the options to renew

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[314] The contentions detailed in this paragraph can be found in the applicant's Founding Affidavit (in particular paras 24.2, 47, 61–83). I obtained the Applicant's Founding Affidavit from the Record of Appeal filed in the Constitutional Court (this is not available online).

[315] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust* 2018 (1) SA 549 (WCC) para 39.

the leases had indeed been validly exercised.[316] In finding for the applicants, Davis J relied on the Constitutional Court's decision in *Botha*[317], in which he located a 'principle of proportionality', according to which the sanction claimed by a cancelling party needs to be proportionate to the consequences of the breach.[318] Applying this principle, Davis J found that the relief sought by the applicants should be granted.[319] He emphasised that the sanction being urged by the respondents – to cancel the lease – was disproportionate 'because the contracts signed maximised the interests of both parties and this meant that they intended ensuring that the franchise agreements be underpinned by the lease agreements'.[320] He also accepted the Beadica parties' contention that they were 'not sophisticated business people who understood the intricacies of contractual provisions'.[321] In the circumstances, the respondents were required to do more than simply show that the Beadica parties had requested a renewal of their leases late, in an imprecise form and 'without the requisite business knowledge'.[322]

5.2 *The Supreme Court of Appeal Judgment*

On appeal to the Supreme Court of Appeal, Lewis JA, for a unanimous bench, emphasised the importance of *pacta sunt servanda* and commercial certainty, which she took to mean that 'the parties will know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable'.[323] She held that Davis J did not undertake an explicit public policy analysis but relied rather on the disproportionality concept that he sourced from *Botha*.[324] Lewis J held that the case turned on the application of the public policy doctrine.[325] Relying on *Barkhuizen*, *Bredenkamp* and several of the Supreme Court of Appeal's post-*Bredenkamp* decisions,[326] Lewis JA applied a test of public policy, which she equated to 'the legal convictions of the community, rooted now in the Constitution'.[327]

The Supreme Court of Appeal held that the effect of the High Court's orders was to create a new contract for the parties, and it could see no public policy grounds to support such an approach. Lewis JA was not persuaded that the Beadica parties, who had all operated franchises, lacked sufficient business acumen to appreciate that they needed to renew the leases within the agreed notice period.[328] Critically, the Court found that the Beadica parties had not provided an explanation for their failure to give notice in time and, applying *Barkhuizen*, this meant that their public policy argument was

[316] Ibid para 45.
[317] *Botha* supra note 307.
[318] *Beadica HC* supra note 315 para 35.
[319] Ibid para 40.
[320] Ibid para 42.
[321] Ibid para 37–8.
[322] Ibid para 44.
[323] *Trustees for the time being of Oregon Trust v Beadica 231 CC and Others* 2019 (4) SA 517 para 26.
[324] Ibid para 37.
[325] Ibid para 34.
[326] Ibid paras 24, 27.
[327] Ibid para 38.
[328] Ibid para 39.

stillborn.[329] Enforcing the renewal clauses was consequently not unconscionable and the Supreme Court of Appeal declared that the leases terminated on 31 July 2016. The appeal was accordingly upheld.

5.3 *Legal submissions in the Constitutional Court*

On appeal to the Constitutional Court, the Beadica parties' legal submissions steered the legal debate directly towards the correct interpretation of *Barkhuizen* and *Botha* and they sought to highlight the potential rift between the jurisprudence of the Supreme Court of Appeal and the Constitutional Court. The stage was therefore set for the Constitutional Court finally to resolve some of the controversies to which *Barkhuizen* and *Botha* had given rise. The Court's resulting decision in *Beadica*[330] was a crucial turning point in the law concerning contractual fairness. I will begin by providing an exposition of the majority judgment. After that I will argue for what I take to be its 'core finding'. The majority said something critically important about the manner in which abstract values do *not* function under South African law. My principal aim in this chapter is to clarify precisely what the Court held in this regard and to ward off some potential misreadings of the judgment. This will require engagement with a number of interpretive difficulties. The minority judgment, written by Froneman J, raised some probing questions that in many ways resonate with the spirit of this thesis. However, I will defend an interpretation of the majority judgment that clarifies its core finding and shows that, contrary to Froneman J's view, *Beadica* is reconcilable with the existing law of public policy, including *Barkhuizen*.

In the Constitutional Court, the Beadica parties framed the main legal issue as being '[w]hether the strict enforcement of a contractual clause would be contrary to public policy for being unjust and or unfair'.[331] On the Beadica parties' interpretation of *Barkhuizen*, the Constitutional Court had sought to draw a 'largely unqualified causal link' between unfairness and public policy.[332] They unsurprisingly emphasised the statement in Ngcobo J's judgment that said that '[p]ublic policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair'.[333] In other words, the Beadica parties advanced a free-standing interpretation of *Barkhuizen*. The respondents, on the other hand, agreed with the *Bredenkamp* finding that '*Barkhuizen* is not authority for fairness constituting a substantive, overarching rule'.[334]

5.4 *Framing the legal issue at stake and overview of the majority's approach*

The majority began with an attempt to properly frame the issue before the Court. In very broad terms, as Theron J explained in the first sentence of the judgment, the case concerned 'the proper constitutional

[329] Ibid paras 40–1, 44.
[330] *Beadica CC* supra note 2.
[331] Applicants' Written Submissions para 13. The parties' written submissions can be accessed at the Constitutional Court's website: <https://collections.concourt.org.za/handle/20.500.12144/36616?show=full> (accessed on 5 January 2024).
[332] Ibid para 41.1.
[333] Ibid para 73.
[334] Respondents' Written Submissions para 28.

approach to the judicial enforcement of contractual terms and, in particular, the *public policy grounds* upon which a court may refuse to enforce these terms'.[335] In more specific terms, Theron J initially framed the legal issue as being the 'extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh'.[336] This proved to be an important formulation and I will refer to it as the 'initial framing'. Later in the judgment, the majority also formulated the issue using the terminology and conceptual apparatus developed previously by the Supreme Court of Appeal.[337] It said that the controversy at issue centred on 'the role of abstract values in our law of contract and whether these values can be directly relied upon to invalidate, or refuse to enforce, contractual terms'.[338] I will refer to this as the 'wider framing', because it expanded the scope of the inquiry in two key respects.

Firstly, whereas the initial framing related only to the *non-enforcement* of *valid* contractual terms in circumstances when enforcement would be unfair, unreasonable or unduly harsh, the wider framing encompassed, in addition, the extent to which courts can *invalidate* contractual terms on the basis that they are *per se* (i.e., 'objectively' or 'on their face') unfair, unreasonable or in conflict with some other abstract value. We saw in 4.1 that the *Barkhuizen* test dealt with both types of scenarios under its two separate legs.[339] While the *Beadica* case involved an application for the non-enforcement of an objectively valid clause (consistent with the initial framing), the majority in *Beadica* decided that it should, as in the *Barkhuizen* case, set out the proper approach to *both* 'objective invalidity' and 'valid but not enforceable' scenarios. This was the first way in which the scope of the issue falling for decision was expanded beyond the initial framing.

Secondly, the wider framing (and the general approach taken in the judgment) demonstrates that the majority's concern was not merely with the role of the values of fairness, reasonableness and undue harshness (the only values referred to in the initial framing), but rather with direct reliance on abstract values *more broadly*. This wider concern was evident at several places in the judgment. The other values to which the majority explicitly and repeatedly referred were good faith,[340] justice[341] and ubuntu.[342]

We will see that both the initial and wider framings were directly reflected in the Court's ultimate findings, which makes it necessary to grapple with the question of how they relate to each other. For now, it is important just to note that, in terms of *both* framings, the majority viewed the question before the Court as fundamentally a question about the *scope of the public policy doctrine* and the role of abstract values under that doctrine. This point will prove to be critical. It was made transparent in the

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[335] *Beadica CC* supra note 2 para 1 (emphasis added).
[336] Ibid para 1.
[337] See Chapter 3, subsections 3.5–3.6.
[338] *Beadica CC* supra note 2 para 79 (emphasis added).
[339] *Barkhuizen* supra note 1 paras 56–8.
[340] *Beadica CC* supra note 2 paras 20, 29, 31, 38, 57, 61–70, 80.
[341] Ibid paras 35, 72, 77, 80.
[342] Ibid paras 17, 35, 72.

first sentence of the judgment quoted at the beginning of this sub-section.[343] There is nothing surprising about this. Firstly, it is in keeping with *Barkhuizen*'s finding that constitutional challenges to contracts are to be channelled through the common law doctrine of public policy.[344] At issue was whether the Constitution demanded the existence of a free-standing equitable override *in terms of that doctrine*. Secondly, it reflects the way in which the case was argued: the Beadica parties sought the non-enforcement of the leases on the basis of public policy,[345] and they said it was the *Barkhuizen* public policy test that enabled courts to override contractual undertakings whenever their enforcement would be unfair.[346]

Theron J acknowledged that the questions before the Court were the subject of 'deep contestation' among judges and academics, and she noted the perceived schism between the approaches of the Supreme Court of Appeal and Constitutional Court.[347] She lamented the 'uncertainty and confusion' that had ensued, and her judgment was characterised by a clear intention to assume responsibility for guiding the way forward and securing 'much needed clarity on these issues'.[348] In marked contrast to the Constitutional Court's rather cursory approach to the relevant legal sources in *Botha*, Theron J's judgment engaged comprehensively with pre and post-constitutional case law, and she also considered a range of academic work.

Theron J's discussion of these sources culminated in the landmark conclusion that 'the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real'.[349] The majority embraced key aspects of the Supreme Court of Appeal's approach to abstract values, adopting several of the orthodox formulations and justifications developed by that Court in *Brisley*, *Afrox* and *SAFCOL*. At the same time, the majority unreservedly supported the *Barkhuizen* decision, which it proclaimed 'remains the leading authority in our law on the role of equity in contract, as part of public policy considerations'.[350] It also endorsed and clarified the scope of *Botha*, which it said had frequently been misconstrued. A full-scale reconciliation of the two Courts' case law was therefore attempted.

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[343] To recap, the first sentence of the judgement stated: 'This application concerns the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the *public policy grounds* upon which a court may refuse to enforce these terms' (emphasis added).
[344] *Barkhuizen* supra note 2 para 30.
[345] Recall that they framed the legal issue as being '[w]hether the strict enforcement of a contractual clause would be contrary to public policy for being unjust and or unfair' (para 13).
[346] In the High Court, they argued that enforcement of the renewal provisions would be 'unconscionable, unconstitutional and contrary to public policy' (Applicants' Founding Affidavit op cit note 314 para 47). In their written submissions in the Constitutional Court, meanwhile, they cited *Barkhuizen* as direct support for their legal contention that, under the public policy test, courts are precluded from enforcing contracts when to do so would be unjust or unfair (see supra note 331 para 41).
[347] *Beadica CC* supra note 2 paras 17–8.
[348] Ibid para 18.
[349] Ibid para 80.
[350] Ibid para 58.

I will trace the chronological path of the judgment, which sought to pave the way for the majority's findings in relation to abstract values via a thorough engagement with existing case law.

5.5 *Exposition of the majority judgment*

In her treatment of the pre-constitutional authorities, Theron J briefly covered the demise of the *exceptio doli generalis* and, citing *Magna Alloys*[351] and *Sasfin*,[352] she explained the increasing importance of public policy in the judicial control of contracts.[353] Turning to the Supreme Court of Appeal's post-Constitution decisions, she reviewed the main abstract values findings in *Brisley*, *Afrox* and *SAFCOL*;[354] she summarised the *Bredenkamp* Court's interpretation of *Barkhuizen*;[355] and she quoted the six principles put forward by Cachalia JA in *Pridwin*.[356]

A crucial feature of Theron J's judgment was that, save for certain qualifications that I will address later, she was broadly supportive of the Supreme Court of Appeal's jurisprudence. She took a largely descriptive approach to it, setting out the main findings in the cases and allowing them to speak for themselves. The impression created was that the Supreme Court of Appeal's judgments spoke with a unified voice. Theron J did not address whether *Bredenkamp* amounted to a shift in position as a response to the *Barkhuizen* judgment.

As for the Constitutional Court's jurisprudence, we saw in Chapter 4 that the two main sources of concern for those who feared that the Constitutional Court had embraced a free-standing equitable override were the Court's judgments in *Barkhuizen* and *Botha*. As will become clear, the majority did not see any conflict between *Barkhuizen* and the Supreme Court of Appeal's approach to abstract values. In fact, it seemed to regard *Botha* as a more direct threat to its finding of harmony between the two appeal courts' approaches. Thus, before dealing with *Barkhuizen*, Theron J gave close attention to the scope of *Botha*, which she read narrowly. She emphasised that in *Botha* the Court was required to interpret section 27 of the Alienation of Land Act 68 of 1981, which allows a purchaser of immovable property on instalment, who has paid at least half of the purchase price, to claim transfer of the property against registration of a mortgage bond in favour of the seller. The decision mainly concerned whether the seller's contractual right to cancel for breach could be enforced within this statutory framework.[357] In refusing to enforce this right, on the ground that cancellation would be 'a disproportionate penalty for breach' and unfair in the circumstances, the Court should not have been understood to hold that 'disproportionality or unfairness are separate, self-standing grounds, upon which a court may generally

[351] *Magna Alloys* supra note 55.
[352] *Sasfin* supra note 85.
[353] *Beadica CC* supra note 2 paras 21–8.
[354] Ibid paras 29–31.
[355] Ibid paras 39–41.
[356] *AB v Pridwin* supra note 311.
[357] *Beadica CC* supra note 2 paras 44, 59.

refuse to enforce contractual provisions'.[358] Rather, *Botha*'s reach was strictly limited to its statutory context.[359]

Having clarified the scope of *Botha*, Theron J saw her remaining task (for the purposes of establishing congruence between the two appeal courts' jurisprudence) as being to set out the law in relation to public policy. Theron J set out the findings in *Barkhuizen*'s, which she said remains the pre-eminent expression of the constitutional-era public policy test. She quoted extensively from Ngcobo J's judgment, affirmed the binding force of the two-part test he articulated, and applied it to the facts at hand. She recapped some of the salient principles that emerged in *Barkhuizen*: (i) the determination of public policy is rooted in the Constitution and its value system;[360] (ii) constitutional rights apply through a process of indirect horizontality to contracts;[361] (iii) in order to determine whether a contractual provision or its enforcement is contrary to public policy 'a careful balancing exercise is required';[362] and (iv) public policy 'imports' values of fairness, reasonableness and justice, these values being 'encompassed by' ubuntu, which in turn informs public policy.[363] Theron J also put point (iv) by saying that these abstract values 'form important considerations' in the balancing exercise undertaken by a Court in determining whether a contractual term, or its enforcement, is contrary to public policy.[364]

As mentioned, nothing in *Barkhuizen*'s approach to public policy struck Theron J as being out of step with the Supreme Court of Appeal's approach to abstract values. She held that both appeal Courts agreed that 'abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships'.[365] That is, they have not been accorded 'autonomous, self-standing status as contractual requirements'.[366] They therefore cannot be relied upon directly to invalidate or refuse to enforce a contractual term.[367] These findings corresponded to the wider framing discussed above and I will refer to them as the 'wider framing findings'. Coming to the question that she had posed in the first paragraph of her judgment, and echoing the initial framing, Theron J now held decisively that 'a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh'.[368] I will refer to this as the 'initial framing finding'. The application of abstract values, Theron J explained, is mediated through the rules of contract law, including the rule that a court may not enforce a contractual term when the term or its enforcement would be contrary to public policy.[369] She held that it 'is only where a contractual term, or its

[358] Ibid para 59.
[359] Ibid.
[360] Ibid para 71.
[361] Ibid.
[362] Ibid.
[363] Ibid para 72.
[364] Ibid.
[365] Ibid para 79.
[366] Ibid para 80.
[367] Ibid para 79.
[368] Ibid para 80.
[369] Ibid.

enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it'.[370] This was a critical but potentially confusing finding to which I will return in 5.14 below. Finally, Theron J agreed with Cachalia JA's principle that a court will decline to use this power 'where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose'.[371]

As to the positive role of abstract values, the majority confirmed that they indeed perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract.[372] Although they cannot be applied in a direct free-standing fashion, they operate indirectly: they are 'mediated through' and 'embodied' by many of the established rules and doctrines of contract law, including the public policy standard.[373] Pre-Constitution, they informed the development of new contract law doctrines.[374] Post-Constitution, they also play a fundamental role when courts develop the common law in terms of s 39(2) of the Constitution.[375] The majority emphasised that they should be used to 'draw normative impetus and develop new doctrines that address deficiencies in the law of contract', though this must be carried out in a prudent and disciplined fashion.[376] As I will argue more fully later, the majority also implicitly recognised that abstract values can apply in a direct and contingent (i.e., not free-standing) manner.

Theron J provided general support to the six principles set out by Cachalia JA in *Pridwin*, subject to two qualifications.[377] First, in the public policy analysis, *pacta sunt servanda* should not be privileged over other constitutional rights and values; if a number of constitutional rights values are implicated, a 'careful balancing exercise' must be undertaken to determine the requirements of public policy.[378] Second, while the Court should only invalidate or refuse to enforce contractual terms on the basis of public policy 'in worthy cases', the Supreme Court of Appeal's urging that 'perceptive restraint' be exercised (i.e., 'sparingly, and only in the clearest of cases') should not be 'blithely invoked' by courts so as to avoid their constitutional duty to infuse public policy with constitutional values.[379]

The above findings all relate to the correct legal position. We should note that Theron J also largely agreed with the chief justifications provided by the Supreme Court of Appeal in support of this position. In addition to the commercial certainty considerations that she raised when dealing with *pacta sunt servanda*, Theron J observed that the rule of law demands that the law be clear and ascertainable.[380] The application of contract law should result in reasonably predictable outcomes, enabling individuals to

[370] Ibid.
[371] Ibid para 82.
[372] Ibid para 73.
[373] Ibid paras 73, 80.
[374] Ibid para 77.
[375] Ibid para 74.
[376] Ibid paras 75–6.
[377] Ibid para 82.
[378] Ibid paras 83–7.
[379] Ibid paras 88–90.
[380] Ibid para 81.

conclude contracts with the assurance that they will be able to approach a court to enforce their bargain. The majority agreed that the enforcement of contractual terms does not (and should not) depend on an individual judge's sense of what fairness, reasonableness and justice require.

It is worth observing that the majority's doctrinal findings were of two kinds. On the one hand, a number of the central findings did not relate to existing contract law norms but rather concerned the *absence* of certain legal norms in South African contract law. These findings, which I will refer to as the majority's 'negative' findings, concerned the ways in which abstract values do *not* operate in our law and laid down what judges are not permitted to do under the public policy doctrine. In making these negative findings, the Court also signalled the absence of a legal imperative requiring the Court to develop the common law of public policy to allow abstract values to operate in the manner contended for by the applicants. The other set of findings – the 'positive' findings – gave an account of how abstract values *do* function under the law of public policy. These findings concerned the precedential reach of the proportionality test applied in *Botha*; the status of *Barkhuizen*; the nature of the balancing exercise required to determine public policy when applying *Barkhuizen*, as well as the role of abstract values in this exercise; the creative, informative and controlling functions these values perform; and the broad affirmation of Cachalia JA's first to sixth *Pridwin* principles.

Theron J then proceeded to apply the law to the facts of the case. This entailed clarifying certain aspects of the second leg of the *Barkhuizen* test. Theron J was not prepared to accept the respondents' primary argument that a party's explanation for non-compliance with the contract is the *only* relevant consideration when deciding whether a contractual term should be enforced under the second leg.[381] She nevertheless said that this factor is 'critical' and a failure to provide an explanation 'will, in most cases, be the end of the enquiry'.[382] The majority found that the Beadica parties had failed to provide an adequate explanation. It rejected their argument that their lack of commercial sophistication excused their non-compliance with the renewal clauses. The renewal clauses were couched in 'simple, uncomplicated language, which an ordinary person could reasonably be expected to understand'.[383] Nothing prevented the Beadica parties from complying with the clauses, which were in fact favourable to them, and their failure to comply in such circumstances meant that their public policy argument had to fail.[384]

5.6 *An overview of the interpretive task and my reading of Beadica*

In the previous sub-section, I distinguished the Court's negative and positive legal findings. I will argue in Chapter 6 that, aside from the overdue clarification regarding the scope of *Botha*,[385] the Court's

[381] Ibid para 92.
[382] Ibid.
[383] Ibid para 94.
[384] Ibid para 95.
[385] Although the majority's narrow reading of *Botha* was undoubtedly an important feature of the judgment, I will not need to deal with it any detail. It decisively settles the question of *Botha*'s precedential reach and it dovetails with the majority's main findings in relation to abstract values. Although there may still be unresolved questions

positive findings were in certain respects unsatisfactory and left several important questions unanswered. In my view, the major significance of the *Beadica* decision lies in the majority's negative findings. These findings alone make *Beadica* a landmark decision that should reduce some of the uncertainty that has dogged South African contract law in recent years.[386] To make such a claim, however, requires support. To assess the justifiability, significance and impact of the findings, it is necessary to establish their precise content and this is not a straightforward task. Some passages of Theron J's judgment appear to be in tension with each other; others appear to inaccurately or incompletely express the judgment's intended meaning; and certain ambiguities arise from the language used to express important points. These difficulties threaten to obscure the meaning and significance of the majority's approach. Since the principles of law for which the judgment stands cannot simply be read off it, the remainder of this chapter will undertake the interpretive work and critical analysis required in order to clarify and discern the precise nature and scope of the majority's negative findings.

For orientation purposes, I will provide a brief overview of my interpretation of *Beadica*'s core finding and the path that I will take to support it. The Beadica parties contended that whenever a court regards the enforcement of a contractual term to be unjust or unfair, it is required by *Barkhuizen* to refuse its enforcement on public policy grounds. The majority resisted this submission: echoing the initial framing, it found that a court's view concerning the unfairness, unreasonableness or undue harshness of enforcing a contract cannot serve as a sufficient ground to set aside or refuse to enforce a contract under the public policy doctrine. More broadly, in terms of the wider framing findings, the Court held that courts cannot invoke abstract principles as direct stand-alone grounds for invalidating contracts or refusing their enforcement. The majority, in my view, adopted a 'no direct stand-alone approach' to abstract values and thereby rejected the existence of a free-standing equitable override in South African law. This, in my view, is what is essential about *Beadica's* core finding, which I will attempt to formulate as precisely as possible in 5.13 below. I will argue, however, that the majority followed the *Bredenkamp Court* in not rejecting the direct application of abstract values altogether (i.e., it did not adopt the position advanced in *Afrox-Brisley-SAFCOL*). That is, it accepted that, pursuant to certain established legal tests, abstract values – in addition to their indirect role – can and do serve as *direct* grounds for overriding contracts, provided that certain other circumstances, factors or conditions are also satisfied (i.e., they can serve as contingent override grounds). I will argue that Froneman J misinterpreted this aspect of the judgment by incorrectly reading it in a 'no direct application' fashion, even though he raised a number of searching points and there were understandable reasons why he interpreted the majority in the way he did. In the final analysis, I argue that Froneman J's reading of the majority should be rejected.

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as to how it is to be applied in its statutory context, *Botha* seems unlikely to be a further source of major controversy. For this reason, I have not discussed it in detail in this thesis.

[386] This view is in line with aspects of the early scholarly reception of the case. See Price supra note 8 at 338–342; Brand 'Equity and Certainty' op cit note 207 at 164–71; and Simon Thompson '*Beadica 231 CC:* An End to the Trilogy?' (2020) 137 *SALJ* 641 at 653.

Finally, I will argue that in finding that '[i]t is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it', the majority should be read as endorsing the *Sasfin* principle (which permits courts to override contracts in cases of exceptional unfairness or unreasonableness) and as intentionally distinguishing this power from the judicial power which it rejected, in terms of which courts would be permitted to override contracts when they are *merely* unfair or unreasonable. I will ultimately argue in 5.14 that this critical distinction is reflected most clearly in the initial framing finding. Crucially, I do not agree that *Beadica* endorsed the principle that contracts can be overridden on the basis of direct, free-standing norms *as long as they do so by applying the public policy doctrine*. In my view, such an interpretation would undermine *Beadica's* core finding.

5.7 *Reconciling the initial and wider framing findings*

As explained, the majority expressed its negative findings in the language of both the initial and wider framings. Echoing the initial framing, the Court held that 'a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh'. Pursuant to the wider framing, the Court held that abstract values cannot be directly relied upon to invalidate, or refuse to enforce, contractual terms; they do not provide a free-standing basis upon which a court may interfere in contractual relationships; they have not been accorded autonomous, self-standing status as contractual requirements; and they are not substantive rules that can be directly relied on to escape the consequences of a contract.[387] These two sets of findings were clearly intended to be consistent and read together. Reading them together is the first step towards deriving *Beadica's* core finding. Although the initial framing finding is narrower than the wider framing findings, I do not think we should ignore it and treat the wider framing findings as being constitutive of the Court's core finding. I will explain in 5.14 below that in an important respect, the initial framing finding (appropriately reformulated) is clearer and more illuminating than the wider framing findings, which are framed in vaguer and more abstract terms. I will argue that the initial framing formulation in fact serves to ward off a potential confusion in relation to the judgment's finding that '[i]t is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it'.

As a provisional move, I propose retaining the wording and structure of the initial framing finding, while adding to it in a way that accommodates the wider scope clearly intended by the Court's wider framing findings. This is the first step in what I will ultimately argue is a rational reconstruction of the Court's core finding. On this initial reconstruction, the majority can be understood to have held (the added portions are in italics): 'A court may not refuse to enforce contractual terms on the basis that the

[387] Regarding the second of these points, it is worth noting that Theron J's finding that courts cannot 'interfere in contractual relationships' (a broad enough notion to cover both types of scenario) was an immediate response to the question she had posed in the sentence before, namely whether abstract values can be 'directly relied upon to *invalidate*, or refuse to enforce, contractual terms' (emphasis added).

enforcement would, in its subjective view, be unfair, unreasonable, unduly harsh, *unjust or contrary to other abstract values, such as good faith and ubuntu, and a court may not invalidate contractual terms on the basis that, in its subjective view, they are unfair, unreasonable, unduly harsh, unjust or contrary to other abstract values, such as good faith and ubuntu*'. This combines the two framings in a coherent manner, and it takes us closer to the core finding of the judgment.

5.8 *Interpreting the wider framing findings*

I turn now to the wider framing findings and some of the challenges that arise in interpreting them. There are two related aspects to the findings: (i) abstract values cannot be *directly relied upon* to invalidate, or refuse to enforce, contractual terms, because they are not substantive rules that can be used for this purpose (the 'no direct reliance' finding); and (ii) abstract values do not provide a *free-standing* basis upon which a court may interfere in contractual relationships and they have not been accorded *autonomous, self-standing* status as contractual requirements (the 'no free-standing' finding). Again, it is clear from the judgment that these findings were intended to be mutually supportive and read together. However, one might possibly conclude (as Froneman J did) that the 'no direct reliance' finding suggests a far-reaching 'no direct application' approach to abstract values. I will argue instead that the 'no free-standing finding' is consistent with the 'no direct reliance finding' and that, read together, the majority is best understood as advocating a 'no direct free-standing approach' and rejecting a 'no direct application' approach.

It is helpful, in my view, to begin with the second aspect of the wider framing findings – i.e., the rejection of values as providing a *free-standing* basis for judicial interference in contracts. It provides, the key to understanding the majority's core finding. The majority emphasised that abstract values are not *free-standing*, *self-standing* or *autonomous* bases on which to override a contract. On *any* interpretation of the majority judgment, this finding amounted to an unequivocal rejection of the Beadica parties' chief submission. At the very least, the majority embraced a 'no direct stand-alone approach' to abstract values. The proposition that a judge can strike down or refuse to enforce a contractual clause *solely* on the basis that the clause (or its enforcement) is unfair or unreasonable (or runs foul of one of the other abstract values) is no longer sustainable after *Beadica*.

In relation to the 'no direct reliance' finding – according to which abstract values cannot be *directly relied upon* to invalidate, or refuse to enforce, contractual terms – I will argue that the majority should not be understood as ruling out direct application of values across the board. As explained, the 'no direct reliance' finding has to be read together with the majority's 'no free-standing' finding. I think the free-standing finding is best understood as clarifying and specifying the particular *type* of direct reliance rejected by the majority, namely *free-standing* direct reliance. I will now explain why I do not believe the majority went further by embracing a 'no direct application' approach akin to that advanced in *Afrox* and *SAFCOL*.

5.9 *Froneman J's interpretation of the majority judgment*

The importance of this issue was highlighted by the dissenting judgment of Froneman J, who would have found in favour of the applicants. Froneman J applied the *Barkhuizen* test to the facts in a markedly different manner from that of the majority.[388] However, as my discussion is concerned with doctrinal questions, I will not deal with this divergence. Froneman J detected a lack of coherence in the majority's core doctrinal finding and this will be my central focus. I will argue that the difficulties perceived by Froneman J arose because he understood these judgments as laying down a 'no direct application' approach to abstract values. This approach was problematic, in Froneman J's view, because it was inconsistent with crucial features of the *Barkhuizen* test.

On Froneman J's conception of the *Barkhuizen* test, it is authoritative and binding precedent for the proposition that, where constitutional values or rights are implicated, public policy is applied 'directly in accordance with notions of fairness, justice and equity, and reasonableness'.[389] He quoted extensively from those sections of Ngcobo J's judgment in which he directly applied standards of fairness and reasonableness under both the first and second stages of the test,[390] saying that these passages constituted 'direct authoritative precedent that in cases where constitutional values or rights are alleged to be implicated in the application of public policy in the invalidation or enforcement of contractual clauses, so-called abstract notions of fairness, reasonableness and simple justice between persons are the unmediated standards against which the validity of the clauses or their enforcement is judged'.[391] To these values, he later added justice, equity and ubuntu.[392] Froneman J's point was not merely that, in applying the *Barkhuizen* test, each judge's personal normative views are likely to play a background and informing role, but rather that the test expressly permits or even requires judges to apply abstract values as direct override grounds – i.e., they are the very benchmarks set out in the test.

Froneman J was of the view that this 'unmediated and direct'[393] application of abstract values under the *Barkhuizen* test (a test the majority supported) clashed with the majority's approach to abstract values,[394] as well as that developed by the Supreme Court of Appeal in some of its post-*Bredenkamp* judgments.[395] Froneman J identified the following statements as being problematic: (i) the 'repetitive' statement that abstract values 'have no autonomous, self-standing status';[396] (ii) the statement that the application of abstract values is mediated by the common law rule that a court may not enforce contractual terms contrary to public policy;[397] and (iii) the 'mantra' adopted 'uncritically' by the

[388] *Beadica CC* supra note 2 paras 196–203.
[389] Ibid para 146.
[390] Ibid paras 147–50.
[391] Ibid para 151.
[392] Ibid para 155.
[393] Ibid para 152.
[394] Ibid paras 144–51.
[395] Ibid paras 156–8. The judgments he specifically referred to were *AB v Pridwin* supra note 311 and *Beadica SCA* supra note 323.
[396] *Beadica CC* supra note 2 para 145.
[397] Ibid.

Supreme Court of Appeal after *Bredenkamp* that fairness and reasonableness 'may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy'.[398]

Why did Froneman J think that these statements collide with the type of direct application of abstract values mandated by the *Barkhuizen* test? The basis for the collision was clearly that Froneman J understood the majority to have laid down a 'no direct application' approach to abstract values (as opposed to a narrower, 'no direct stand-alone approach'). Let us take the three statements in turn. He understood the statement that abstract values 'have no autonomous, self-standing status' to mean that they are never directly applied as contractual overrides (i.e., not simply that they are never applied in a stand-alone fashion). He seemed to understand the statement that the application of abstract values is mediated by the public policy rule to imply that the public policy rule does not itself ever require or permit the direct application of abstract values as part of the applicable legal test.[399] Finally, he construed the statements that fairness and reasonableness are not 'substantive rules' or 'self-standing principles' under the public policy doctrine to mean that these values are not relied on in a direct and unmediated fashion *at all* under that doctrine. It is because he understood these statements in this 'no direct application' fashion that he perceived them to conflict with the direct application of values under *Barkhuizen*, to which the majority seemed fully committed.

That this was Froneman J's interpretation was further demonstrated by the markedly different interpretive approach he adopted when considering Harms DP's judgment in *Bredenkamp*. Interpreting the *Bredenkamp* decision raises a nearly identical problem to that just discussed, because on the one hand, Harms DP held that 'fairness is not a free-standing requirement for the exercise of a contractual right',[400] and yet, on the other hand, he held that the application of the *Barkhuizen* test involves applying a type of 'fairness and reasonableness' test.[401] The former statement seems to fall in much the same genre of statements that Froneman J found problematic in Theron J's judgment. Crucially, however, Froneman J found himself able to reconcile *Bredenkamp* with *Barkhuizen* by refusing a 'no direct application' reading of Harms DP's judgment. It is worth taking a closer look at this.

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[398] Ibid para 156. This was Froneman J's gloss, rather than being a direct quote. In support of this last point, he cited, firstly, the fifth and sixth of Cachalia JA's principles in *AB v Pridwin* supra note 311. It will be recalled that the sixth principle (the more pertinent of the two for current purposes) was that a court will decline to exercise its public policy power to invalidate or refuse to enforce contracts 'where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose'. Secondly, Froneman J (at para 157) cited Lewis JA's finding in *Beadica SCA* supra note 323 (at para 35) that 'although fairness and reasonableness inform policy they are not self-standing principles'.

[399] It is necessary to speculate a little here, as Froneman J does not make it entirely clear what it is about this statement which collides with *Barkhuizen*.

[400] *Bredenkamp* supra note 57 para 53.

[401] As explained in Chapter 4, *Bredenkamp* took the view that at the first stage of the *Barkhuizen* test the question is whether the clause itself is *ex facie* unreasonable. If it is not unreasonable, at the second 'enforcement stage' of the test, the question is whether 'the limitation of the identified constitutional value' is 'fair and reasonable in the circumstances' (see *Bredenkamp* supra note 57 paras 46–8).

Froneman J, it should firstly be emphasised, was broadly supportive of *Bredenkamp*'s gloss of *Barkhuizen*.[402] In relation to the finding that 'fairness is not a free-standing requirement for the exercise of a contractual right', Froneman J carved out a vital qualification: he said that we should not understand Harms DP to mean that fairness is *never* a directly applicable requirement against which the exercise of contractual rights can be tested. On the contrary, according to Harms DP, the direct application of abstract values under *Barkhuizen* test applies *when constitutional values or rights are invoked or implicated*.[403] More specifically, Froneman J held that the statement 'should not be read as saying that fairness is not a free-standing requirement for the exercise of a contractual right *when the validity of the right is attacked as being in conflict with constitutional values or other public policy considerations*'.[404] In such scenarios, it *is* a directly applied standard under the *Barkhuizen* test, which, as I noted in 4.2.3, amounts to a direct 'fairness and reasonableness' test. Froneman J emphasised, therefore, that the Supreme Court of Appeal in *Bredenkamp* did not deny *Barkhuizen's* 'general import' that, when the *Barkhuizen* test applies, courts are empowered to invalidate or refuse to enforce contracts on the direct basis that they conflict with abstract values.[405] The *Bredenkamp* Court thus accommodated the contingent direct application of abstract values. *Bredenkamp* merely denied that *Barkhuizen* is authority for the proposition that, *even if no public policy considerations found in the Constitution or elsewhere are implicated,* valid contractual terms or their enforcement may be overridden on the basis of an abstract value standing alone. In this regard, Froneman J said that there was 'little to quibble with'.[406] Importantly, it follows that Froneman J was not supportive of the applicants' contention that abstract values can serve as stand-alone override grounds: he expressly supported the *Bredenkamp* approach to *Barkzhuizen*, which turned on its denial of this proposition.[407]

Froneman J's approach to *Bredenkamp* therefore amounted to a 'no direct stand-alone application' reading of *Bredenkamp*. He understood the decision (as I did in Chapter 4) to deny simply that fairness can be applied in the absence of prior trigger conditions. Abstract values are, however, directly applied as part of the *Barkhuizen* test, contingent on those conditions being met. I cannot fault his interpretation of *Bredenkamp* in this respect. The question is why he thought the majority in *Beadica* adopted a 'no direct application' approach. Clearly, he thought that Theron J did not – but should have – embraced the *Bredenkamp* Court's approach. I will return to consider this issue in depth at 5.11 and 5.12 below.

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[402] *Beadica CC* supra note 2 paras 154–5.
[403] Ibid. More accurately, as Froneman J went on to acknowledge at para 154, Harms DP held that the test applies when public policy considerations found in the Constitution *or elsewhere* are implicated (emphasis added).
[404] Ibid para 155 (emphasis added).
[405] Ibid. Harms DP referred only to the values of fairness and reasonableness in this context, but this need not concern us for present purposes.
[406] Ibid para 154.
[407] I emphasise this point partly because, as will shortly become apparent, this feature of Froneman J's judgment seems to have been underappreciated in some of the recent academic commentary on the case (see 5.10).

5.10 *What is at stake in the 'no direct application' versus 'no direct stand-alone' application debate?*

I have argued that Froneman J interpreted the *Beadica* majority as prescribing a 'no direct application' approach to abstract values and that he rightly thought that such an approach would contradict the *Barkhuizen* test, whose application the majority unreservedly endorsed. Before I explain why I think the majority in fact advocated a 'no direct stand-alone application' approach, we should pause to consider what is at stake. For the reasons already provided in relation to the *Afrox* and *SAFCOL* decisions, I agree with Froneman J that if the *Beadica* majority sought to deny that abstract values are ever directly applied as contractual overrides, particularly post-*Barkhuizen*, the coherence of South Africa's contract law jurisprudence would be compromised.

In Chapter 4, I explained why I agree that *Barkhuizen* requires courts directly to apply, at the very least, a 'reasonableness' test, and I pointed out that none of the prevailing interpretations of *Barkhuizen* appear remotely to deny this. Froneman J's judgment shone a lucid spotlight on this important point. He emphasised that when the *Barkhuizen* test is applied, abstract values are the 'unmediated standards against which the validity of the clauses or their enforcement is judged'.[408] Although it is not clear why Froneman J referred to abstract values *generally* (the *Barkhuizen* test made no explicit reference, for example, to good faith or ubuntu), his statement certainly seems correct at the very least in relation to reasonableness, which was the standard prescribed by Ngcobo J under the first leg of the test. It follows that if the majority held to a 'no direct application' approach and also wholeheartedly endorsed *Barkhuizen*, its judgment would seem to provide an inaccurate reflection of the prevailing legal reality. Doctrinal coherence therefore appears to be the central issue at stake in the current debate. If Froneman J's reading of the majority judgment is correct, there would seem to be a highly unsatisfactory tension in our contract law jurisprudence.

However, we should not exaggerate the differences between Froneman J's approach and that of the majority. Even on Froneman J's interpretation of the majority, the two judgments agreed on critical points. Both gave *Barkhuizen* a ringing endorsement and went on to apply it. Furthermore, neither Froneman J nor the majority thought that abstract values are applicable in the manner contended for by the applicants: both judgments agreed that judges cannot apply abstract values in a stand-alone fashion.[409] Froneman J expressly supported *Bredenkamp* and the majority judgment, too, appeared supportive of *Bredenkamp* and clearly viewed its approach as being compatible with its own.[410] It is thus seems somewhat misleading to say, as Fritz Brand did in a recent article, that Froneman J's judgment

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[408] *Beadica CC* supra note 2 para 151. Froneman J went on to assert in footnote 284: 'The direct, unmediated application of notions of fairness, unreasonableness and simple justice between contracting parties is explicitly made throughout the judgment.'

[409] This is what *Bredenkamp* found and, as noted above, Froneman J (at para 154) said there was little to quibble with this finding.

[410] *Beadica CC* supra note 2 paras 39–42. As Boonzaier points out in Boonzaier op cit note 58 at 255, Theron J also approved Cachalia JA's principles (ii) and (iii), which were based on *Bredenkamp*.

'essentially reflects the line of reasoning maintained by Olivier JA, Davis J and others over the years'.[411] Brand focused on Froneman J's critique of the majority's reliance on the value of certainty as a central *justification* for its approach, but he failed to acknowledge that Froneman J supported the *Bredenkamp* approach to *Barkhuizen* (which was the same approach in fact favoured by Brand).

From a doctrinal standpoint, the two judgments are therefore in key respects overlapping. Far from wanting to downplay this harmony, my aim is rather to show that the judgments had *even more* in common than Froneman J was willing to allow. Theron J's judgment, I will argue, should be read in a very similar manner to the way in which Froneman J read *Bredenkamp*, i.e., as setting out a no direct stand-alone approach to abstract values. Viewed in this light, the difference between the two judgments is less significant than Froneman J thought, and his concerns about internal doctrinal consistency are overcome.

5.11 *Arguments in favour of a 'no direct application' reading of the majority judgment*

I will first set out what I take to be the three strongest arguments in favour of accepting Froneman J's ascription of a 'no direct application' approach to the majority. Although these arguments are all hinted at in Froneman J's dissent, they go beyond what he explicitly said in his judgment. My aim is no longer to provide an exegesis of Froneman J's reasoning but rather to find the strongest reasons for his reading of the majority. Even though I will ultimately disagree with this reading, I hope to show that there are three aspects of the judgment which support it, making the interpretive questions at stake all the more difficult.

Firstly, the *Beadica* majority did not appear to distance itself from the Supreme Court of Appeal's pre-*Bredenkamp* case law which, as argued in Chapter 3, appeared to espouse a 'no direct application' approach to abstract values. Theron J endorsed the *Brisley*, *Afrox* and *SAFCOL* decisions and she embraced the terminology and concepts that found their first judicial expression in these cases. If the Supreme Court of Appeal initially intended to endorse a 'no direct application' approach to abstract values, this provides one reason to think that the majority intended the same in *Beadica*.

A second possible argument supporting Froneman's interpretation is that at least three of Theron J's central negative findings most naturally lend themselves to a 'no direct application' reading. A 'no direct stand-alone application' reading, by contrast, would seem to force us to qualify these findings in a manner that is arguably not readily apparent from the text. In what follows, the italicised phrases are the qualifications that would need to be 'read in' so as to render these three findings consistent with a 'no direct stand-alone application' approach to abstract values:

(i) The statement that 'a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh' would

[411] Brand 'Equity and Certainty' op cit note 207 at 168. Brand was referring to Olivier JA's approach in *Saayman* and *Brisley*, and to Davis J's approach in *Beadica HC* supra note 315 and in his academic writings.

need to be understood as 'a court may not refuse to enforce contractual terms on the *stand-alone* basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh'.

(ii) The statement that '[t]he enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require' would need to be understood as 'the 'enforcement of contractual terms does not depend, *as a stand-alone ground*, on an individual judge's sense of what fairness, reasonableness and justice require'.

(iii) Cachalia JA's sixth *Pridwin* principle, expressly embraced by the majority, would need to be understood as '[a] court will decline to exercise its public policy power to invalidate or not enforce contracts where a party relies directly on abstract values of fairness and reasonableness, *on a stand-alone basis*, to escape the consequences of a contract because they are not *stand-alone* substantive rules that may be used for this purpose'.

A 'no direct application' reading of the majority judgment does not require us to read in the above italicised qualifications and, *at least in this respect*, seems a more natural textual reading. That said, I will later provide examples of other passages in the judgment that, in my view, provide strong textual support for a 'no direct stand-alone' reading of the majority.

Thirdly, the 'pro-certainty' justifications provided by the majority in support of its approach to abstract values could be read to suggest that its target was the application of abstract values as contractual overrides *tout court*. This recalls the second argument I gave at 3.7 in favour of a 'no direct application' interpretation of *Brisley, Afrox and SAFCOL*. Theron J explained that the majority sought to avoid the uncertainty that would result from the enforcement of contractual terms being dependent on 'an individual judge's sense of what fairness, reasonableness and justice require'.[412] Arguably, a similar problem would arise even if abstract values are applied only as contingent overrides (for example, as in *Barkhuizen*, only after some type of constitutional trigger is established). This is because whenever open-ended and unrulified value concepts are applied directly, judges might be required to make evaluative judgments of a fairly uncircumscribed kind. If that is what the majority was trying to avoid, one might perhaps infer that it rejected the direct application of abstract values in all their open-ended and unstructured manifestations, rather than only their stand-alone application.

5.12 *In defence of a 'no direct stand-alone application' reading of the majority judgment*

Why, in spite of the above arguments, do I favour a reading in terms of which the majority advanced a 'no direct stand-alone application' approach? I will provide four reasons that I think, viewed collectively, decisively tip the scales against a 'no direct application' reading.

[412] *Beadica CC* supra note 2 para 81.

Firstly, while it may be true that three of the majority's negative findings most naturally suggest a 'no direct application' approach, other negative findings strongly imply otherwise. These findings do not need to be qualified at all and offer weighty, text-based support for the view that the majority intended a 'no direct stand-alone application' approach. We have seen that the majority held that abstract values 'do not provide a *free-standing* basis upon which a court may interfere in contractual relationships' and that they 'have not been accorded *autonomous, self-standing* status as contractual requirements'. A 'no direct application' reading does not seem to attach sufficient significance to the majority's emphasis that abstract values are not applied in an *autonomous, self-standing* or *free-standing* manner. This terminology seems to reflect an explicit attempt to specify precisely that it is the status of abstract values as direct *stand-alone* grounds that the Court has rejected. No 'reading in' or qualification is required in respect of *these* statements; any attempt to do so would seem peculiar and redundant.[413] In respect of these statements, it is a 'no direct application' reading that seems forced into a strained interpretation of the text. These statements suggest that the majority's rejection of 'free-standing' application of values was intended to *add* content to its rejection of 'direct reliance' on these values: again, it specified the precise *type* of direct reliance (free-standing reliance) rejected by the majority.

Secondly, we should again recall the legal arguments to which the Court was responding. The Beadica parties asked the Court to find that abstract values serve as *stand-alone* grounds for the non-enforcement of a contract under the public policy doctrine and under *Barkhuizen*. It is only natural to assume that the majority rejected *this* submission and not a submission that, at least in the written argument, was not before the Court. The respondents, meanwhile, did not ask the Court to deny that abstract values ever play a direct role under the public policy doctrine. Instead, as explained in 5.3, they also seemed to favour a 'no direct stand-alone application' approach. A 'no direct stand-alone application' reading of the majority thus makes sense of the Court's findings in a manner that is responsive to the legal submissions before it (rejecting the applicants' submissions and vindicating the respondents'). A 'no direct application' reading, by contrast, would go much further and uphold a point of law that neither of the parties appeared to advance.

Thirdly, and perhaps most importantly, in its treatment of the existing law of public policy, the majority expressly emphasised that abstract values play a far-reaching and direct role in public policy-based overrides of contractual terms. Far from seeking to shy away from the direct role played by abstract values under the *Barkhuizen* test, Theron J elaborated the test in detail (including those parts that refer explicitly to fairness and reasonableness) and she emphasised that abstract values 'form important considerations' in the balancing exercise that a court undertakes in deciding whether a term, or its enforcement, is contrary to public policy. She expressly said that the creative, informative and

[413] Consider how superfluous the following attempted 'qualifications' would appear if we attempted to provide them (the qualifications are in square brackets): (i) abstract values do not provide a free-standing [*i.e. stand-alone*] basis upon which a court may interfere in contractual relationships; and (ii) abstract values have not been accorded autonomous, self-standing status as [*stand-alone*] contractual requirements.

controlling functions of abstract values were *additional* to this 'important role in the public policy analysis'.[414] This is a further textually-grounded reason that speaks in favour of a 'no direct stand-alone application' reading of the majority.

It is worth recalling that the third reason just elaborated was precisely what led Froneman J to refuse to interpret *Bredenkamp* in a 'no direct application' manner. He took the Court's acknowledgement of a 'fairness and reasonableness' *Barkhuizen* test as textual evidence that Harms JA could not possibly have meant to deny the direct application of values. This sound interpretive approach led him to read the Court's statement that 'fairness is not a free-standing requirement for the exercise of a contractual right' in a manner that was consistent with the contingent direct application of values. Froneman J did not explain why he did not give precisely the same interpretation to the *Beadica* majority judgment, even though it, too, endorsed *Barkhuizen* (and *Bredenkamp*) and emphasised the prominent role that abstract values play under its signature balancing test.

Finally, a 'no direct stand-alone application' reading of the majority judgment enables us to make sense of Theron J's embrace of *Bredenkamp* and her finding that *Barkhuizen*, *Bredenkamp* and the Supreme Court of Appeal's pre- and post-*Bredenkamp* jurisprudence cohere. Theron J's finding of harmony in this body of case law means that whatever reading we give to the majority judgment now also needs to be ascribed to the Supreme Court of Appeal's jurisprudence. A 'no direct application' reading would struggle to accommodate *Bredenkamp* for all the reasons already given. The same problem would apply to all the later cases that expressly approved *Bredenkamp*. If we read the majority as taking a 'no direct stand-alone application' approach, these problems do not arise. This reading accommodates the middle ground position set out in *Bredenkamp* (which implicitly and *in substance* acknowledged that *Barkhuizen* had effected a change in the law) and it saves the Supreme Court of Appeal's jurisprudence from the charge of failing to account for the contingent application of abstract values under South African law.

In my view, viewed together, these four reasons point overwhelmingly towards the conclusion that the majority judgment in *Beadica* laid down a 'no direct stand-alone application' approach to abstract values. This makes best sense of a judgment that, on any reading, requires some interpretation. It is supported by key passages of the judgment and a consideration of the parties' submissions. It properly accommodates the majority's acknowledgment of the direct application of values under *Barkhuizen*, as well as its endorsement of *Bredenkamp*. In my view, there is no easy reading of *Beadica* available. On any reading, certain statements will have to be emphasised at the expense of others, and some statements will need to be construed in a qualified manner.[415] Froneman J, in holding the majority to a 'no direct application' approach to abstract values, asks us to swallow the unpalatable conclusion that the majority's approach to abstract values is incompatible with the central decision that it sought to defend

[414] *Beadica CC* supra note 2 para 73.
[415] The qualifications I am referring to were set out in detail above in 5.11.

and apply, namely, *Barkhuizen*. I have tried to demonstrate that there are ample reasons for reading the majority judgment in a 'no direct stand-alone application' manner, including reasons that Froneman J marshalled convincingly when he interpreted *Bredenkamp*. This avoids the verdict that the Constitutional Court's account of abstract values is inconsistent with *Barkhuizen*, which it endorsed and applied, and it avoids the conclusion that our highest court is confused about the prevailing legal position and in denial about the contingent application of abstract values underscored by that position.

5.13 *Formulating Beadica's core finding and assessing its consequences and justification*

On the reading I have proposed, the core finding of *Beadica* can now be stated in more precise terms. It embraced a no direct stand-alone approach to abstract values and its signal take-away and core finding can be summarised as follows:

> South African contract law does not permit judges (i) to invalidate contractual terms on the stand-alone basis that they are unfair, unreasonable, unduly harsh, unjust or contrary to other abstract values, such as good faith and ubuntu, or (ii) to refuse to enforce contractual terms on the stand-alone basis that their enforcement would be unfair, unreasonable, unduly harsh, unjust or contrary to other abstract values, such as good faith and ubuntu.

Beadica therefore rejected the existence of a free-standing equitable override in South African contract law. Abstract values cannot ever serve as directly applicable *stand-alone* grounds for invalidating or refusing to enforce contractual terms. Neither the public policy doctrine, including the *Barkhuizen* test, nor any other norm of South African contract law, permits them to function in this manner. At the same time, this finding is consistent with the contingent direct application of abstract values under South African contract law. The same reading must now be given to the Supreme Court of Appeal's body of jurisprudence. On this reading, we need not accept, as Du Bois helpfully puts it, that a value such as good faith always 'exists behind a rule, *never as part of the rule itself*'.[416] Values such as good faith *can* exist as 'front-line' contractual overrides, so long as we accept that they can never apply as *stand-alone* overrides.

I welcome the majority's core finding for several reasons, and although I cannot go into detail here, I would like to briefly state some of them. In my view, there is nothing inherently 'progressive' about a free-standing equitable override. If anything, it is a defence more likely to be exploited by well-heeled parties who can afford to drag weaker parties into time-consuming and costly litigation. Such litigation is rarely beneficial for weaker parties and there are arguably powerful access to justice arguments *against* free-standing overrides, which feed into the well-trodden rule of law and legal certainty justifications. In commercial settings, meanwhile, there are often powerful reasons for holding parties to their bargains and without second-guessing the fairness of the underlying *quid pro quo*. This is particularly so where parties of roughly equal bargaining power have painstakingly negotiated the terms

[416] Francois Du Bois, 'Developing Good Faith' op cit note 177 at 227.

to which they wish to be bound. This is *not* to reject the need for open-ended standards in cases demanding higher levels of scrutiny, such as constitutionally-charged cases or agreements in restraint of trade. It is merely to recognise that a completely unstructured and free-standing override would likely do more harm than good, especially for weaker parties who have often have far less capacity to fight protracted and costly litigation. If one accepts these arguments, the leadership shown by the Constitutional Court on this point was a welcome relief.

5.14 *Free-standing equitable overrides as part of the public policy doctrine?*

There is one final interpretive issue that needs briefly to be considered. It concerns the question of how to understand the majority's finding that '[i]t is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it' (the 'so unfair, unreasonable or unjust finding'). On the reading of *Beadica* proposed in this chapter, the majority holds that judges cannot override contractual provisions merely because they are unfair, unreasonable, unduly harsh, unjust or contrary to other abstract values, such as good faith and ubuntu. This reading does not, however, deny that judges may have a power to set aside contracts that are grossly or extremely unfair (or unreasonable, unjust, and so forth) on public policy grounds. In my view, the 'so unfair, unreasonable or unjust finding' should be read as a reminder that they *do* in fact have such a power, namely, under the *Sasfin* principle, as it ultimately came to be interpreted in *Brisley* and *Afrox*.[417] I explained why I support this reading of *Sasfin* in 2.6 above.

Some courts and commentators appear to conclude from the 'so unfair, unreasonable or unjust' finding that a free-standing equitable override can be applied by courts *so long as they claim to do so as part of the public policy rule.*[418] In my view, this interpretation would be a grave mistake for four reasons. Firstly, it ignores the crucial adverb 'so' that occurs before 'unfair, unreasonable or unjust'. The majority is here clearly affirming that especially blatant cases of unfairness, unreasonableness or injustice trigger the courts' public policy jurisdiction. Again, this essentially amounts to a recognition of the now well-established *Sasfin* head of public policy.[419] This is plainly not the same as allowing contracts to be invalidated or not enforced when they are *merely* unfair, unreasonable or unjust. Recall that the majority's initial framing finding (albeit too narrow) was that 'a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable

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[417] See 2.6 above, where I cited, in support of this proposition, *Brisley* supra note 146 para 31 and *Afrox* supra note 147 at paras 8, 10.

[418] Keightley J recently seemed to interpret *Beadica* in this way in *Engen Petroleum Limited South Africa v Jai Hind EMCC CC and Another* [2021] ZAGPJHC 540. Keightley J held (at para 125): 'Where equitable principles will apply in petroleum contracts litigation is in the context of a court determining whether it is justifiable to refuse to uphold or enforce contractual terms because the inequities involved render the terms or the enforcement of them contrary to public policy.' See also Boonzaier op cit note 58 at 252, who appears to conclude from, *inter alia*, the 'so unfair, unreasonable or unjust' finding that the majority's view was that a direct fairness and reasonableness test *can* be applied to any contractual provision 'provided only that the fairness or reasonableness test is conceived of as taking place under some doctrinal heading – such as, pertinently, the longstanding rule that a contract term (or its enforcement) is invalid if it is contrary to public policy.'

[419] See 2.6 above.

or unduly harsh'. The absence of the 'so' qualifier preceding 'unfair, unreasonable or unduly harsh' was significant and, in my view, intentional. It highlights the critical distinction between contracts that are merely unfair or unreasonable (which do not warrant a stand-alone override) and those that are *so* unfair or unreasonable as to fall foul of the *Sasfin* principle. It is in this respect that the initial framing finding is particularly informative. The wider framing findings that abstract values cannot be directly and autonomously applied are, on the other hand, arguably ambiguous as to whether such a distinction was intended.

Secondly, as set out in 5.4, the majority was explicit about the fact that its object of focus was precisely whether abstract values could serve as stand-alone grounds *under the public policy doctrine*.[420] Thirdly, the judgment made it clear that abstract values could play no such role in South African contract law in any shape or form, whether under the public policy doctrine or otherwise. Fourthly, and perhaps most critically of all, the reading currently under consideration would appear to be inconsistent with the majority judgment's core finding. If a litigant could rely on abstract values as stand-alone override grounds simply by basing its argument on the public policy doctrine, *Beadica* (aside from its reading of *Botha*) would have achieved nothing in practical terms and would appear to be entirely defeated. If the stand-alone application of abstract values were permitted under the public policy doctrine, the legal effect would be that abstract values would function as free-standing judicial overrides. That is precisely what the judgment sought to prevent. In my view, then, to think that the majority allowed for the stand-alone application of values in terms of the public policy doctrine would be fundamentally to misunderstand the question that the majority sought to answer. If anything was clear cut in *Beadica*, it was surely that the majority judgment denied the existence of free-standing equitable overrides *tout court*.

5.15 *Conclusion*

On the reading of the majority that I have defended, much of the doctrinal gap that Froneman J discerned between his approach and that of the majority disappears. It is true that Theron J and Froneman J applied the *Barkhuizen* test to the facts in markedly different ways that suggested differing normative commitments. But as a matter of applicable legal doctrine, both judgments, I have argued, denied that values can be directly applied on a stand-alone basis and both supported and applied the *Barkhuizen* test. Theron J essentially consummated the reconciliation between the Supreme Court of Appeal's case law and *Barkhuizen* that was initiated by Harms DP in *Bredenkamp*. She confirmed, firstly, that the Constitutional Court agrees that abstract values cannot be invoked – on a stand-alone basis – to overcome contractual obligations and, secondly, this is consistent with *Barkhuizen* and *Botha*. So long as we understand the majority to have accepted, concurrently, the *contingent* direct application of abstract values, the majority's attempted reconciliation can be judged successful. Although it is true that a unifying gloss may have been somewhat forced onto a body of case law that at times spoke with different

[420] *Beadica CC* supra note 2 para 1. For my reasoning on this point, see 5.12 above.

voices and intended different meanings, this gloss attempts to make best sense of the legal materials and to interpret the case law in a cohesive and comprehensible fashion, which is what the majority in *Beadica* expressly set out to do.[421] In my view, its judgment finally lays to rest the question of whether values can be applied directly in a stand-alone fashion, and the Constitutional Court's negative finding in this regard provides a foundation from which a number of other pressing issues concerning the governing law of public policy can now be addressed.

In this chapter, I sought to clarify the precise content of the majority's negative findings in *Beadica*. I have also tried to set the stage for a deeper interrogation of the state of South Africa's existing law of public policy. I have said that the majority accepted that abstract values apply contingently in South African contract law. However, a number of questions remain unanswered in relation to the content and methodology of the *Barkhuizen* test, the conditions necessary for its application, and its relationship to the other existing strands of public policy in South African law. I address these issues in Chapter 6.

[421] Theron J stated at para 18 that the *Beadica* case 'presents an opportunity to resolve the perceived divergence between the approach of this Court and that of the Supreme Court of Appeal, by engaging in a doctrinal analysis that seeks to make the best sense of our jurisprudence on these issues and present a coherent account thereof'.

CHAPTER 6: UNRESOLVED QUESTIONS AND THE FUTURE OF THE PUBLIC POLICY DOCTRINE

6.1 *Goals of this chapter*

This thesis has analysed the history of pre- and post-constitutional cases concerning the development of the public policy doctrine, and then examined the manner in which the increasingly contested post-constitutional debate concerning the scope of the doctrine culminated in the Constitutional Court's decision in *Beadica*. In the previous chapter I focused on trying to elucidate *Beadica*'s core negative finding, which required some close analysis and interpretation. By way of conclusion, I now wish to consider some of the implications of my reading of *Beadica* and other points advanced in the thesis. There are, in my view, still a number of unresolved questions that call for judicial resolution, both in relation to *Barkhuizen*, and in respect of the public policy doctrine more broadly. There appear to be different strands of the public policy doctrine which call for rationalisation or a coherent doctrinal structure within which to situate them. For reasons of space, I cannot go into the level of detail that will ultimately be required if the issues raised in this chapter are to be satisfactorily resolved by our courts.

In Chapter 5, I explained why the *Beadica* judgment should be understood to have rejected the existence of free-standing equitable overrides in South African contract law, whether as part of the public policy doctrine or otherwise. This interpretation has important and hard-won implications for how we should now understand and apply the *Barkhuizen* test. Unfortunately, these implications were not made explicit in *Beadica* and it seems to me that that our courts – including the Constitutional Court – may be at risk of undermining them.

I will revisit the following questions in light of the *Beadica* decision: firstly, *when* does the *Barkhuizen* test apply? Secondly, how should the two legs of the *Barkhuizen* test be formulated? Thirdly, how should *Barkhuizen* be situated in the broader scheme of the public policy doctrine? In particular, how does it relate to other public policy heads, *Sasfin*'s cautionary principles and the residual power discussed in Chapter 2? I will deal with each question separately and make some proposals – some more tentative than others – regarding how some of these issues might be resolved, drawing on the work covered so far in this thesis, as well as that of other scholars. I will then examine some recent court decisions which, in my view, have the potential to contribute to further confusion in this area and do little to assist the rational development of the public policy doctrine. Lastly, I will take stock of some of the conclusions reached in this thesis, and offer some thoughts regarding the possible implications of *Beadica* for the future trajectory of South African contract law.

6.2 *The Barkhuizen test's trigger conditions*

I return now to a question first raised in Chapter 4: when does the *Barkhuizen* test apply? I argued in Chapter 4 that free-standing interpretations of *Barkhuizen* ignored the fact that *Barkhuizen's* signature test was applied by the majority only *contingent on* a constitutional threshold having first been met (i.e.,

the judgment's 'if-then' structure).[422] *Beadica*, which rejected the stand-alone application of abstract values, is plainly inconsistent with free-standing interpretations of *Barkhuizen*. These interpretations understood *Barkhuizen* to mean that tests of fairness and reasonableness could be directly applied to *any* contractual clause as self-sufficient bases for overcoming the enforcement of a contract. On these readings of *Barkhuizen*, the mere unfairness or unreasonableness of a contract (or its enforcement) would have served as sufficient override grounds and *Barkhuizen* would have endorsed a free-standing equitable override. Such an interpretation cannot survive the Constitutional Court's judgment in *Beadica*. In Chapter 5, I argued that the Court's rejection of free-standing equitable overrides – in any shape or form whatsoever – was the core take-away of the judgment.

I also argued, however, that the *Beadica* majority judgment should be understood as accepting that that *when the Barkhuizen test does apply*, it requires judges 'directly' to apply abstract values as contractual overrides. The *Barkhuizen* test is a type of direct 'fairness and reasonableness' test, and post-*Beadica* it can *only* be understood as a test that applies if and only if certain prior conditions are met. What, then, are the test's trigger conditions? Although *Bredenkamp* was arguably pioneering in kick-starting a reading of *Barkhuizen* that opens up the present question, for reasons given in the previous chapter and further below, it does not satisfactorily resolve it. Our courts tend not to engage the issue with the precision demanded and different threshold tests on occasion appear to be implied or expressed.[423]

In my view, some type of 'constitutional limitation' interpretation of *Barkhuizen* should expressly be adopted – and then fleshed out more precisely – by our courts. My reasoning for this was already set out in 4.1 and 4.2.2 above, and I will not recap it here. It leads me to the proposal that the *Barkhuizen* decision is best seen as giving rise to a distinct head of public policy, one which applies when a litigant has identified a direct constitutional threat of some kind. Irrespective of how our courts might ultimately seek to conceptualise the type of threat that triggers the test, on a constitutional limitation understanding of the test, it applies *only* in these cases. There is arguably an underlying constitutional logic to this legal development. The Constitutional Court may not have been willing to allow contracts to be overridden merely because they are unfair or unreasonable (which is as far-reaching an override as one can imagine); however, *Barkhuizen* can be viewed as the Court's acknowledgment that *when a constitutional threat is at issue*, a heightened degree of scrutiny of the contract – exercised by way of the *Barkhuizen* test – becomes fully justified. The thorny question that remains is to try to clarify precisely what constitutional threshold should be met in order for the *Barkhuizen* test to be triggered.

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[422] See 4.2.2.

[423] In Theron J's majority judgment in *Beadica*, for example, she seemed to treat the applicants' contention that enforcement of the leases would be 'inimical to the constitutional value of equality' as a sufficient basis for considering their enforceability (see *Beadica CC* supra note 2 paras 99–101). Froneman J appeared to think that the *Barkhuizen* test applied whenever 'constitutional values or rights are alleged to be implicated' (see *Beadica CC* supra note 2 para 151).

Bredenkamp, as we have already seen, paved the way for a constitutional limitation interpretation of *Barkhuizen*. Harms DP emphasised that the *Barkhuizen* test had been applied by Ngcobo J only after he had established that Barkhuizen's constitutional right to judicial redress had been 'limited'.[424] Boonzaier describes the *Bredenkamp* Court's approach as follows: 'The fairness test was [Harms DP's] means of adjudicating whether that rights-limitation, once established, makes the term contrary to public policy and thus invalid. So *Barkhuizen* in effect endorses a *conditional* fairness test: it comes off the shelf only if a constitutional rights-infringement has been established.'[425]

There are persuasive reasons for endorsing this reading of *Barkhuizen* (i.e., that *Barkhuizen* applies only when a constitutional *right* has been limited), several of which are put forward by Boonzaier, and which I refer briefly to below.[426] However, two often-quoted passages of *Bredenkamp* suggest that such a reading is not what the *Bredenkamp* Court had in mind. Firstly, at one point the Court described the enquiry under the first leg of *Barkhuizen* as follows: '[I]s the limitation of the identified constitutional *value* – the right of access to courts – fair and reasonable in the circumstances?'[427] Here the Court introduced the notion that it is the limitation (and later 'implication')[428] of a constitutional *value* which triggers the *Barkhuizen* test, and it appeared to conflate the identified constitutional value with a constitutional *right*, namely that of access to courts. This formulation has proved quite influential.[429] However, whereas the concept of a rights limitation is a well-developed notion in constitutional law (at least in the vertical context),[430] the idea of a constitutional value being 'limited' is rather amorphous. As Boonzaier points out, if the mere limitation of a constitutional value is the relevant threshold, it risks being a not very meaningful one, since 'the [Constitutional] Court has shown a willingness to link almost any dispute before it to constitutional values – including fairness itself'.[431]

A similar concern arises out of the proposition that the *Barkhuizen* test applies when a constitutional right or value is 'implicated'[432] or 'invoked'.[433] These framings, which have been taken up in subsequent judgments, appear to suffer from similar problems – i.e., they are both too vague and too easily met to

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[424] Ibid para 44.
[425] Leo Boonzaier op cit note 58 at 234.
[426] For an example of a recent High Court case that seemed to treat the infringement of a constitutional right as the relevant threshold, see *Cato Ridge Gas Company (Pty) Limited v BP Southern Africa (Pty)* Limited [2021] ZAGPJHC 527 (12 October 2021) para 48.
[427] *Bredenkamp* supra note 57 para 46 (emphasis added).
[428] Ibid para 47.
[429] It was embraced, for example, by both the majority and minority judgments in *Beadica CC* supra note 2 (see paras 41 and 155 respectively). In a similar vein, in *Maphango* supra note 305 para 26, the Supreme Court of Appeal seemed to treat the *Barkhuizen* test as simply being whether a term in a contract is 'inimical to the values enshrined in the Constitution'.
[430] As Boonzaier puts it at op cit note 58 at 256: The 'question of whether a certain right has been infringed is an enquiry structured by the constitutional text and much case law.'
[431] Ibid.
[432] See *Bredenkamp* supra note 57 para 47 and *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) para 27. For a recent High Court judgment that held that the *Barkhuizen* test applies when 'a number of constitutional rights and values are implicated', see *MEC for the Department of Transport, KwaZulu-Natal v Raubex KZN (Pty) Ltd and Another* [2021] ZAKZPHC 77 (8 June 2021) para 19.
[433] *Beadica CC* supra note 2 para 155.

serve as meaningful boundaries capable of determining, in a principled manner, when *Barkhuizen*'s heightened scrutiny standard should apply. If the trigger conditions can be met with ease by a litigant simply invoking a broad range of constitutional values, *Beadica*'s rejection of free-standing equitable overrides would be rendered in substance toothless, for then virtually all contracts would be subject to *Barkhuizen's* fairness and reasonableness test.[434] There are therefore good reasons to support Boonzaier's proposal that the *Barkhuizen* test should apply only when a constitutional *right* is limited, especially given that this was precisely the type of constitutional limitation at stake in *Barkhuizen* itself.

The second obstacle to reading *Bredenkamp* as endorsing a 'rights-limitation' reading of *Barkhuizen* is due to the 'or elsewhere' statement that I mentioned in Chapter 4. Recall that Harms DP held that *Barkhuizen* did not prescribe 'that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution *or elsewhere* is implicated'.[435] In my view, the 'or elsewhere' extension was misleading and continues to cause confusion.[436] Having led the way for understanding the *Barkhuizen* test to entail a specific head of public policy, triggered by some kind of constitutional limitation, the Court's 'or elsewhere' statement implied that the *Barkhuizen* test might also be triggered by (unelaborated) *other* public policy considerations. Why should the same 'fairness and reasonableness' test apply in these other circumstances? *Bredenkamp* gives no answer to this question, which appears to open the floodgates to the *Barkhuizen* test applying whenever *any* type of sanctioned public policy consideration is sufficiently implicated. On this approach, the existing law of public policy threatens to be entirely subsumed by the *Barkhuizen* test, without there being any principled or justified basis for this. The *Barkhuizen* Court at no stage expressly set out to do this.

It bears repeating: our courts have often developed specific multi-factors tests or criteria as established methods for resolving cases falling under particular heads of public policy and which are intended to *suit the particular contingencies of that category*. The *Barkhuizen* test was developed in the context of a *threatened constitutional right*, and its balancing methodology under the first leg made explicit reference to this. There is no principled reason for this same test to apply to other new or existing heads of public policy. *Bredenkamp*, in any event, seemed initially to be trying to achieve the opposite of this. It sought to treat the *Barkhuizen* test as applicable only when specific constitutional conditions are met. The 'or elsewhere' extension threatens to undermine this and I see no sound basis for it. For these reasons, my proposal would be to treat *Bredenkamp's* 'or elsewhere' statement as a throw-away comment that was not intended to subtract from what was, in substance, a constitutional limitation reading of *Barkhuizen*. Boonzaier's proposal that, as in *Barkhuizen* itself, the *Barkhuizen* test should apply only when a constitutional *right* has been limited, appears to have substantial merit.

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[434] See Boonzaier op cit note 58 at 256.
[435] *Bredenkamp* supra note 57 para 50 (emphasis added).
[436] In *Beadica CC* supra note 2, Theron J (at para 40) quoted Harms DP's statement in this regard and Froneman J (at para 155) expressly endorsed it.

6.3 *The formulation and application of the Barkhuizen test*

If our courts were to elaborate a sufficiently precise type of constitutional trigger for the *Barkhuizen* test, that would only take us so far, because our courts have not satisfactorily clarified how the test should be properly formulated and applied when it does apply. In Chapter 4 I dealt with some of the anomalies and inconsistencies in Ngcobo J's judgment in *Barkhuizen*: (i) the majority's application of the first leg was more stringent than the 'reasonableness' test initially set out, being closer to the *Sasfin* 'gross unreasonableness' test; (ii) the balancing methodology Ngcobo J had advocated in order to determine 'reasonableness' was not ultimately applied by the Court; and (iii) in applying the second leg of the test, the value of 'justice' made a sudden appearance and the majority advanced the sweeping statement that '[p]ublic policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair'. No balancing methodology was applied to the second leg. The concepts of reasonableness, fairness and justice, moreover, appeared to be deployed almost interchangeably. There was a general sense of haphazardness when the *Barkhuizen* test was eventually applied by the Court.

It seems to me that there is currently still no settled formulation or canonical statement of the *Barkhuizen* test. Although courts often quote copiously from *Barkhuizen*, that does not help resolve the problem under discussion, due to the various anomalies just recapped. On some occasions, courts (including the Constitutional Court) have provided differing formulations of the test, a point I deal with in 6.6 below. It is therefore unsurprising that our lower courts fairly frequently apply the test in unpredictable and inconsistent ways.[437] *Beadica* was a missed opportunity for the Constitutional Court to address some of these problems and to attempt to settle on a formulation and methodology for applying the test. As noted previously at 5.5, the Court did clarify that, under the second leg of the test, a party's explanation for non-compliance with the contract is, while critical, not the *only* relevant consideration.[438] Beyond that, however, the Court left the problems raised above unaddressed.

I argued earlier that on *any* reasonable interpretation of the first leg of *Barkhuizen*, the Court was engaged in the activity of directly applying the value of reasonableness to contracts that fall under this head of public policy. Ngcobo J's initial formulation of the first leg of the test unquestionably hinged on a reasonableness standard. As to how to determine reasonableness, Ngcobo J proposed a balancing methodology in terms of which a court weighs the reasons in favour of the *pacta sunt servanda* principle against the threatened constitutional right.[439] In my view, if Ngcobo J had applied this test and balancing methodology (instead of allowing the test, without explanation, to mutate into one of 'manifest

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[437] For example, contrast the diverging approaches taken to applying the test in the recent High Court judgments of *Cato Ridge* supra note 426*; Engen Petroleum* supra note 418*; Raubex* supra note 432*; Ullman Sails (Pty) Ltd v Jannie Reuvers Sails (Pty) Ltd and Others; Ullman Sails International Incorporated and Others v Reuvers and Another; Ullman Sails International Incorporated and Others v Reuvers and Another* [2022] ZAWCHC 38*;* and *Wyno Construction and Projects (Pty) Ltd v Miway Insurance Ltd* [2022] ZAGPPHC 437 (13 June 2022). See notes 418, 426 and 432 above for further discussion of *Engen Petroleum*, *Cato Ridge* and *Raubex* respectively. See note 479 below for further discussion of *Ullman Sails* and *Wyno Construction.*

[438] *Beadica CC* supra note 2 para 92.

[439] *Barkhuizen* supra note 1 paras 56–7, 59.

unreasonableness'), it would have been workable. It is the type of open-ended standard that contains sufficient flexibility to handle a range of novel and complex constitutionally-grounded cases and it would seem capable of generating more specific guidelines or criteria suited to particular categories of cases that emerge over time.[440]

I would propose that our courts should adopt Ngcobo J's fairly clear statement of the first leg's test and methodology as a basis for approaching the second 'valid but unenforceable' leg as well. I see no reason why the same 'reasonableness' test and balancing methodology should not apply here. This would be preferable, in my view, to the far looser proposal of Froneman J that, on the authority of *Barkhuizen*, a 'contractual clause or its enforcement may be invalidated as being in conflict with fairness, justice and equity, reasonableness, the necessity to do simple justice between individuals, or ubuntu.'[441] The *Barkhuizen* test made no reference to broad 'equity', the necessity to do simple justice between individuals or ubuntu.[442]

On this proposal, the *Barkhuizen* test would still be a very open-ended standard that would require our courts to engage in an evaluative process of weighing competing values and assigning relative importance to them. In settling on an approach, our courts could draw inspiration from the approaches adopted by other legal systems – for example, the German Constitutional Court has developed a not dissimilar balancing method when adjudicating challenges to contracts when fundamental rights are issue.[443] Whatever approach is ultimately taken, the application of such a test would entail an inevitable element of judicial value judgment but, as should by now be clear, this is often part and parcel of applying the public policy doctrine. Under a system of precedent, as particular categories of case become increasingly well-trodden and their legal tests become more fine-grained, greater predictability is likely to follow. The first step, however, is to settle on a formulation of the test and an agreed-upon methodology for applying it. Our courts do not seem to have reached this stage and, for the all the reasons given, quoting from *Barkhuizen* does not take the matter further.

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[440] See Lubbe 'Fundamental Rights' op cit note 43 at 404–5, referring to the German "*Fallengruppen*" methodology, as explained in more detail in the quote from Lubbe's article in note 43 above.

[441] *Beadica CC* supra note 2 para 155.

[442] Ngcobo J did say (at para 51) that these values 'inform public policy' (i.e., before he set out the actual test to be applied in constitutionally-based cases). In *Beadica CC* supra note 2, Froneman J appeared to conflate this informing role in the general schema of the public policy doctrine with the values directly applied in the more specific and targeted methodology of the *Barkhuizen* test.

[443] See, for example, the seminal *Bürgschaft* decision (*BverfGE* 19 October 1993, *BVerfGE* 89, 214), in which the Federal Constitutional Court invalidated a contract in terms of which a daughter had acted as a surety for her father's loan on the basis of her constitutional right to the free development of her personality, as provided for in Article 2(1) of the German Federal Constitution. See also the earlier *Lüth* decision (*BverfG* 15 January 1958, *BverfGE* 7, 198). For further analysis of the German approach to balancing the interests of contracting parties when fundamental rights are at stake, see Olha Cherednychenko 'Fundamental Rights, Contract Law and Transactional Justice' (2021) 17 *European Review of Contract Law* 130 at 133–6.

6.4 *Mapping the public policy doctrine after Barkhuizen and Beadica*

I now turn to a more general doctrinal question that, to my knowledge, has not frequently been interrogated in depth in the post-*Barkhuizen* era. It is this: how do the various pre- and post-constitutional strands, principles and heads of the public policy doctrine relate to each other as a unified, coherent body of law? I do not intend to offer a comprehensive answer to this 'mapping' question here, which I can canvass only very briefly. My aim is rather to take some of the theses I have already developed and the problems already encountered to offer some broad proposals from which a more structured and coherent doctrinal framework might in the future be constructed. My chief aim is to stimulate further thought about an undoubtedly complex question. One reason I think it is worth opening up this line of inquiry is that judicial attempts to summarise the law on public policy frequently cite multiple statements drawn from a number of different cases in a manner that can leave one wondering how they relate to each other as part of a unified whole.

It is instructive to return to the six principles Cachalia JA cited in support of his claim that '[t]he relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established'.[444] The first was that public policy requires that contracts freely and consciously entered into must be honoured. The second principle was that a court will declare invalid a contract that is 'prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy'; the third was that '[w]here a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it'; and the fourth concerned the onus that lies on the party attacking a contract. The second, third and fourth principles were clearly attempts to summarise *Barkhuizen*, as interpreted by *Bredenkamp*, which were the two cases Cachalia JA cited in their support. The fifth principle was based on the *Sasfin* Court's finding that '[a] court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases'. The sixth was that a court will decline to use its public policy override 'where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract'.[445] The six principles imply that there is a now single over-arching public policy framework that is squarely based on the *Barkhuizen* test, as supplemented by *Sasfin's* cautionary principles. In my view, this summation is not without difficulty. It does not sufficiently recognise the distinct heads of public policy that our courts have developed (including the *Barkhuizen* test); it does not deal with the relationship between these individual heads and our courts' general and residual power to strike down contracts on public policy grounds; finally, it could be read as implying that the *Barkhuizen* test *replaced* that residual power. I will propose the broad outline of a slightly different framework below.

In Chapter 2, I tried to demonstrate that prior to the Constitution, our courts retained a general, residual power to expand the public policy doctrine into fresh and uncharted terrain. There is every reason to

[444] *AB v Pridwin* supra note 311 para 27.
[445] Ibid.

think that this residual power remains intact; at no stage have our courts in the post-constitutional era attempted to deny its existence, and the Constitution only seems to breathe further life into it. I also argued in Chapter 2 that it is in the exercise of this residual power that *Sasfin's* cautionary principles are most relevant: they serve as useful guidelines when a court is faced with a novel factual scenario and tasked (as it was in *Sasfin*) with deciding whether to expand the public policy doctrine into new territory. The reminder that this should not be done lightly remains apposite and it is therefore unsurprising that the Constitutional Court and Supreme Court of Appeal continue to cite the principles.[446] In my view, they are less relevant when a court is applying an established head of public policy using a well-trodden method.

In 2.2, I also discussed how particular heads of public policy have become established over time, often giving rise to distinct legal methodologies and tests that are applied to these recognised categories in a way that suits the sphere of public policy at issue. I tried to demonstrate, via the *Sasfin* example, that this process can be initiated precisely by a court's exercise of its residual power when faced with a novel case. Whether or not the Court in *Sasfin* was driven by the desire to create a new head of policy, its ultimate reception by later courts demonstrates how these two processes can be intimately linked: the exercise of the residual power to strike down a contract in a *particular* case can quite naturally, in a common law precedential system, develop into an established *category* of public policy whose legal methodology becomes more established or 'rulified' over time. Again, nothing in our post-constitutional case law has cast any doubt on the inherent capacity of our courts to recognise new heads of public policy, whether they are categorically or conditionally prohibited.

There appears to be great value in the judicial development and preservation of discrete heads of public policy because it allows for the application of tailor-made legal enquiries that have been developed and refined to suit particular types of conduct. In the context of restraint of trade agreements, for example, our courts assess the reasonableness of a restraint partly by balancing the restrainee's interest in being economically active against the restrainor's interest – which must first be deemed 'worthy of protection' – that is threatened by the restrainee's conduct.[447] If we are to recognise the value of developing discrete tests that apply to discrete heads of public policy, it follows, I think, that our courts should avoid the tendency to cite principles or tests that have been specifically developed in relation to a particular head as if they pertain to public policy *as a whole*. I would like to try flesh out this point out by returning to the example of *Barkhuizen*.

I earlier argued that after *Beadica*, the *Barkhuizen* test cannot simply be applied to *any* contract, without more. At the risk of repetition, if abstract values cannot be applied as stand-alone override grounds, it follows that the *Barkhuizen* fairness and reasonableness test applies *only on the satisfaction of a prior condition*. The *Barkhuizen* test, I argued, represents a distinct head of public policy reliant on

[446] See *AB v Pridwin* supra note 311 para 34 and *Beadica CC* supra note 2 para 82.
[447] *Basson* supra note 248 at 767F–I.

its own constitutional trigger conditions. Similarly, I would argue that our courts should apply the multi-factored test they have developed in relation to restraint of trade agreements *only when a restraint of trade is at issue*. These are discrete tests applicable to discrete heads of public policy. It was on this basis that, in 2.4.2, I challenged Kerr's assumption that the *Magna Alloys* test applicable to restraint of trade agreements should be applied whenever a court exercises its residual power to refuse to enforce contracts in 'valid but enforceable' scenarios. I could see no principled basis for such a far-reaching expansion of the *Magna Alloys* test.

A similar tendency has now reared its head in relation to the *Barkhuizen* test, as evidenced by Cachalia JA's six principles and *Bredenkamp's* 'or elsewhere' statement. Because I supported a 'constitutional limitation' reading of *Barkhuizen* – and this seemed in line with key passages in *Bredenkamp* – I cautioned against the taking the *Bredenkamp* Court's 'or elsewhere' statement too literally; it appeared to imply that the *Barkuizen* fairness and reasonableness test applies whenever *any* public policy consideration whatsoever is sufficiently implicated. This statement, like Cachalia JA's principles, suggests that the *Barkhuizen* test *covers the field* of public policy and provides an over-arching structure within which *all* public policy challenges to contracts can be resolved. Again, I see no principled basis for such a reading, which threatens both to swallow up other discrete branches of the public policy doctrine, and to constrain the open-ended parameters of the court's residual power to develop the ambit of the public policy doctrine.

It bears emphasising that in arguing for the view that the *Barkhuizen* test represents its own distinct head of public policy, one triggered by a constitutional limitation of some kind, I do not intend to suggest that constitutional considerations cannot arise for discussion under other heads of public policy, or when a court exercises its general power to expand its public policy override into a new sphere. To take an obvious example: the post-constitutional law governing restraint of trade agreements is now informed by the fact that freedom of trade is constitutionally guaranteed by s 22 of the Constitution.[448] My argument is rather that the *Barkhuizen* test was expressly developed as a way of resolving cases in which there is a *direct* constitutional challenge to a contract.[449] In arguing that the *Barkhuizen* test thereby represents a distinct head of public policy, one that does not cover the entire field of public policy, I am therefore *not* suggesting that constitutional considerations do not permeate other aspects of the law of public policy.

On my tentative proposed mapping of the public policy doctrine, the specific tests applied under discrete heads of public policy – whether restraint of trade agreements, *Sasfin*, *Barkhuizen* and so forth – should be understood as existing alongside each other, but not as encroaching on each other. *In addition*, these discrete heads exist alongside the Court's residual jurisdiction to expand public policy

[448] Section 22 provides: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'
[449] *Barkhuizen* supra note 1 para 22.

into new areas when appropriate (and with due reference to *Sasfin*'s cautionary principles). If we view the public policy doctrine in this way, I think a certain type of rational structure begins to emerge. It is a structure that is in my view immanent in both pre- and post-constitutional case law and can be plausibly derived from it. Greater clarity from our courts in relation to these issues would, however, be highly welcome.

6.5 *The failure of post-Beadica case law to clarify or resolve the above problems*

I now turn to two Constitutional Court judgments in the post-*Beadica* era which further demonstrate the unresolved nature of some of the issues discussed above.

6.5.1 *Pridwin in the Constitutional Court*

I will first deal with the Constitutional Court's majority judgment in *Pridwin*,[450] which was not *technically* 'post' *Beadica*, as it was handed down on the same day. It is not possible to engage fully with the nuances of this case here, in part because it would require grappling in detail with the complex 'horizontality' debate in constitutional law.[451] Instead, my chief aim is to focus on how *Pridwin* contributes to further uncertainty regarding *Barkhuizen*'s trigger conditions, and although this means that I cannot entirely avoid the horizontality debate, I will try to avoid as far as possible being lured into some of the terminological knots in which our courts seem to have become entangled when discussing direct and indirect horizontal application of constitutional rights.

The facts of *Pridwin* were briefly explained in Chapter 4. The High Court and the Supreme Court of Appeal held that Pridwin was entitled to cancel the Parent Contract and that such cancellation was not contrary to public policy or unconstitutional. The Constitutional Court overturned this verdict. For reasons of space, I will deal only with the majority judgment. The majority judgment, again led by Theron J, surprisingly saw no need to apply *Barkhuizen*. According to the majority, Pridwin's constitutional obligations arose directly from sections 28(2)[452] and 29(1)(a)[453] of the Constitution and operated independently of the contract.[454] It followed that the validity of the termination clause need not be determined at all and there was no need to apply the common law's *Barkhuizen* test.[455] It was rather the 'direct constitutional challenge to conduct'[456] that the majority decided to deal with exclusively.[457]

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[450] *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC).
[451] For recent detailed discussions, see Meghan Finn 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 *SALJ* 591–608 and Ally & Linde op cit note 265. See also Boonzaier op cit note 58 at 267–73.
[452] Section 28(2) provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.
[453] Section 29(1)(a) provides that everyone has the right 'to a basic education, including adult basic education'.
[454] *Pridwin CC* supra note 450 para 103.
[455] Ibid paras 103, 105–7.
[456] *Pridwin CC* supra note 450 para 188.
[457] Ibid para 104. See 4.1 above for my initial discussion of this aspect of Ngcobo J's approach.

The majority essentially held that it could 'directly' apply the children's constitutional rights on the basis of section 8(2) of the Constitution, but *without the mediation of the common law of contract*.

Theron J doubled down on *Barkhuizen's* finding, dealt with in 4.1 above, that section 8(2) is not applicable when contracts are challenged on constitutional grounds.[458] On her reasoning, however, there was no need to deal with the case by applying contract law: section 8(2) could be applied directly to the school's *decision*, which could be adjudicated independently of the contract itself.[459] This appeared to be a novel form of 'direct' application that goes beyond the ordinary type of 'direct' application under sections 8(2) and 8(3), which involve *precisely* developments of the common law aimed at giving effect to constitutional rights. Directly applying the Bill of Rights in this manner, Theron J concluded that section 28(2) of the Constitution, which gives paramount importance to the best interests of the child, required Pridwin to follow a fair and determinable process by soliciting representations on the children's best interests before excluding them from the school.[460] The majority also held that Pridwin had infringed the children's section 29(1) right to a basic education without 'appropriate justification'.[461] The school's decision to terminate the contract was accordingly set aside on the basis that it was unconstitutional and invalid.

It is difficult to reconcile the majority's approach in *Pridwin* with that of the majority judgments in *Barkhuizen* and *Beadica*. Theron J sought to avoid the law of contract apparently on the basis that a constitutional right had been expressly invoked by the applicants. As Boonzaier points out, Theron J did not justify her striking claim that the boys' constitutional rights operated independently from the contract:

> Merely pointing out that the boys' constitutional rights and the enforcement of the parent contract are two different things does not establish that they operate independently. And indeed every indication had been that they *do not* operate independently: the applicant's case was that Pridwin's invocation of the cancellation clause was invalid *because* of its effect on the boys' constitutional rights; he invoked the boys' constitutional rights *in order* to restrain the enforcement of Pridwin's contractual power. The two issues seemed therefore to be closely interdependent – and both squarely matters for *Barkhuizen*.[462]

As we have already seen, Barkhuizen's claim was based squarely on the alleged infringement of his constitutional right of access to court. Furthermore, as I have been at pains to emphasise, the *Barkhuizen* test was formulated and applied only *after* the Court had found that Barkhuizen's section 34 right had been limited.[463] The difference between *Pridwin* and *Barkhuizen* in this regard is therefore difficult to discern. It may be true that in *Barkhuizen*, Ngcobo J somewhat confused the matter by citing section

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[458] Ibid para 106.
[459] Ibid para 107.
[460] Ibid paras 146–51, 193–5.
[461] Ibid paras 196–208. The 'appropriate justification' test was imported from the decision of *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).
[462] Boonzaier op cit note 58 at 269.
[463] Ibid at 270.

39(2) of the Constitution as the basis for his common law development. He channelled Barkhuizen's *rights*-based constitutional challenge to the insurance contract via a development to the common law's public policy doctrine, whereas section 8(2) of the Constitution was arguably the more appropriate constitutional basis for this.[464] However, the *Pridwin* litigation, as Nurina Ally and Daniel Linde note, was an ideal opportunity for the Constitutional Court to correct this mistake.[465] In contending that a challenge to a contractual provision based on public policy could not be channelled through the application of section 8(2), 'the majority reinforced rather than corrected *Barkhuizen's* misguided view that there is a dividing line between direct horizontal application of the Bill of Rights and constitutional scrutiny of contracts'.[466] This led to *Barkhuizen's* public policy analysis being side-stepped altogether.

Boonzaier locates the source of the confusion in the differing meanings that our courts have given to the notion of direct and indirect horizontal application.[467] It is outside the scope of this thesis to deal with this matter in detail. The point is simply that *Pridwin* was on all fours with *Barkhuizen* at least in the sense that the enforcement of a contractual provision was challenged on the basis that it limited a constitutional right and that enforcement would therefore fall foul of public policy. The *Pridwin* majority's eschewing of *Barkhuizen*, and its novel form of 'direct' application of the Constitution, contributes to yet further confusion regarding *Barkhuizen's* triggering conditions.

6.5.2 *Fujitsu in the Constitutional Court*

The Constitutional Court's most recent application of the decision in *Barkhuizen* is contained in two separate judgments in *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* ('*Fujitsu*').[468] The Constitutional Court considered the enforceability of an exemption clause concluded by Fujitsu Services Core (Pty) Ltd ('Fujitsu'), a distributor of electronic goods, and Schenker South Africa (Pty) Ltd ('Schenker'), a freight forwarder, which clause had been incorporated into the parties' distribution agreement by the Standard Trading Terms and Conditions of the South African Association of Freight Forwarders ('the Standard Terms'). Schenker had agreed to assist Fujitsu with logistics and freight forwarding in respect of various laptops Fujitsu had imported from overseas. It was common cause that one of Schenker's employees had stolen the goods and then disappeared, leading Fujitsu to institute a delictual damages claim against Schenker.

In terms of clause 17 of the Standard Terms, Schenker would not accept or deal in certain types of high value goods unless prior arrangements had been agreed in writing with Fujitsu. If Fujitsu delivered such goods to Schenker without such prior agreement, Schenker would incur no liability whatsoever in respect of such goods. Clause 17 was to be read with clauses 40 and 41 of the Standard Terms, dealing

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[464] See Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 123 *SALJ* 762 at 772–5 and more recently Ally & Linde op cit note 27 at 290–1.
[465] Ally & Linde op cite note 27 at 292–3.
[466] Ibid at 292.
[467] Boonzaier op cit note 58 at 270.
[468] *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* 2023 (9) BCLR 1054 (CC).

with limitation of liability. Schenker sought to avoid liability by relying on these clauses. In the High Court and Supreme Court of Appeal, the argument turned on the proper interpretation of the clauses. The High Court found for Fujitsu, ordering Schenker to pay it damages, but this decision was reversed by the Supreme Court of Appeal. Before the Constitutional Court, Fujitsu argued for the first time – relying on *Barkhuizen* and *Beadica* – that clause 17, to the extent that it exempted Schenker from liability for loss arising from the theft of its employees, fell foul of public policy. Fujitsu argued *inter alia* that the exemption clause deprived it of judicial redress in circumstances inimical to constitutional values and was therefore contrary to public policy. I will confine my discussion to how the two Constitutional Court judgments dealt with this argument.

Mathopo J (writing first and for the minority) affirmed the *Beadica* finding that 'fairness and reasonableness do not qualify as free-standing requirements'.[469] Citing *Schierhout v Minister of Justice*[470], he then asserted: 'Courts have a duty to express their disapproval where a term in a contract deprives a party of the right to seek judicial redress.' He stated that in *Beadica* and *Barkhuizen*:

> [T]his Court established principles of fairness, reasonableness, justice and ubuntu, and found that these constitutional values play a fundamental role in the application and development of the rules of contract law in such a manner as to give effect to the spirit, purport and objects of the Bill of Rights. The important constitutional issue of public policy should not be lost or diluted by a straitjacketed approach which borders on a narrow interpretation of contracts.[471]

Applying this understanding of the law, he then found:

> The narrow approach in *Goodman Brothers* fails to take into account the constitutional values of fairness, reasonableness and justice. It undermines the essence of the contract and negates the contractual purpose of the contracting parties. In this instance, Schenker agreed to collect and deliver the goods belonging to Fujitsu. A clause that allows employees to steal goods in such circumstances and exculpates the employer from liability on the basis of the phrases 'of whatsoever' nature, 'any such goods', 'howsoever arising', 'any loss damage or expense arising' and 'whatsoever shall any liability' offends the values of human dignity, the achievement of equality, the advancement of human rights and most importantly, the rule of law.[472]

On this basis, he concluded that 'the impugned clauses clearly serve to prevent Fujitsu from obtaining judicial redress which would otherwise be available to it'. Enforcing the agreement would deprive Fujitsu 'of its basic contractual rights and offend the principles of good faith and fairness'.[473] He found that 'an act of theft can never be said to be in furtherance of a legally valid and enforceable contract'.[474] The minority would have accordingly upheld the appeal.

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[469] Ibid para 71.
[470] *Schierhout v Minister of Justice* 1925 AD 417 at 424.
[471] *Fujitsu* supra note 468 para 77.
[472] Ibid para 78.
[473] Ibid para 79.
[474] Ibid.

As mentioned, Mathopo J began by acknowledging that, after *Beadica*, 'fairness and reasonableness do not qualify as free-standing requirements'. However, he went on to refuse enforcement of the exemption clause on the basis that it flouted the values of fairness, reasonableness and justice and, further, that it offended human dignity, the achievement of equality, the advancement of human rights, the rule of law and the principle of good faith. He did not reason his way towards these conclusions (i.e., he did not explain *why* the clauses offended these values), which was an unfortunate aspect of the judgment that need not detain us here. I wish simply to draw attention to two features of his judgment.

Firstly, Mathopo J's loose formulation of the *Barkhuizen* test exemplifies an approach that is common in the case law.[475] Ngcobo J's two-leg test made no mention of good faith, the advancement of human rights or the rule of law. Wheeling out a sprawling list of values, and then applying them to a contract (without even saying *why* the contract at hand offends them) cannot be the way forward in this area of the law. The approach appears to conflate the values which inform the development of public policy *at a general level* with the *specific* values applied as part of the *Barkhuizen* test. Arguably, Mathopo J did not actually apply the *Barkhuizen* test at all. Secondly, one might wonder whether his direct application of a number of abstract values to the clause at hand contradicted his statement that 'fairness and reasonableness do not qualify as free-standing requirements'. Drawing on my own analysis in 4.2 above, I will argue that we need not view this as a contradiction. However, I will return to this question after considering the *Fujitsu* majority's treatment of *Barkhuizen*, as both judgments give rise to the same concern.

Zondo CJ, writing for the majority, quoted extensively from *Barkhuizen*, which included comprehensive coverage of both legs of the *Barkhuizen* test. I explained above why lengthy quotations from *Barkhuizen* do little to solve its remaining uncertainties. After one lengthy quote, and in applying the first leg of the test, Zondo CJ stated: 'Applying the approach outlined by this Court in *Barkhuizen*, I would say that there is nothing unfair or unreasonable about the terms of clause 17. On the contrary, the terms of clause 17 are very fair to both parties.'[476] Zondo CJ then went on to explain why the enforcement of the clause was fair in the circumstances. His reasoning turned chiefly on Fujitsu's absence of an explanation for its non-compliance with clause 17.[477] By contrast with Mathopo J's extensive list of values, when Zondo CJ applied the *Barkhuizen* test, he focused more squarely on the values mentioned in it, namely, fairness and reasonableness. Moreover, he reasoned his way to his conclusions regarding these values (at least when applying the second leg), rather than simply citing them as self-evident bases for his decision.

I asked earlier whether Mathopo J's statement that 'fairness and reasonableness do not qualify as free-standing requirements' was consistent with his eventual direct application of these values. Both the

[475] See 6.3 above.
[476] *Fujitsu* supra note 468 para 122.
[477] Ibid para 123 (emphasis added).

majority and minority judgments directly applied various abstract values to the clause at hand without first applying a constitutional limitation analysis or indeed any other type of threshold test. In considering whether the Court had jurisdiction, Zondo CJ said that 'a contention that an agreement or a clause in an agreement is contrary to public policy raises a constitutional issue'.[478] If that was also intended to serve as the trigger condition for applying the *Barkhuizen* test, *any* public policy-based challenge to a contract would suffice. One is left with the impression that there are no meaningful triggering conditions, which raises the question whether the *Beadica* judgment is being overlooked. Unless the *Barkhuizen* test is applied after meeting some type of prior threshold, *Beadica*'s finding that these values cannot be applied as stand-alone grounds to override contracts or refuse to enforce them would be contradicted and eroded. The two judgments can be saved from this contradiction only if we assume that both judgments implicitly accepted that a constitutional threshold had indeed been met. It is unfortunate that neither judgment made these conditions explicit nor attempted to delineate the conditions that trigger the application of the *Barkhuizen* test. This ongoing practice threatens to dilute or even erase the core finding of *Beadica* and it invites confusion and uncertainty, as reflected in recent High Court judgments.[479] Moreover, neither of the judgments in *Fujitsu* contributed towards clarifying the proper formulation and methodology applicable to the *Barkhuizen* test.

6.6 *Conclusion: Findings of this thesis and the substantive trajectory of South African contract law post-Beadica*

This chapter has made a number of proposals in relation to questions that I think remain unresolved in relation to the modern law of public policy. I would now like to take stock and summarise some of the more definite theses that I developed in relation to *Beadica* and its relationship to the Supreme Court of Appeal's post-constitutional jurisprudence. I will also explain and reinforce why I think that the implications and consequences of the Constitutional Court's judgment are more nuanced than one might initially think.

In *Beadica*, the Constitutional Court ultimately supported the centuries-old position in South African contract law according to which the mere substantive *inter partes* unreasonableness of a voluntarily struck bargain is not by itself sufficient to justify a judicial override. Self-standing equitable overrides form no part of South African law, including under the public policy doctrine. For the reasons given earlier, I welcome this finding. However, I think it would be a mistake to locate in the *Beadica* majority judgment a wholesale acceptance of the various doctrinal and normative ideas that informed the Supreme Court of Appeal's approach to this issue pre-*Bredenkamp* (especially in relation to the *Afrox* and *SAFCOL* decisions). Although the Supreme Court of Appeal had also consistently rejected free-

[478] Ibid para 95.

[479] See the 2022 High Court judgment in *Wyno Construction* supra note 437, in which the Court (at para 16) applied the *Barkhuizen* test without considering whether any constitutional implication was at stake, and simply asked whether the objective of the contract was to 'prejudice unfairly or unjustly or unreasonably the other party'. See also *Ullman Sails* supra note 437, in which the High Court also (at para 25) made no mention of a constitutional threshold needing to be met as a precursor to applying the *Barkhuizen* test.

standing equitable overrides, *Afrox* and *SAFCOL* went further, by holding, in addition, that judges do not ever directly apply abstract values as contractual overrides in the substantive law of contract. While *Brisley* may have been correct to make this finding in relation to good faith, the extension of the *Brisley* finding to abstract values more generally (as laid down in *Afrox* and *SAFCOL*) appeared to contradict the existing law applicable to agreements in restraint of trade and the courts' general discretion to refuse specific performance when the remedy would be productive of injustice. I argued that the *contingent* application of abstract values as contractual overrides was already a feature of the law of public policy at the time that *Afrox* and *SAFCOL* were decided.

After *Barkhuizen*, the apparent disjuncture between this legal reality and the Supreme Court of Appeal's approach was further accentuated. I agreed with Boonzaier that in *Bredenkamp*, and apparently in response to the clear role given to the direct application of fairness and reasonableness in the *Barkhuizen* test, the Supreme Court of Appeal changed tack, although the change was somewhat muted and unacknowledged. Instead of denying that fairness and reasonableness were ever directly applied as part of the *Barkhuizen* test, *Bredenkamp* held that these values do apply, provided that certain prior conditions are met. Although the *Bredenkamp* Court struggled to articulate with precision what those precise conditions were, in hindsight the judgment can be seen as sowing the seed for the reconciliation between the two appellate courts' jurisprudence, one ultimately brought to fruition by the Constitutional Court's judgment in *Beadica*.

However, given my 'no direct stand-alone application' reading of *Beadica*, I do not think the judgment represents a victory for 'rules-based jurisprudence'[480] in the rules versus standards debate in South African contract law, nor a victory for the position laid out in *Afrox* and *SAFCOL*. Contrary to Froneman J's interpretation, I argued that the majority accepted that abstract values *are* directly applied as part of South Africa's public policy doctrine in particular instances (including *Barkhuizen), contingent on other conditions being satisfied*. The *Beadica* majority's perhaps over-enthusiastic adoption of the concepts, terminology and justifications developed in the Supreme Court of Appeal's pre-*Bredenkamp* jurisprudence threatened to obscure this point. Nonetheless, on my reading of *Beadica*, the majority accepted the long-standing existence of value-based contractual overrides in South African contract law, most explicitly in relation to the application of the *Barkhuizen* test and the ongoing applicability of the public policy doctrine. It did not embrace a 'no direct application' approach to abstract values. Open-ended override standards remain a critical feature of South African contract law, particularly under the public policy doctrine.[481] The question our courts have always had to grapple with

[480] See Jaco Barnard-Naudé 'Form and Substance in the Constitutional Court: Whither Contract Law's Policy After Apartheid?' (2021) 138 *SALJ* 569 at 578.

[481] Even in *Bredenkamp* supra note 57 at para 39, Harms DP maintained that '[m]aking rules of law discretionary or subject to value judgments may be destructive of the rule of law'. Such a statement surely goes too far and seems to deny the extent to which some degree of judicial value judgment is inevitable whenever unrulified open-ended standards, such as the *Barkhuizen* test or the residual power of courts to strike down contracts on public policy grounds, are applied.

is not *whether* to maintain open-ended value norms that directly apply as contractual overrides; the questions have always rather been: *when, why* and *in what form*?

I agree with Schauer that the choice between rules and standards is a widespread and recurring question of legal methodology applicable to most areas of law, and one which is less tied to particular normative or political worldviews than some scholars have argued. The rules-standard debate in contract law has on occasion been reduced to a clash between those who seek to promote individualism, liberalism and laissez-faire economics (goals supposedly served most appropriately by rules) and those with a concern for collectivism, fairness and altruism (who are supposedly attracted to standards).[482] In my view, for the reasons given in 1.4, this is too simple. Both rules and standards can be deployed as tools in the service of almost any normative end and the choice between them is pervasive across most areas of the law.[483] On my reading of *Beadica,* the Constitutional Court moved beyond this somewhat crude dichotomy. The Court rejected a totally unhinged and free-standing equitable override. However, although the Court emphasised the importance of legal certainty, it did not deny the ongoing existence and importance of open-ended override standards under the public policy doctrine. The *Barkhuizen* test, viewed as its own discrete head of public policy, is itself currently a very broad override standard that requires our courts to apply value concepts directly to contracts challenged on direct constitutional grounds.[484] *Beadica,* in my view, should not be understood as meaning that 'the rules position should retain its privileged position in a constitutional era that values standards'.[485]

Whether the *Barkhuizen* standard is 'rulified' over time, leading to greater predictability in its application, remains to be seen. Such a process would be assisted, I argued, if our courts were to clarify the precise trigger conditions for *Barkhuizen* and settle on a clearer formulation of both legs of the test. The Court's judgments in *Beadica*, *Pridwin* and *Fujitsu* did little to further this cause, and in various ways contributed to further uncertainty. Nonetheless, *Barkhuizen* remains, in my view, a crucial and far-reaching judgment with great potential to further the constitutionalisation of contract law. *Barkhuizen* rightly sought to ensure that a heightened level of judicial scrutiny is applied to contracts that threaten to impinge on constitutional rights. This reflected an intention to take constitutional rights seriously in the horizontal context. *Beadica's* denial of direct stand-alone value overrides should not be read as nullifying this crucial head of public policy, whose ultimate fruits are hopefully still to be fully realised,

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[482] See, for example, Kennedy op cit note 34; Alfred Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 44; and Jaco Barnard-Naudé op cit note 480 at 577–80.
[483] In this respect I support the views of Schauer, set out at 1.4.
[484] In this respect, and for all the reasons given in this thesis, I disagree with Barnard-Naudé's suggestion at op cit note 480 at 585-9 that the majority's approach should be read, in the final analysis, as 'steeped in the domination of the rules-based approach in our law of contract' (at 589) or amounting to 'a decided rejection of … the standards-based approach circumscribed in the Constitutional Court's own judgment in *Barkhuizen*'. Nor do I agree with his statement (at 590) that the majority's reference to the need to develop 'clear and ascertainable rules and doctrines' meant that 'the court in effect translated the *standard* of public policy as expounded in *Barkhuizen* into a rule in and of itself'. That being said, I agree with Barnard-Naudé that the majority could and should have been much clearer on this point, as alluded to in 5.11 above.
[485] Ibid at 591.

and which may yet develop into a more predictable and sophisticated area of law over time. The *Barkhuizen* test still has great dynamic potential but arguably remains in its infancy.

Furthermore, whereas many sensed in the Supreme Court of Appeal's early invocation of the 'indirect' application of abstract values a possible attempt to subdue the dynamic power of abstract values on the basis of a commitment to certainty and an aversion to judicial value judgments,[486] I argued that this was never the intention of writers such as Hutchison or Lubbe and Murray, who advocated instead that good faith and other values should be given definite content by the courts and *actively drive* developments in the substantive law of contract. It is noteworthy that the *Beadica* Court's approach to indirect application of values appeared to be in line with this type of approach. The Court firstly placed less emphasis on the 'degree of restraint' to be exercised by our courts when applying the public policy doctrine in novel cases.[487] It also emphasised that abstract values 'should be used creatively by courts to draw normative impetus and develop new doctrines that address deficiencies in the law of contract'[488] and courts should continue to 'develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair'.[489] The majority also affirmed that 'courts must not lose sight of the transformative mandate of our Constitution'.[490] Our courts have always retained the power to develop the common law to adjust to changing social conditions and *Beadica* has given them further licence to draw freely on the Constitution, as well as values such as good faith and fairness, to fashion new contract law doctrines when the existing law is deficient in some respect. The active, dynamic engagement of these values was emphasised by the Court and I think it would be a mistake to view this as mere lip service.[491]

Taking this injunction seriously will require substantive and creative normative reasoning on the part of both practitioners and judges and it could lead to wide-ranging developments in our law. In this regard, the more definite the content that our courts can give to values such as good faith,[492] the more likely that these values can be used to drive common law developments on a principled and rigorous basis. Whether a newly developed legal norm should fall more towards the rule or standards end of the spectrum should remain an open and context-dependent question.

The public policy doctrine will likely continue to be a central peg on which further equity-based developments to contract law will be hung. Even if it does not permit the application of free-standing equitable overrides, it remains a broad equitable standard that continues to operate 'at large', in the various senses described in this thesis, and its established heads will also continue to evolve. When faced

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[486] See, for example, Bhana & Pieterse op cit note 239 at 892.
[487] *Beadica CC* supra note 2 para 90.
[488] Ibid para 75.
[489] Ibid para 81.
[490] Ibid para 74.
[491] For a contrasting interpretation of the majority judgment, see Jaco Barnard-Naudé op cit note 480 at 584–97.
[492] For a recent clarion call for more concrete content to be given to good faith with renewed vigour, post-*Beadica*, and by using comparative law techniques, see Du Bois 'Developing Good Faith' op cit note 177 at 227–39, 243–50.

with public policy challenges in hard or novel cases, our courts will need to continue to balance the competing interests of both contracting parties and the broader public, and this will call for substantive evaluative reasoning.

Further heads of public policy are likely to emerge over time. But this need not simply be a matter of unrestrained judicial fancy: a number of vital constraints should continue to inform judicial reasoning, as has always been the case. Firstly, a common thread emphasised in this thesis is the need for our courts to reason well when they develop and apply the law. As referred to above, this partly requires them to give concrete content to evaluative concepts so that a basis is laid for more principled and rigorous application of these concepts when they are applied directly *or* indirectly. Value concepts can be dangerous if they are employed loosely or cited as self-evident bases for legal conclusions. Secondly, the deeply ingrained common law principle of incremental, gradual development of the law should not lightly be abandoned, as the majority in *Beadica* acknowledged.[493] Finally, as Du Bois aptly puts it, judicial discretion never exists 'in a vacuum' but is rather always exercised 'within a network of other legal norms which may control the exercise of that discretion'.[494] In this regard, the most important lodestar in the South African legal context will remain the Constitution. Its rights and fundamental values should continue to play a central role in guiding future developments to the law of contract, including developments under the public policy doctrine.

[493] See *Beadica CC* supra note 2 para 76, where Theron J held: 'In line with this Court's repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require.'
[494] Du Bois 'Law' op cit note 23 at 29.

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