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Beneath the burning issue of Beadica: public policy and context astride the corporate veil

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Acknowledgement

In his introduction to the *Law of Obligations* Reinhard Zimmerman wrote that the Roman law can easily seem a 'shoreless ocean'. During my brief exploration of its depths I have found this to be profoundly true. Only the inestimable work of writers like Zimmerman and Hutchison, amongst others, have allowed me to avoid drowning. Those closest to me have made the waters all the sweeter. Truly, I stand on the shoulders of giants.

Andrew van Wijk

15 March 2021

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Abstract

The metaphors used when speaking of equity are rather colourful. One reads, amused, of the 'burning issue', the 'shibboleth' and the 'sacred cow'. But these metaphors, used as they are in a discipline which tends away from the dramatic in its everyday formulations, only lend more emphasis to the gravity of the quandary. A widening gap between views on the proper method for the judicial control of contract, be it a balanced public policy or unfettered equity, caused true discordance between the Supreme Court of Appeal and the Constitutional Court, our two highest courts.

In *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) the Constitutional Court largely settled matters when it came down on the side of public policy. This no doubt caused surprise in some quarters, given its *dicta* in earlier cases. Nevertheless it settled the question of which legal device was to be used. Public policy is to have sole mandate and the 'burning issue' was, apparently, doused.

As to the nature of this legal device, it is a truism that the content of public policy changes with the times, but in the constitutional republic that South Africa is today the Constitution is an unassailable source of its content and values. This makes our interpretation of what it demands in the contractual context of huge import. The tension meant that instead of the cut and thrust of hard precedent, cases were largely evaluated for their tendency to reflect the increasing public facet to this most cloistered sanctum of private law.

Brought back to the challenge in *Beadica*, this study traces in Chapters II and II something that went largely unnoticed in the shadow of the contract tectonics then on the move: the historical antecedents and theoretical underpinnings of the public interest aspect of public policy had culminated in a tension with separate legal personality. In *Beadica* the parties were juristic persons yet claimed the benefit of historical, substantive equality in their contractual affairs. This claim was weighed but found wanting in the Constitutional Court - but it is this ember, the implications of the corporate veil being lifted in the evaluation of equality, that represents, if not something new, then the confirmation of what some have long argued for - or suspected. Chapter IV accordingly argues

that *Beadica* is a confirmation of the imperative of substantive equality in the contractual context, albeit that the bar has been set very high in light of the dangers. Chapter V briefly explores the adjacent legal routes by which similar outcomes could be reached before reflecting on the general historical treatment that is the bedrock of this piece.

I INTRODUCTION

Background

Dale Hutchison described the role of fairness in the enforcement of contracts as a 'burning issue'. The issue, more specifically, was to what extent a court in our constitutional era can refuse to enforce a term which is otherwise good in law - and on what grounds.[1] The heat had been rising for some time. The traditional view of contract is that the varied results of *private* contractual autonomy, freely exercised, must triumph against a desire to balm the harshness that might follow - *pacta sunt servanda*.[2] Our Constitution,[3] the supreme law, conversely enjoins the law to have a higher regard to fairness and equity because it rearranged the values, the *grundnorm*, upon which the law rests.[4]

A long line of cases since the dual statements on good faith by the Supreme Court of Appeal ('SCA') in *Brisley v Drotsky*[5] and *Afrox Healthcare Bpk v Strydom*[6] has kept the issue very much alive. The SCA hewed closer to the approach which appears so clearly in *Sasfin (Pty) Ltd v Beukes*[7]: that disallowing enforcement could only obtain where that enforcement would be against public policy, and this only where the harm was unconscionable. The Constitutional Court placed a far greater, if not consistent, premium on good faith and concepts

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[1] Dale Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99 at 99-100.
[2] Ibid at 100. 'Agreements must be honoured.'
[3] Constitution of the Republic of South Africa, 1996; the so-called 'Final Constitution' - (the 'Constitution').
[4] *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) paras 15-16, 32-35 ('*Beadica (CCT)*').
[5] 2002 (4) SA 1 (SCA).
[6] 2002 (6) SA 21 (SCA).
[7] 1989 (1) SA 1 (A).

like substantive justice, reasonableness and *ubuntu*.[8] This distance between the courts, real or perceived, had long gone unresolved. Outlier cases such as *Botha v Rich*, widely disparate, had begun to mount.[9] This stoked the fires higher.

In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[10] the Western Cape High Court granted an order disallowing the exercise of a landlord's valid contractual rights. Made in the context of an empowerment transaction, the order was made explicitly on the ground of 'disproportionality' informed by *ubuntu,* fairness and equality.[11] At last, conflagration.

This case drew my attention from the outset because of an interest in the then on-going fairness quandary and the various issues of law touched upon by the judgment. Understandably, many in academia and practice wrote on the *Beadica* saga and called for clarity by the apex court.[12] If this study were written two years ago it would no doubt be cast in the same mould.

In any event, to the benefit of the country and our law of contract the apex court has, finally, given clarity on the matter. A majority of the Constitutional court held that the approach laid down

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[8] Note that 'good faith' and 'equity' in our tradition often run together terminologically, to the extent that Bhana and Meerkotter lead with a disclaimer that these are used interchangeably. Deeksha Bhana & Anmari Meerkotter 'The Impact of the Constitution on the Common Law on Contract: *Botha v Rich NO*' (2015) 132.3 *SALJ* 494 at 494. A similar approach will be followed due to the common blurring in the literature on the subject, unless the context indicates otherwise.
[9] *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC).
[10] 2018 (1) SA 549 (WCC), ('*Beadica (WCC)*').
[11] Ibid para 35.
[12] For example: Andrew Hutchison 'Good faith in contract: a uniquely South African perspective' (2019) 1(1) *Journal of Commonwealth Law* 227 at 246-7; Jordan Dias 'Trustees for the Time Being of the Oregon Trust v Beadica 231 CC and Others' *Schindlers* 10 June 2019, available at www.schindlers.co.za/2019/trustees-for-the-time-being-of-the-oregon
-trust-v-beadica-231-cc-and-others-74-2018-2019-zasca-23-28-march-2019/, accessed 1 March 2021.

in its first word on contract, *Barkhuizen v Napier*,[13] is indeed the correct one. Public policy is the only ground upon which a court may disallow the enforcement of a valid term but within this basket lies both the familiar sanctity of contract, but also the new 'equals' of good faith, *ubuntu* and reasonableness.[14]

This binding ruling settles the vexed issue of the generally applicable test, though the specifics will have to be ironed out in a new series of cases. The proper place of good faith, of *ubuntu* and of fairness is now beyond doubt. They are not freestanding principles but form part of the greater composite, complex whole that we term public policy.

Public policy and the corporate veil

But embers remain, strewn within the ashes. There is one specific aspect which seemed to receive scant discussion at all levels while the *Beadica* dispute wound its way up the court system - the corporate veil over the *Beadica* entities that launched the application in the court *a quo*. Though these parties were *companies* with separate legal personalities, their argument that an adverse result would have deleterious effects on black economic empowerment - to wit, equality - was assessed on its *merits*. The fact that the parties were juristic persons 'without a soul to damn, a body to kick'[15] or perhaps 'a race to see' seemed not to factor at all. Granted, it is understandable, perhaps, that it went unremarked upon while fairness was having its day in court.

[13] 2007 (5) SA 323 (CC).
[14] *Beadica (CCT)* supra note 4.
[15] Lord Chancellor Thurlow as quoted in John Poynder *Literary Extracts* (1844), vol. 1, p. 268.

The victor of this hearing, public policy, has traditionally been cast as something akin to the public interest as a whole[16] but the *Beadica* saga casts doubt on the continued relevance of even this simple formulation. Under the Constitution what benefit, or harm, to the public means, and whether strictly the public and not the party should centre, have changed.

This is nowhere more apparent than in the judgments of the Western Cape High Court and Constitutional Court, whose formulations of public policy explicitly include the social equality implications of corporate contractual relations. In doing this they implicitly engaged the interface of shareholders or directors' race[17] - a social reality - and separate legal personality ('SLP') - a legal fiction.[18]

Fiction or otherwise, today there exist firms far beyond the imagining of a merchant factor in the Carthage or Rome of antiquity. These are increasing in both size and penetration into our lives, aided in part by the efficiency and risk mitigation made possible by their separate personality in law.[19] The gains of this legal fig leaf have on balance been great and the economic credentials of SLP are well established.[20] The company structure is integral to the formal economy in our country and is present in every sector. It is a fiction made very much real by effect.

Similarly, race in South Africa is a tangible reality. It was and is the main focus of numerous pieces of legislation, both historical and current. It is incorporated by these statutes into the procurement, employment and development decisions of both the state and certain

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[16] *Sasfin* supra note 7 at 7H-8D.
[17] Or, 'previous disadvantage', used interchangeably.
[18] The SCA in *Trustees for the time being of Oregon Trust v Beadica 231 CC and Others* 2019 (4) SA 517 (SCA), ('*Beadica (SCA)*'), avoided this entanglement. This is discussed in Chapter IV below.
[19] Madala J in *S v Coetzee* 1997 1 SACR 379 (CC) at 430H.
[20] Katsuhito Iwai 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance.' (1999) 47 *American Journal of Comparative Law* 583 at 583-90.

parts of the private sector. In our country, it plays a role in commercial life *by law*, both historical and contemporary.

Quixotically, given these two realities, the conventional view is that a company has no race.[21] Yet, where the exercise of a contractual term's validity against public policy is challenged it is of necessity the context and circumstances of that exercise that must be evaluated for public policy considerations.[22] While it is established that the racial identity of a company's ownership is relevant when specifically made so by legislation - by the Broad-based Black Economic Empowerment Act[23] (the 'B-BBEE Act') for instance - it is as yet unanswered whether race may *per se* be a factor in the public policy evaluation.

The question that logically follows asks the extent to which public policy's scope extends to the identities to be found beyond the veil. It is not an idle one. In *Beadica* it weighed heavily with the court *a quo* that the contract was in furtherance of a transformational agenda albeit that the separate legal identity of the companies seemed not to signal at all. Considering that nothing in black letter law allowed the court to lift the veil without more, it seemed to be the general transformational and racial *grundnorm* of both the Constitution and law that weighed heavily. The Constitutional court, which ultimately dismissed the companies' suit, did not specifically reject the latter approach and indeed it loomed large in the *obiter* of Victor AJ's dissent.

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[21] This view, expressed in *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 550, has gone on to be repeated as principle and is the focus of Chapter III, below.
[22] *Beadica (CCT)* supra note 4 para 37.
[23] 53 of 2003.

What questions, and why?

The questions at the heart of this dissertation, then, are: what role, if any, may race play in this public policy evaluation; and, to what extent may the racial identity of the individuals behind the corporate veil be taken into account?

The study is of necessity focused on the tensioned interplay between companies' separate legal personality and contract's public policy considerations. Self-evidently, determining when the identity of a company's members or directors may be of relevance in contract implicates central principles in both company and contract law. These will have to be traced from both ends to extract a coherent view of the *Beadica* saga's implications.

In our company law the sanctity of SLP and the mechanisms by which it may be derogated from are the foundation of all that follows.[24] Though unmentioned, there is in fact a sparse but storied jurisprudence that is of direct relevance even to the specific problem of the veil and the *identities* behind it.[25] It should not be skirted as was done in the *Beadica* saga - ignoring it takes us no further.

An 'equality impact challenge' which seeks to centre equality and identity in the public policy evaluation puts the law of contract at direct odds with the principle of SLP where a company is involved. Public policy, its history, and the tendency of our courts in its application are relevant to the judging of this contest. This is especially so because, as will be submitted, the public policy evaluation of the majority in *Beadica* did not exclude the possibility of

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[24] Rehana Cassim 'The legal concept of a company' in Farouk Cassim (ed) *Contemporary Company Law* 2nd ed (2012) at 30ff.

[25] See again footnote 20.

such a challenge but rather rejected its being decisive based on the strength of the case before it.

Considering the troubled racial-, and chequered corporate history of our country it is undesirable that were such a case to be argued again that a court be faced with having to disentangle this complex interface without the benefit of focused academic discussion.

Aims

Succinctly, the aims of this minor dissertation are to: identify and clarify the role that the parties' identity as part of the contractual context may play in any public policy evaluation whereby a court may refuse to enforce an otherwise good contract term; discuss the effect of the separate legal personality of company structures on any such inclusion in the context able to be considered; evaluate the treatment of what is allowable in this regard under South African law; and briefly place it into the broader legal context.

Scope, structure and method

Because of the specific point intended and the historical background needed to buttress it, this piece can neither be an in-depth discussion of the potential impact of empowerment legislation on private contracts,[26] nor step into the mirror-world of contracting in the public sphere.[27] It will by its nature be a desktop traversal and contrast of the jurisprudence and precedent on good faith, public policy, *ubuntu* against the theories and doctrines relating to the corporate veil.

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[26] Such as the B-BBEE Act.

[27] The distinction is well explained at Alistair Price and Andrew Hutchison 'Judicial Review Of Exercises Of Contractual Power: South Africa's Divergence From The Common Law Tradition" (2015) 79(4) *Rabel Journal of Comparative and International Private Law* 822 at 825-7.

Chapter II will be a high-level overview of the law of contract *until* the *Beadica* saga but will delve into the thread of development that led thereto. Chapter III will be a detailed study of separate legal personality and veil lifting while Chapter IV will be a discussion of the *Beadica* saga, in which the conclusions and 'predictions' in the preceding two chapters are brought together. In Chapter V a brief *semble* based on the preceding chapters is followed by a placing of the discussion in context, there being other alternatives for an equality impact challenge than one rooted in public policy.

II CONTRACT AND PUBLIC POLICY

Introductory comments

Before *Beadica*[28] there were arguably two competing strands of thought on how values such as fairness, *ubuntu* or good faith were to operate. A gross oversimplification of these two strands is that one was 'for' fairness as a freestanding principle in our law of contract while the other was 'against'. Because of precedent our highest courts' disparate judgments and *dicta* prior to *Beadica* on this 'burning issue' made a lengthy discussion of the 'fairness' cases necessary for any principled argument on fairness in contract.[29] Indeed, many dissertations[30], judgments[31] and journal articles[32] include fine-toothed traversals of the jurisprudence on this point as the prelude to the substance of their argument - whether for or against.

As noted previously, the majority judgment in *Beadica* puts the fundamental aspect of the debate to rest.[33] The core of the study that follows is, by contrast, rather a historical tracing of public policy's development in respect of both contractual impacts on the public interest and harshness *inter partes*. This chapter will accordingly not exhaustively retread the worn path down the long years of development except to highlight the points germane to the issues raised in the first chapter, or in passing.

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[28] Being the majority judgment of the Constitutional Court; *Beadica (CCT)* supra note 4 paras 1-104.

[29] George Devenish 'The doctrine of precedent in South Africa.' (2007) 28.1 *Obiter* 1 at 22.

[30] Keryn Layton-McCann *The role of good faith and fairness in contract law: where do we stand in South Africa, and what can be learnt from other jurisdictions?* (Unpublished LLM thesis, University of Cape Town, 2017), for example.

[31] The dissent of Froneman J in *Beadica (CCT)* supra note 4 paras 105-203.

[32] Quite rightly, Hutchison op cit note 1, Price and Hutchison op cit note 27 and Bhana and Meerkotter op cit note 8 all grounded their arguments on the competing precedents in play, for example.

[33] The dissents themselves recognize this. See *Beadica (CCT)* supra note 4 paras 105, 204, respectively.

Prior to the Constitution

Exceptio doli

Our common law of contract was that of Holland, which broadly speaking was that of Rome.[34] In the Roman tradition, contracts of a certain stripe were treated as being absolute in effect - the *negotia stricti iuris*[35] - where even fraud offered no defence until the praetor's introduction of the *exceptio doli.*[36] This procedural device, to be raised by the defendant, created '...room for an exception when it is just...when the action is furnished by law but it is inequitable (in its application) against the defendant.'[37] In practice this device allowed a party to avoid- and the adjudicator to disallow- an action by the counterparty where in the circumstances it would be in bad faith.[38]

Certain other agreements such as sale, meanwhile, were regarded as *bonae fidei* contracts.[39] Good faith was a constitutive element of these

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[34] This fraught statement is made by way of introduction only. See generally George Devenish 'South Africa from pre-colonial times to democracy: A constitutional and jurisprudential odyssey.' (2005) *TSAR* 547 at 552-553 and Eduard Fagan 'Roman-Dutch Law in its South African Historical Context' in Reinhard Zimmermann & Danie Visser (eds) *Southern Cross, Civil Law and Common Law in South Africa* (1996) at 33-42.
[35] Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 663, cited in Hutchison op cit note 1 at 101.
[36] Zimmerman op cit note 35 at 663 fn 99.
[37] The quote is from *Donellus* in his *De Jure Civili (lib* 22 *cap* 6) Nr 4 on *Justinian* as translated by Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) 600A. This case concerned a dispute about the use as security of certain instruments, furnished as securities, for debts not originally secured by them.
[38] Hutchison op cit note 1 at 101. Albeit that per *The Digest of Justinian* (Mommsen and Krueger ed), *Watson's* translation vol 4 at 631, as quoted by Joubert JA in *Bank of Lisbon* supra note 37 at 600A, the precise formulation seems to have been that 'a person's fraud should not benefit him through the medium of the civil law but contrary to *natural equity*' (emphasis own), objective inequity as opposed to fraud or personal misconduct proper was the yardstick.
[39] Ibid at 101-102.

contracts, which were based on consent as in our modern formulation.[40] The equitable discretion introduced by the *exceptio* was therefore inherent in the *iudicia bonae fidei* - actions on good faith contracts.[41]

This body of Roman law came to be applied in Holland, mostly but not completely intact.[42] From the pivotal year of 1652 the prevailing blend of Roman, Canon and Germanic customary law was known as *Het Rooms Hollandsch Recht* - the Roman-Dutch Law.[43] By this time it was accepted that the traditional distinction between contracts *stricti iuris* and contracts *bonae fidei* had ceased to hold real meaning.[44]

Less clear was the precise working or even place, if any, of the *exceptio doli generalis*[45] given that good faith was supposed to operate without introduction.[46] Both the historical juridical survival of the *exceptio* and indeed the existence of *any* 'general clause' of good faith were dubious.[47] Jurists were unconvinced that a substantive equitable defence existed at all - *bona fides* itself was considered to be an underlying principle as opposed to a defence proper.[48] The prevailing view seems to have been that the *exceptio* did not grant Dutch courts an equitable discretion distinct from established rules.[49] This is a difference in kind, not degree, and a formulation quite apart from that discretion afforded the Roman

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[40] Ibid at 101-103. Zimmerman op cit note 35 at 674-675.
[41] Ibid. Zimmerman op cit note 35 at 667.
[42] Trite, but see generally *Bank of Lisbon* supra note 37 at 600D-F and the authorities cited therein by Joubert JA.
[43] See again footnote 34.
[44] Hutchison op cit note 1 at 102. Zimmerman op cit note 35 at 671.
[45] As it had come to be called in the *ius commune*. *Bank of Lisbon* supra note 37 at 594H.
[46] Hutchison op cit note 1 at 102.
[47] Ibid at 105. Zimmerman op cit note 35 at 547 and 674. In practice the *exceptio* seems to have faded from its prior significance seemingly as early as the High Middle Ages; Reinhard Zimmermann 'Good faith and equity' in Reinhard Zimmermann & Danie Visser (eds) *Southern Cross, Civil Law and Common Law in South Africa* (1996) at 218-219.
[48] *Bank of Lisbon* supra note 37 at 605I-605J and 606B-D: *Bona fides* as a freestanding ground was also rejected by Joubert JA. Zimmermann 'Good faith and equity' op cit note 47 at 254-255. This view would later be irreversibly entrenched, per Hutchison op cit note 1 at 110.
[49] Ibid at 606A-610B. Having read the judgment of Joubert JA this seems to be the correct position on this point. Hutchison op cit note 1 at 102-103.

adjudicator.[50] After a valiant attempt to manifest the *exceptio* in South Africa[51] it met its end under the pen of Joubert JA - *'requiescat in pace.'*[52]

Public policy

With the arrival of the English, came the influence of the law of England.[53] Speaking in the broadest of terms, good faith occupies a precarious position in their law and implied terms 'found' by virtue of reasonableness is the favourite ameliorator of the jurists of that country.[54] Also operative is a different legal concept, public policy, which has now become so important in our law as well.[55] While it existed in some respect in Roman and Roman-Dutch law as it does in English law, it did not occupy the same juridical niche there given the then place of the *exceptio doli*, *bona fides* and *bonos mores*.[56]

This is not to say that the Roman formulations were wholly dissimilar to the public policy more easily recognisable in modern times. No crude inquiry into fairness, without more, *dolus* against natural equity (in other

[50] Contrast the authorities, *inter alia* from Huber to Kotze JA, cited by Hutchison op cit note 1 at 102-103 with the description in Zimmerman op cit note 35 at 667-668.

[51] Ibid at 102-103; cf *inter alia* its arguable apogee in Botha J's judgment at 215B–C in *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) and what was ultimately its last stand in the dissent of Jansen JA in *Bank of Lisbon* supra note 37.

[52] *Bank of Lisbon* supra note 37 at 607B. This binding majority of the Appellate division 'buried' the *exceptio* - not without collateral damage however. *Bona fides* as a freestanding principle was also purportedly excluded by Joubert JA at 606D; cf also the unforeseen consequences for retention rights per Luanda Hawthorne 'Codex 8 26 (27) 1: The forgotten text.' (2014) 20.1 *Fundamina* 394 at 401-402.

[53] Trite but see generally Devenish op cit note 34 at 553-556, Zimmermann 'Good faith and equity' op cit note 47 at 222-224 and Philip Thomas 'Did the Supreme Court of the Colony of the Cape of Good Hope Have Equity Jurisdiction?' (2006) 12.1 *Fundamina* 251.

[54] Reinhard Zimmermann *Roman Law, Contemporary Law, European Law: the Civilian Tradition Today* (2004) at 177.

[55] With the demise of the *exceptio* it has taken on renewed urgency in the void that followed, as was perhaps inevitable; Zimmerman op cit note 35 at 677 said that the '*exceptio doli* may…haunt the courts and legal writers from its grave.'

[56] For this doctrine seemingly had its roots, originally, in the *bonos mores*, 'good morals', of the Roman law. Cf Zimmerman op cit note 35 at 706-709. Luanda Hawthorne 'Public policy: the origin of a general clause in the South African law of contract.' (2013) 19.2 *Fundamina* 300 at 310-311, 318-319.

words, the *exceptio*) entailed moral considerations but was not composed only of these.[57] The needs of trade and business, the cleverness by which the incentives of the market may be acquired, was recognized.[58] Still, it goes without saying that what may offend decency, *ordentlikheid*, was different to a spectator of the games than a citizen of a modern constitutional republic.

As regards the provenance of public policy in South Africa, while there are echoes of direct Roman-Dutch ancestry[59] the doctrine's *contours* come in the main via reliance on the English jurisprudence.[60] The line of cases in what is called the 'economic sphere' can be traced from the earlier restraint of trade matters.[61]

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[57] Zimmerman op cit note 35 at 668-9: the fascinating point is made that fraud employed against an alien or barbarian was unobjectionable.

[58] Zimmerman op cit note 35 at 256-257 and 668-670. This view is suitably convincing if not absolutely universal: cf John W. Baldwin 'The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries.' (1959) 49.4 *Transactions of the American Philosophical Society* 1 at 17-18.

[59] See generally the views of *inter alia* Wessels, canvassed by Hawthorne op cit note 56 at 304-7, 314. Cf *Elliott's Trustees v Elliott and His Curator AD Litem (1828-1849)* 3 Menzies 86, the earliest example of Roman heritage available to this writer. In *Elliott's Trustees* supra the counsel for the plaintiff, in that case the Attorney General in the Cape of Good Hope (!) as was seemingly a usage at the time, argued in 1845 that a transaction be voided on the ground of public policy - unsuccessfully in the event - with direct reference to the writings on contract of *Mantica*, a Jesuit scholar of the *ius commune* active in the 16th century.

[60] Ibid at 310-311 and Thomas op cit note 53 at 256-259. Contrast *Knox v Koch* (1883-1884) 2 SC 382, not touched on by the preceding sources, where De Villiers CJ as early as 1883 states clearly at 384 '...that the Court will not enforce a contract which in the opinion of the Court is clearly against public policy...' as a general principle of contract. The same judge, though trained in the English tradition, makes reference in *Edgcombe v Hodgson* (1902) 19 SC 224 at 226 to *Voet*, *Commentarius ad Pandectus* 2.14.16 (translated by *Gane*), which reads that 'all honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which might rebound to the public injury.'

[61] Ibid at 313-318, wherein she makes reference to the much-cited *Eastwood v Shepstone* 1902 TS 294. It is clear that neither Roman nor Roman-Dutch Law found issue with such covenants, given that *Voet* 2.14.16 was historically no obstacle. While Hawthorne is convincing she is, with respect, strongest where the English influence on the shape, focus and underpinnings of public policy is argued, as opposed to the *authority* for the doctrine in the traversed period. See John Saner SC *Agreements in Restraint of Trade in South African Law* (1999) at 3.4-3.5 and 6.3.1. Where the Roman-Dutch understanding of public policy did not place much weight on economic freedom's value to the public, the English did. The English position was that such contracts are *prima facie* unenforceable.

In the *locus classicus* of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[62], the court was faced with an attempt to defend such an agreement on the basis that the Roman-Dutch Law did not exclude contracts in restraint of trade on public policy grounds.[63] In light of the English doctrine on restraints of trade and the patent public interest[64] in the freedom of trade, Rabie CJ settled once and for all that public policy did indeed act to regulate such covenants albeit that it did not regard them as *prima facie* unenforceable, as in England.[65]

This reflected the shift of public policy from a narrower focus on morality or the state to increased cognizance of the rightness of contractual outcomes *vis-à-vis* the public interest, whether harsh *inter partes* or otherwise.[66] Nevertheless, it seems that the interests of the public were, given the specific context, thought of as mainly the '*botsende oorwegings*'[67] of contractual certainty on the one hand and productivity and economic freedom on the other, which interests would be at loggerheads in such covenants.[68]

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[62] 1984 (4) SA 874 (A)
[63] Ibid, per the submissions of Unterhalter SC.
[64] Ibid at 894B-C.
[65] Ibid at 894C-D, 897F-898D. Rabie CJ also relied on the many decisions from lower courts on this issue and ultimately the *norm* of the English doctrine but not its 'operation' *per se* was accepted. Saner SC *Agreements* op cit note 61 at 3.7-3.8.
[66] Ibid at 892I-893D. Cf *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767D-E for the explanation of the public interest by Nienaber JA. See Saner SC *Agreements* op cit 61 at 4.4 for the trend from *Magna Alloys* to *Basson*, and 6.3.1, where Lord Pearce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 325B is quoted as saying "Although the decided cases are almost invariably based on unreasonableness between the parties, it is *ultimately* on the grounds of public policy that the court will decline to enforce a restraint as being unreasonable between the parties." See finally Hawthorne op cit note 56 at 318-319, Alfred Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 SALJ 40 at 61 and the discussion in Gerhard Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) 1 *Stell LR* 7 at 10ff.
[67] *Basson* supra note 66 at 767D.
[68] Ibid. See also *Magna Alloys* supra note 62 at 893G-894F and *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) at 794D–E.

Public policy astride harshness

While very neat for the evaluation of contracts in restraint of trade, it is, arguably, not quite an equity discretion – a discretion like the one which the court had of course struck down in *Bank of Lisbon*.[69] The *exceptio* was gone and the proverbial sword of Damocles[70] hung over *bona fides* itself as a defence.[71] Doctrines aside, it is a truism that sometimes the laws of man fail and mercy must prevail. No surprise then that this apparent lack of a basis of liability in equity, of an ameliorative, did not go without censure.[72]

Contemporaneous with its burial of the *exceptio*[73] the Appellate Division was faced in *Sasfin*[74] with the cession *in securitatem debiti* by a medical professional of his earnings *in toto* and in perpetuity.[75] Its enforcement was disallowed in the court *a quo* on the ground of public policy.[76] With reliance on *Magna Alloys* and a plethora of other authorities - in which the English influence is in full flow[77] - the Appellate Division confirmed that the terms were unconscionable and therefore against public policy.[78]

If abused, arguably the long-term effect of such contracts would be an accumulation of workers both indentured and despondent, and *ergo* unproductive.[79] But an anaemic recourse to economic productivity was not the court's consideration of choice: the mast to which it nailed its

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[69] Supra note 36. See again footnote 52.
[70] Or perhaps the pen of Joubert JA?
[71] See again footnote 52.
[72] Hutchison op cit note 1 at 106-107 and the writers cited there at footnotes 39 and 40.
[73] *Bank of Lisbon* was delivered in 1988.
[74] Supra note 7.
[75] *Sasfin* supra at 6A-E, 13F-G.
[76] *Sasfin (Pty) Ltd v Beukes; Suid-Afrikaanse Vervoerdienste v Sasfin (Pty) Ltd* 1988 (1) SA 626 (W). There is exclusive reliance on authority of English provenance or influence. *Voet*, regrettably to a lover of history's heart, is not mentioned. While it was not their enforcement in the circumstances that was disallowed but the terms themselves that were struck down, this is of no present significance.
[77] *Sasfin* supra note 7 at 7H-9H.
[78] Ibid at 13I and 15E-H.
[79] See again footnote 68: productivity being of course in the public interest.

jurisprudential colours was equity.[80] 'Simple justice between man and man'[81] was asserted as the equitable concern relied on by the court in arriving at this extension of public policy to a general regulation of harsh contracts.[82]

Clearly, this was a step back from the stance hitherto cleaved to that public policy favoured the utmost sanctity of contract.[83] *Pacta sunt servanda*, previously the destination, was now 'merely' the point of departure.[84]

"Sunset clause"

A legal *cliché* of long standing, it was famously said that public policy is an 'unruly horse.'[85] It is by its nature something changeable - as the public changes, so will public policy.[86] A clear statement from the then jurisprudence on this point was a remark by Rabie CJ:

> '*...opvattings oor wat in die openbare belang is, of wat die openbare belang vereis, [is] nie altyd dieselfde...nie en [kan] van tyd tot tyd...verander...*'[87]

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[80] *Sasfin* supra at 15E-F. Hutchison op cit note 1 at 106-109. Equity here should be read to refer to that minimum level of equity which good faith requires.

[81] Ibid, quoting Stratford CJ in *Jajbhay v Cassim* 1939 AD 537. On researching the citation history of this phrase, it seems to have not been widely applied before *Sasfin* - with spare exceptions, cf *Krasner v Maleta* 1949 (2) SA 911 (T). Hutchison op cit note 1 at 106-9. See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 4th ed. (1978) 82-83 for a criticism of *Jajbhay*.

[82] Hutchison op cit note 1 at 106-107. Lubbe op cit note 66 at 17ff and 24-5 attempted to read this approach as an unsophisticated application of the public interest in the keeping of good faith in agreements.

[83] Ibid, also Zimmermann 'Good faith and equity' op cit note 47 at 258-9 and Cockrell op cit note 66 at 60-1. *Botha (now Griessel) & another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783A-B. The substance of this step is subject to one's reading of *Sasfin*, see footnote 80 above.

[84] *Finanscredit* supra note 83. Lubbe op cit note 66 at 13.

[85] Burroughs J in *Richardson* v *Mellish* (1824) 130 ER 294 at 303.

[86] A brief but illuminating excursus is to be found at 826G-828A in *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C).

[87] *Magna Alloys* supra note 62 at 891H-I. Additions own. He went on to conclude that accordingly no closed list can exist as classes of agreements might enter and exit this list with the ebb and flow of public opinion.

It of necessity reflects the basic assumptions and legal convictions of the polity.[88] While a long way from our previous untrammelled Arcadian 'survival of the fittest'[89] this new 'general clause' for the regulation of contractual harshness still bore the stamp of an instinctual economic Darwinism.[90] This was manifested in both 'substance'[91] and 'form'[92] even if a communitarian impulse is at the heart of a norm of this kind.[93] Ultimately, one that would obtain only where '*the element of public harm [is] manifest*.'[94]

This formulation was not long for the world. The late 1980s, the cradle of this jurisprudence, was also the funeral march of the National Party's grand one-party effort toward *Christelike Nasionalisme*.[95] Though not with quite the same dexterity, the drawing of the curtains on our *ancien régime* meant that so too were its convictions and norms to leave centre stage.

Constitution

Advent

Enter the Constitution. Following economic and political strife, the peace was won and a constitution was drafted with input from South Africans of all

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[88] See footnote 86 above.

[89] The profound and pinnacle statement by Hahlo in 1981 was that '*Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the marketplace.*' H.R. Hahlo 'Unfair Contract Terms in Civil-Law Systems' (1981) 98 *SALJ* 70 at 70.

[90] Luanda Hawthorne, 'The Principle of Equality in the Law of Contract' (1995) 58:2 *THRHR* 157 at 176.

[91] *Sasfin* supra note 7 at 9E: While extending its hold to harshness, Smalberger JA held that public policy still favoured the 'utmost freedom of contract'.

[92] Ibid at 9B: 'the power…should be exercised sparingly and only in the clearest of cases…'

[93] Cockrell op cit note 66 at 54, 55ff.

[94] *Finanscredit* supra note 83 at 783A, my emphasis.

[95] Devenish op cit note 34 at 564-7.

colours and creeds.[96] A document fundamentally apart from its past iterations,[97] it is a fully home-grown statement that provides for both legal and political equality between the races. It is a new *grundnorm*[98], supreme in law and based on human dignity, equality and social justice.[99] So thoroughly a rejection of the old is the new order that flying the pre-1994 flag is illegal.[100] In sum, it is a bridge[101] from the *verkrampte* to the *verligte* and a break from the repressive past.[102]

The bridge, however, is not without a toll. Equality is not achieved by declaring it so, and therefore the Constitution expressly aims for the *achievement* of equality.[103] Along with the late blooming of public policy our contract law in general was already not quite the individualistic monolith it had once been.[104] Still, the communitarian prescripts of the Constitution clearly heralded yet further change.[105]

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[96] Ibid 564-6.
[97] Ibid. See the candid admission of constitutional overhaul in the introductory remarks to the National Party's *Government's Proposals on a Charter of Fundamental Rights* (2 February 1993).
[98] Devenish op cit note 34 at 565-571, who refers here to Hans Kelsen *General Theory of Law and State* 117.
[99] Constitution ss 2 and 1, respectively.
[100] In *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* 2019 (10) BCLR 1245 (EqC) the gratuitous display of the '*Oranje, Blanje, Blou*' was declared unlawful.
[101] Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31.
[102] *S v Makwanyane* 1995 (3) SA 391 (CC) para 261.
[103] Constitution s 1.
[104] Cockrell op cit note 66 at 63.
[105] Doubtlessly painfully obvious to everyone at the time, but see generally the forecasts in C.F.C. van der Walt 'Contracts and Control over Freedom of Contract in a New South Africa' (1991) 54:3 *THRHR* 367 at 386-7 and Dennis M. Davis 'Social Power and Civil Rights: Towards a New Jurisprudence for a Future South Africa' (1991) 108 *SALJ* 453 at 467 as well as the reform effort contained in the South African Law Commission Report (Project 47) *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998).

Public policy made new

Even the primacy of public policy did not go unchallenged.[106] The Constitution led to excited theorizing on how contractual equity was to manifest, and various solutions in terms of both the common law and statute were put forward.[107] Unsurprisingly, an attempt was soon made to assert good faith as a concurrent mechanism for the judicial control of contracts.[108] A reading of *Sasfin* along these lines gained some small momentum but in the end did not go far.[109] In *Brisley v Drotsky*[110] and *Afrox Healthcare Bpk v Strydom*[111] public policy was reaffirmed as the only general ameliorative in contract and good faith as a defence in its own right was firmly rejected.[112] The SCA accepted Hutchison's place for good faith as,[113]

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[106] Suffice to say that what the death of the *exceptio* and the coming of the Constitution wrought was an 'urgent search' for alternatives, aptly described in Hutchison op cit note 1 at 106.

[107] A succinct 'petition' is to be found in Hawthorne 'Equality' op cit note 90 at 169-75. In searching for contractual equity Hawthorne moots: an expansion of the doctrines of undue influence and duress; a repurposing of the device of implied terms; an unabridged resurrection of *bona fides*; a statutory equity discretion; or, lastly, the imaginative refashioning of public policy into a new constitutional doctrine of inequality, itself.

[108] Concurrent with public policy. See the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 318ff which endorsed the view of Lubbe, expressed in Lubbe op cit note 66. Momentum gathered; see *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C), where *bona fides* was directly applied. Before this it seemed to have been relatively uncontroversial in matters of practical litigation that public policy was the sole choice. Regard may be had to the public policy challenge in *De Beer v Keyser* 2002 1 SA 827 (SCA), wherein good faith goes unmentioned by contrast.

[109] Hutchison op cit note 1 at 108-9 and the various cases cited there. Notable is *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) para 28, in which is spoken of the '…modern concept of the role of public policy, bona fides and contractual equity…'

[110] Supra note 5. The case concerned a non-variation clause, a font of litigation, as ever.

[111] Supra note 6. The question, succinctly, was 'Is 'n kontraktuele beding wat 'n hospitaal teen aanspreeklikheid vir die nalatigheid van sy verpleegpersoneel vrywaar, geldig en afdwingbaar?'

[112] *Brisley* supra note 5 paras 16-32. *Afrox* supra note 6 para 32.

[113] Ibid para 22. In *Brisley* Harms, Streicher and Brand JJA quote the formulation directly.

> '*not a principle which constitutes an independent free-floating basis for setting aside or not enforcing contractual principles, but [as] an underlying value that is given expression through existing rules of law.*'[114]

These cases also made explicit the new reality that the Constitution, and indeed both the rights and *values* it embraces, was now an authoritative source of public policy.[115] This approach was confirmed - in principle[116] - by the Constitutional Court in *Barkhuizen*[117] though in a dictum the majority raised concerns about the constitutional soundness of equity's seemingly limited place.[118] Fairness and reasonableness were raised higher than they seemed to be allowed in the preceding cases,[119] though alongside a reaffirmation of the place of *pacta sunt servanda*.[120]

This tension is apparent in the court's foregrounding in the evaluation of the reasons for breach or non-compliance, a logical mediator of a freer

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[114] Paraphrasing own. See Dale Hutchison "Non-variation clauses in contract: Any escape from the Shifren straightjacket" 2001 *SALJ* 720 at 743-4 for the origin of this influential phrase. This stance was affirmed once again in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) where an attempt at contractual equity via recourse to implied terms was similarly shot down for entailing much the same as a freestanding principle of good faith.

[115] See the minority concurrence of Cameron in *Brisley* supra note 5 para 91 and its acceptance by the full bench in *Afrox* supra note 6 para 18. Before, public policy was somewhat less ascertainable, if definitely of the opposite bent. See *Ismail v Ismail* 1983 (1) SA 1006 (A), where polygamous Muslim marriages were held contrary to public policy.

[116] If not detail. See Edwin Cameron and Leo Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 92 *Rabel Journal* 786 at 822. Here the approach of the apex court is considered to have been similar but more 'freewheeling' in its reasoning, in that it zealously emphasized equity alongside certainty in its public policy evaluation.

[117] Supra note 13 paras 28-30.

[118] Ibid para 82. Prophetically, it turned out.

[119] Ibid para 80, 84-6. This seemingly suggests that it is fairness or reasonableness *per se* but a better reading is that these were put forth in a self-limiting formulation and therefore conceptually indistinguishable from a public policy test that balances fairness and certainty. Para 60, for instance, reiterates that the unfairness must be *manifest*.

[120] Ibid paras 57, 72. In the former paragraph the majority recognizes the continuing place of *pacta sunt servanda* but in the latter expressly distances itself from the proposition that fairness, even within public policy, can never give rise to invalidity or unenforceability.

discretion.[121] While 'certainty' enjoyed a new, constitutional lease on life[122] *ubuntu* also made its (brief) debut in the contractual context.[123]

Subsequently, the SCA in *Bredenkamp and Others v Standard Bank of South Africa Ltd*[124] somewhat controversially read *Barkhuizen* to be *granularly*[125] congruent with the approach taken in *Brisley* and *Afrox*.[126] In doing this it seemed to incorrectly downplay the place of fairness.[127] A further nuance, the court emphasized that while public policy may largely be drawn from constitutional values this is not *exclusively* so - legality and commercial certainty are also relevant.[128] Continuity, of a sort, was maintained.[129]

Hereafter the Constitutional Court took a more robust line and in various *dicta* specifically placed *ubuntu* amongst the vanguard of public policy in contractual cases.[130] These *dicta* quickly took flight in the lower courts, where they were handled with varying degrees of discipline.[131]

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[121] Ibid paras 83-6.
[122] Ibid para 57: '*Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.*' The court went on to dismiss the appeal, the invocation of equity notwithstanding.
[123] Ibid para 51. Ngcobo J, for the majority, wrote that '*Public policy is informed by the concept of ubuntu.*' Given the contestation that has followed, this is a blessedly simple statement that can still not be gainsaid even now.
[124] 2010 (4) SA 468 (SCA), which concerned a client with a trade of dubious legality challenging the withdrawal of his banking services.
[125] Ibid paras 41-53. Cameron and Boonzaier op cit note 116 at 827-8 note that this seemed to restrict even the indirect application of fairness to constitutional complaints. They most helpfully canvass the academic ripostes, which were harsh.
[126] Supra notes 5 and 6, respectively. See again the preceding footnote, as well as Hutchison op cit note 1 at 115.
[127] *Bredenkamp* supra note 124 para 53 reads, '*In the light of my conclusion that fairness is not a free-standing requirement for the exercise of a contractual right it is strictly unnecessary to consider the facts relating to fairness...*' I use 'incorrect', for of course fairness is a factor in the public policy evaluation. *Barkhuizen* supra note 13 para 73 confirmed that '*...public policy imports the notions of fairness, justice and reasonableness.*'
[128] *Bredenkamp* supra note 124 para 39.
[129] See *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA), which continued the trend.
[130] See both the majority at paras 71-2 and minority at paras 23-4 in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).
[131] Hutchison op cit note 1 at 122-3 and the cases cited there, including the remarkable judgment of the Gauteng High Court in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ). Another egregious example of this

Hic sunt dracones[132]

The apogee came with the *enfant terrible*[133] of *Botha v Rich*[134] where the Constitutional Court disallowed an (otherwise valid) cancellation because it considered it to be a 'disproportionate penalty'.[135] The case concerned Ms Botha's attempted exercise of a statutory power in the context of a sale of immovable property *after* the adjacent contract had been purportedly (and validly) cancelled for material breach.[136] While at face value this is legally impossible[137] the court barred cancellation and allowed Ms Botha to exercise her (otherwise extinguished) right.[138]

With respect, this ruling may have done the law of contract much violence if left to rot.[139] In the rescuing thus necessary, some have read it as

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trend, albeit in the adjacent context of 'obligations' to negotiate in good faith, is *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* 2016 BIP 371 (GJ). At paras 57-8 the court *openly* prefers the (acknowledged) obiter of the Constitutional Court to a binding precedent of the SCA (also acknowledged).

[132] 'Here be dragons.' – a warning drawn from Malcom Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 at 568.

[133] Ibid at 117-20; 'almost cavalier'. Reactions have been mixed, to say the least. *Botha* is covered in detail for the incidental implications it holds for the public policy quandary that forms the core of this paper.

[134] Supra note 9.

[135] Ibid paras 50-1.

[136] Ibid para 2. Wallis op cit note 132 at 557. The contract was governed by the Alienation of Land Act 68 of 1981. Under sections 27 and 28 a purchaser by installment under a contract for the sale of land is entitled to demand and enforce transfer of the property once a certain threshold of payment had been reached. The purchaser had reached this threshold but only purported to exercise this power once in arrears and after the seller had cancelled for breach. The argument goes that *a priori* the contract must be extant, i.e. uncancelled, for the power to obtain.

[137] In reference to the preceding footnote, a bold but justifiable framing. For a further reason see Price and Hutchison op cit note 27 at 850 where it is similarly pointed out that the right to cancel is *distinct* from the penalty clause - the provision the court deemed to render the cancellation disproportionate. See also Bhana and Meerkotter op cit note 8 at 502-3, where the apparent application of the *exceptio non adimpleti contractus* to a *statutory* power is heavily critiqued.

[138] *Botha* supra note 9 para 2.

[139] Hutchison op cit note 1 at 120. Price and Hutchison op cit note 27 at 850 title their discussion of *Botha*, 'Cancellation of contracts for breach must be *fair*' (emphasis own) - although they do not let it go without question, as noted in the preceding footnotes. Wallis op cit note 132 at 554-7 is considerably less diplomatic.

a clumsy but largely faithful application of *Barkhuizen*[140] at worst, but the more defensible line is that followed by Boonzaier.[141]

It is not a universal view[142] but his criticism that the Constitutional Court[143] found relief in the relevant legislation's *underlying motive* rather than what may be called its 'express provisions' is persuasive.[144] Boonzaier read it as an approach to 'statute-adjacent' transactions that goes somewhat further with legislative-purposive discretion than previously done - in other words, that the court had in essence applied the *purpose* of the provision.[145]

Happily, this interpretation excises from the general law of contract a would-be, self-contained criterion of proportionality.[146] Still, *Botha* cannot be ignored.[147] As a ground, 'disproportionality' in *Botha* should rather be regarded as the granular outcome of the application of a principle holding that 'statute-adjacent' exercises of contractual power are subject to the legislative purpose contained in the accompanying enactments.[148] While Boonzaier describes it as a newly found principle of public policy[149] that the

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[140] See for instance Bhana & Meerkotter op cit note 8 at 507. Note however that they, although dyed in the wool communitarians, nonetheless expressed disquiet.
[141] Leo Boonzaier 'Rereading *Botha v Rich*' (2020) 137 SALJ 1.
[142] Bhana and Meerkotter op cit note 8 at 506-7. They note that it is reasonable to read *Botha* as having established a 'free-floating' fairness discretion. For support for this view see also Hanri Du Plessis 'Human dignity in the common law of contract: making sense of the Barkhuizen, Bredenkamp and Botha trilogy: the limited influence of African moral theory & law on the Constitution.' (2019) 9.1 *Constitutional Court Review* 409 at 438-441.
[143] A full bench, no less. Note that the Constitutional Court has itself 'clarified' *Botha*, but this will be fully discussed in Chapter IV where the *Beadica* saga is the singular concern.
[144] Boonzaier op cit note 141 at 7, 'undermine the legislative *purpose*', (emphasis own). Hutchison op cit note 1 at 117-20.
[145] Ibid at 7, 10. Another formulation is what is 'implied' by the statute, but these are not necessarily dissimilar.
[146] Ibid at 12. It is excised, or, in his words, '...*properly situated, its remarks interpreted contextually, and its proper precedential reach delineated with care.*'
[147] Justly called 'disturbing' or 'embarrassingly poor', but not ignored. Cf Hutchison op cit note 1 at 117, 119. The reader is referred again to Devenish op cit note 29.
[148] Boonzaier op cit note 141 at 10-12.
[149] Ibid at 12. For clarity his conclusion is quoted in its entirety:

> *'That [interpretation] yields a novel, but still narrow, rule, in which public policy is given content, unremarkably, by legislation. It might stand for a principle something like this:*

legislative purpose will be decisive, it is submitted that the rule may more appropriately be placed outside the bounds of public policy. Granted, the interests of the seller-counterparty were addressed to some degree (taken to indicate a policy consideration) but this is standard when evaluating cancellation.[150] Damningly, the normal discussion of what public policy requires is conspicuously absent.[151]

Ultimately whether it is a rule of public policy or not is neither here nor there, as such a rule applied in a manner consistent with *Botha* (i.e. in a public policy vacuum focusing only on the immediate legislative purpose) will operate identically, within public policy or no.

Ubuntu

Whatever the truth of *Botha*, the general trend of Constitutional jurisprudence on contract tends inexorably towards *ubuntu* rather than away from it.[152] What *ubuntu* demands is therefore of utmost importance and also of much difficulty in elucidation.[153] Views, understandably, vary.[154]

> > *A contractual term, or its enforcement, is contrary to public policy if it would strip a party of an accrued statutory right, the rationale for which justifies the restriction of the rights of the other party.*
>
> *Or it may support a broader principle:*
>
> > *A contractual term, or its enforcement, is contrary to public policy if it would thwart the purpose of a legislative provision.'*

[150] See *Louw and Others v Davids and Others* [2018] ZASCA 70 para 24 on the value judgment a court must make when deciding whether to acknowledge cancellation.

[151] *Botha* supra note 9 paras 50-1. While public policy is mentioned earlier, this is more by way of introduction. The court does not explicitly hold the cancellation to be against public policy, but faults it as invalid for disproportionality, which is cast more as a prerequisite than an exception, which public policy is. 'Certainty' does not appear in the judgment.

[152] It appears in the postamble to the Interim but not Final Constitution. In *Makwanyane* supra note 102 the concept appears in both the main judgment and no less than 4 concurrences and in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37 it is described as the Bill of Rights' 'underlying motif'. See generally Bhana & Meerkotter op cit note 8 at 504-5 and Price and Hutchison op cit note 27 at 841-3. A more complete listing of its use by the court is to be found in *Everfresh* supra note 130 at fn 44.

[153] Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1 *PER* 15 at 15-6. TW Bennett 'Ubuntu: an African Equity' (2011) 14.4 *PER* 30 at 30, 44-6. See also Sibusiso Radebe and Moses Phooko 'Ubuntu And The Law In South Africa: Exploring And Understanding The Substantive Content Of Ubuntu' (2017) 36(2) *South African Journal of Philosophy* 239 at

There is an understandable temptation to view *ubuntu* as simply the local analogue or translation of more readily recognizable concepts,[155] such as *bona fides* or human dignity of the Kantian bent.[156] Whatever the 'merits' of either value system, conceptually this temptation must be resisted as unserious.[157] *Ubuntu* cannot be hand waved as a parochial example of 'simple justice between man and man'. It does not only connote a *simple* justice.[158]

It is not the bare minimum duty individuals owe each other but rather greater.[159] One can say with some confidence that its focus is not on the atomized individual but on the community and that this non-individualism entails duties that may be owed by one and not another, or in differing amounts.[160] And the obligation owed - the *sacrifice*, really[161] - is what is required 'in the preservation and stability of the whole community'.[162]

239-40. For a high level philosophical treatise on the subject regard may be had to Leonhard Praeg 'An Answer to the Question: What Is [ubuntu]?' 27(4) *South African Journal of Philosophy* 367.

[154] See the differing views canvassed in Radebe and Phooko op cit note 153 at 239-44.

[155] For those trained in the Western legal canon.

[156] Du Plessis op cit note 142 at 420-22.

[157] Even an attempt at reconciling *ubuntu* with human dignity proceeds on the basis that it is a *new* conception thereof. See Thaddeus Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) *African Human Rights Law Journal* 532 at 541.

[158] Ibid. See its inclusion at the scale of national reconstruction in the postamble to the (Interim) Constitution of the Republic of South Africa Act 200 of 1993. In *Makanyane* supra, the meaning of *ubuntu* at the highest level of policy (capital punishment) was a core issue. Hutchison 'Good faith' op cit note 12 at 244-9.

[159] Du Plessis op cit note 142 at 420-422.

[160] Anathema to formal legal equality. See Devenish op cit note 34 at 548, Radebe and Phooko op cit note 153 at 244, Bennet op cit note 153 at 48 and, generally, G.M. Nkondo 'Ubuntu as a public policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies* 90. Having regard to Metz op cit note 157, this view is not universal.

[161] Nkondo op cit note 160 writes that, ' ...[*ubuntu* represents] the supreme value of society, the primacy of social or communal interests, obligations and duties over and above the rights of the individual...'.

[162] See again footnote 160 above. Not 'merely' human dignity, as perhaps intimated in *Makwanyane* supra note 102 para 229. See Praeg op cit note 153 at 380-2: *Ubuntu* may be different things, depending on the context - the point is made that in the criminal context reconciliation and forgiveness might win the day, while restoration or reparation are demanded in the economic context. Hutchison 'Good faith' op cit note 12 at 253-9. In considering this point the reader is referred to the preamble to the Promotion of National Unity and Reconciliation Act 34 of 1995, which reads '...the Constitution states that there is

It is trite that the most basic ethos of the Constitution is equality[163] and what the community has professed to 'require' in this regard is the '*achievement* of equality', sometimes called 'transformation'.[164] As noted, this cannot be equality in law only.[165] Even the more familiar terrain of public policy has always had, as the name might suggest, a more *public* scope than a seemingly narrower concept like good faith.[166] As in *Basson v Chilwan*[167], the public interest, quite separate from the situation *inter partes*, can indeed carry the day. *Ubuntu* cannot be substantive fairness *inter partes* only; the ideal of what can be termed 'substantive equality' requires both formal, legal equality and economic equality at the social scale.[168]

Ubuntu, equality and contract

Where a party has exhausted all other options and hung its hopes on an 'equality impact challenge', its contention is that allowing the contract to take its course would have unacceptable implications for substantive equality, or the achievement thereof. How, if at all, should such a recourse to equality, to *ubuntu*, be judged?

It is submitted that, conceptually, the *material* position of a given (previously disadvantaged) party may sit as a granular proxy for the public

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a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization...'

[163] Constitution s 1. *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) para 20. For a recent assertion see the dictum at para 66 of apex courts' unanimous judgment in *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* 2019 (5) SA 354 (CC), which reads in part that, '...[The] development of good faith and ubuntu in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power ...'

[164] Ibid. Constitution s 1(a). *Beadica (CCT)* supra note 4 para 74. Cameron and Boonzaier op cit note 116 at 792-3. See more generally *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paras 75-7.

[165] *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC) para 27.

[166] See again footnote 94.

[167] Supra note 66.

[168] Cf Bhana & Meerkotter op cit note 8 at 505.

interest in equality at societal scale, the link's scope depending on the circumstances.[169]

A greater link may be found where the fortunes of multitudes of the economically fragile majority are at stake (for instance, a commercial contract having grave implications for the Government Employees Pension Fund) or even where a few individuals (or one) are taken to stand as representatives for the whole (suppose a contract where the only previously disadvantaged players in a strategic industry are imperilled). These engage some consideration of the equality impact, at the very least. Conversely a weaker link might be found where the 'damage' is great but the proportion thereof falling on previously disadvantaged individuals is not dire, or the consequences for them truly trivial.

This idea sits well within *ubuntu*, which means that a person can only be a person through others.[170] The corollary would be that a people can only be such through *actual* persons: the idea being of course that for any to 'be', or be uplifted, through others, some of those others must actually be uplifted.[171]

The proposition is that the value judgment of public policy could arguably include an assessment of a contract's specific circumstances for its impact on a disadvantaged party (or parties) set amidst the context of the wider transformational injunction.[172] This is not a trump card as there are of course other competing public policy values such as formal equality before the law, *pacta sunt servanda* and so on - but there is at least a case to answer. With reference to the company law principles to be laid out in

[169] This public interest in equality being of course communitarian-oriented as seemingly demanded by a serious commitment to *ubuntu*.
[170] Mokgoro op cit note 153 at 16.
[171] Du Plessis op cit note 142 at 421.
[172] As done in a similar but not identical way in the *obiter* on transformation in *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction and Others* 2011 (6) SA 331 (GSJ) para 15.

Chapter III below, it will be shown in Chapter IV that this question has been resoundingly answered in the affirmative.[173]

[173] The position taken is that this is in fact what has happened in the *Beadica* saga.

III COMPANIES AND VEILS

The corporation

The corporate form has stood the test of time.[174] Yet for all its significance it is not without a chequered history.[175] While always being a commercial association in character, the legal face of the corporation has changed much over the long years of its evolution.[176] In the West it may be traced from the abortive start of the Roman *publicani*[177] through to the pre-industrial rekindling of the East-India Companies[178] and the last, final blooming amid the Industrial Revolution and its consequences.[179]

The separate legal personality thereof

Today, as multinationals wielding contracts of adhesion, these titans of industry have brought the barterer low. 'Company' has become synonymous with its contemporary features, separate legal personality ('SLP') and limited liability, though this was not always so.[180]

Ascribing SLP to a company means, broadly speaking, that it has a life of its own separate to that of its directors or shareholders; so-called

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[174] Iwai op cit note 20 at 588-9: they were present even in Assyria some forty centuries ago.
[175] Ibid at 583ff. This is something mentioned solely by way of introduction and historical interest.
[176] Ibid.
[177] Ibid at 588-9. Geoffrey Poitras & Frederick Willeboordse 'The societas publicanorum and corporate personality in Roman private law' (2019) 39 *Business History* 1 at 5ff.
[178] Dutch and English amongst others, albeit that there were earlier hints in the partnerships of medieval Italy. Iwai op cit note 20 at 589.
[179] Ibid.
[180] In fact these features were contested indeed. See the changing attitude toward the *publicani* per Poitras op cit note 177 and in England the opening of incorporation to all as (truly) late as 1844 via the Joint Stock Companies Act (1844) and the extension of limited liability by the Limited Liability Act (1855). For a fascinating historical account see B.C. Hunt *The Development of the Business Corporation in England, 1800–1867* (1936) chapters 5 and 6, but more specifically at 94-101 and 134ff.

perpetual succession.[181] It has its own discrete assets, liabilities, delicts, actions and omissions wholly distinct from its constituent shareholders or directors.[182] Economically, this status makes possible business organisations unshackled from the lifetimes of managers and owners as well as enabling the ever greater aggregation of capital - and risk.[183] Cumulatively, this allows for, and has led to, enterprise of gargantuan proportions.[184]

Legally, it was settled more than a century ago in the English *locus classicus* of *Salomon v Salomon & Co Ltd*[185] that a corporation is a juristic person decisively separate in law from its constituent natural persons. A trader managed to extract considerable resources from the insolvency of a company that constituted only himself, leading to understandable objection.[186] Due to its distinct personality, the creditors' attempt to 'pursue the man' failed.[187] Nearly a cliché now, the frustrated creditors alleged that the said Salomon & Co Ltd - being only one, implicated man - was a 'sham'.[188] The allegation, in the absence of fraud, received short shrift.[189]

This strict conceptual separation and its upholding even in circumstances that could seem to be unintuitive was decisively received into South Africa law. In *Dadoo*[190] the SLP of a company was upheld even against racialized laws aimed at preventing the very shareholders of that company from exercising the activities that the company itself had pursued, the court famously holding that '[SLP is] no merely artificial and technical thing, it is a thing of substance'.[191] Suffice to say that, for our purposes, SLP has always

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[181] Cassim op cit note 24 at 28-9; 41.
[182] Ibid.
[183] Ibid at 3.
[184] Iwai op cit note 20 at 590.
[185] [1897] AC 22 (HL).
[186] Ibid at 22-4.
[187] Ibid.
[188] Ibid at 25.
[189] Ibid at 22, 51-4.
[190] Supra note 21.
[191] Ibid at 550.

been trite in case law[192] and recognized in statute.[193] So much so that the Constitution now recognizes the entitlement of juristic persons to the Bill of Rights, where appropriate.[194]

'The veil'

For all its sacrosanct nature and high regard, SLP is not absolute. It is manifested in South Africa, as in many other jurisdictions, solely by way of statute.[195] The veil may be disregarded by a court when the principle is abused, in that its objects and lawful uses are subverted.[196] While not a closed list, this can (and perhaps typically does) refer to the use of SLP for fraud, alternatively when a company's controllers do not themselves respect SLP - the latter named 'instrumentality'.[197] Veil piercing can be distinguished from the 'direct' liability of directors, corporate statutory penalties, the rules of 'act' attribution, the instrumentality doctrine and the so-called quasi-partnerships.[198]

While granularly unsettled, the traditional view of veil piercing at common law was that the remedy is reserved to limited grounds only, and this in the absence of alternatives.[199] The burden of academic opinion holds, ironically, that it is academically burdensome to lucidly ascertain the grounds and rationales for veil piercing - especially given the many cases on the

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[192] For example: *Itzikowitz v ABSA Bank Ltd* 2016 4 SA 432 (SCA).
[193] Today the Companies Act 71 of 2008, yesterday the Companies Act 61 of 1973 and an age ago the Companies Act 46 of 1926. See 'Chapter 2: Formation, Administration and Dissolution of Companies' in Jacqueline Yeats (ed) *Commentary on the Companies Act of 2008* (2016) 64-7. In *Dadoo*'s case this was the Transvaal Companies Act 31 of 1909.
[194] Constitution s 8(4).
[195] The discussion is about incorporated bodies and not the common law *universitas*. Cf Yeats op cit note 193 at 2-70-71.
[196] Cassim op cit note 24 at 42.
[197] Yeats op cit note 193 at 2-166-7.
[198] Cassim op cit note 24 at 52-53. Yeats op cit note 193 at 2-163, 2-170 for the distinction.
[199] Ibid at 49-50. Yeats op cit note 193 at 2-166-74.

subject.[200] The most recent development is the Companies Act of 2008. A sea change, it introduced statutory veil piercing in respect of companies for the first time.[201] It did not however abrogate the common law, which it exists alongside.[202] Since then the trend in the cases has been to maintain the traditional high regard shown to SLP.[203] From all this may it be understood that SLP is not something to be ignored without the proper ritual and good cause, lest its benefits be lost.[204]

There is a further terminological wrinkle as regards the difference between 'veil *piercing*', being specifically the attribution of company liability to shareholders or directors, and 'veil *lifting*', which is broadly such derogation of SLP for any other legal purpose.[205] Veil piercing as opposed to lifting is in other words the *imputation* of existing activity or liability - by crude analogy, cession as opposed to novation.

Lifting the veil

Veil lifting, the focus of this chapter, is therefore something quite different indeed. It is not so much about the *abuse* of the corporate form so much as the legal conclusions to be drawn about either the company or shareholders in disregard of the veil.[206] In contrast to piercing, it is 'to have regard to the shareholding of a company for some legal purpose'.[207] The resultantly broad range of things which may require lifting the veil do not lend themselves to

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[200] Ibid at 42 - 43. Piet Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) at 86.
[201] Ibid at 57: notably these rules, which may be found at s 20(9) of the Companies Act, are arguably more permissive than the common law position.
[202] Ibid at 58. *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[203] Ibid at 49-50. See again footnote 192.
[204] *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 803-4.
[205] Cassim op cit note 24 at 46-7.
[206] Ibid.
[207] Ibid quoting Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769 at 779.

categorisation - they may include domicile, nationality, tax, restraints of trade or specific enactments.[208]

The classic example of a veil lifting case is to be found in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd*.[209] Cited therein and closer to home is a case that serves as a rather more colourful starting point, however. In *Netherlands South African Company v. Fischer*[210] the company sued Fischer for certain defamatory remarks made in a book he authored relating to its conduct during the war.[211] While registered in Amsterdam and having a shareholding composed nearly entirely of men of the Continent - thus neutral - it was nevertheless barred in its claim as having an enemy character for its material support to the Transvaal.[212] In this way its *actions* had imbued it with an enemy character, illustrating neatly the point that it was the policy rationale rather than any exclusive, specific indicator that was the true yardstick.[213]

By contrast, in *Daimler*[214] it was simply the identity of the company's controlling shareholders that led the court to consider it of 'enemy

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[208] Yeats op cit note 193 at 139. This could be about *either* the liability of the company *or* the shareholder, but not the *transfer* of one's liability to the other.
[209] [1916] 53 S.L.R. 845
[210] [1902] 18 T.L.R. 116
[211] Ibid at 116-7.
[212] Ibid. The support was proved most damningly, and amusingly, by a letter from a manager to the board in Amsterdam. It set out in excruciating detail that '*We have made cannon and ammunition; we have sold material to the Republic; we have blown up bridges on English territory, and we have not discharged our staff on commando. And we have assisted the Orange Free State...*'
[213] Ibid. See by contrast *Janson v. Driefontein Consolidated Mines* [1902] A.C. 484 where the company was neutral to England but the company was registered in the Transvaal. The company's gold, insured with Lloyd's, had been seized by the Republic while the war was only brewing, not raging. The court held that public policy did not dictate that these shareholders should lose by the actions taken before war, given that they were not then enemies of England, the company's *current* 'hostile' registration notwithstanding. The court did remark that its registration would have been dispositive had the loss been incurred *ad bellum*.
[214] *Daimler* supra note 209. Not a perfect contrast as the case was ultimately decided on the rather more technical ground of authority and therefore the enemy character of the company was not in the end decisive, making the relevant passages *obiter*. It is nevertheless quite influential. See for instance its inclusion in a leading student textbook; Cassim op cit note 24 at 47.

character.'[215] The company, with shareholding and management German in all material respects, tried to institute action on the basis that being registered in England and having given no succour to her enemies its suit did not fall against the trite law that no action could lie against Crown subjects by alien enemies.[216] The court accepted separate legal personality for the purposes of ownership and contract but said that the character (and legal significance thereof) did not become sterile purely by reason of registration.[217] In the end a split majority held against Daimler with Lord Parker being the scribe for the more influential of the majority opinions.[218] He wrote that while a company (being a juristic person) could only by a 'figure of speech' be said to have a nationality or residence, these being the most obvious elements of enemy character, that 'its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence.'[219] The Lord went on to use as his measure the commercial notion of 'control', which is denoted by the shareholding which ultimately exercises control over a firm.[220]

This is entirely in line with the thrust of the legal reasoning being on the policy underlying the rule, as it was in *Netherlands South African Company*.[221] The reasoning in *Daimler* was that it would defeat the policy considerations behind the rule to 'apply' it *not* having looked under the veil; the rule was considered to require exposure and it duly constituted a lawful purpose for which the veil may be lifted.[222]

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[215] Ibid at 854.
[216] Ibid.
[217] Ibid at 856-7.
[218] *Dadoo* supra note 21 at 551-2. Innes CJ in *Dadoo* proceeded on the basis of Lord Parker's reasoning. In the majority of five Lords three concurred with Lord Parker for a 'majority' of four.
[219] *Daimler* supra note 209 at 855.
[220] Ibid.
[221] *Netherlands South African Company* supra note 210 and *Driefontein Consolidated Mines* supra note 213.
[222] *Daimler* supra note 209 at 857: 'the rule would be deprived of its substantial justification and be reduced to a barren canon'. Cassim op cit note 24 at 47.

Reading Dadoo

This crucial nuance, it is submitted, has been somewhat spurned in the South African writing on this point.[223] *Dadoo*[224] concerned the lease of a stand to an Indian in the municipality of Krugersdorp, where Indians could not legally own nor reside on land, on the ground that his company, a juristic person, was the owner and lessor.[225] The court proceeded on the basis that the question was whether an Indian holding such a stand by juristic proxy was *in fraudem legis* of the barring legislation.[226] This harkens back to Lord Halsbury's[227]

'…very simple proposition that in our law when the object to be obtained is unlawful the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness.'

Reference was instead made quite rightly to the weighty opinion of Lord Parker in *Daimler*[228], discussed above, that while a company may not have nationality, for instance, 'enemy character' could still be decided by reference to the nationality of the controlling shareholders.[229] To do otherwise, so the argument went, would render the rule dead to meaning.[230]

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[223] This is not to say that this is the first place that this point is made: it is alluded to, for instance, at footnote 25 in Yeats op cit note 193 (19) at 69. This contention is expanded upon further presently.
[224] *Dadoo* supra note 21.
[225] Ibid at 539-40.
[226] Ibid at 541, 545-7. In this instance section 2 of the Coolies, Arabs and other Asiatics Act 3 of 1885 (S.A. Republic), which prohibited ownership, and section 30 of the Precious and Base Metals Act 35 of 1908 (Transvaal), which forbade acquisition or occupation.
[227] *Daimler* supra note 209 at 845. Of course this formulation, if literally applied, is 'difficult to reconcile with *Salomon*…' per Innes CJ. *Dadoo* supra note 21 at 551.
[228] *Daimler* supra note 209 at 857.
[229] This argument was in fact directly referenced in *Dadoo* supra note 21 at 551.
[230] Ibid.

In *Dadoo*, however, the court seemed to draw a distinction between enemy character, which a juristic person cannot have, and ownership, which capacity a juristic person can validly and legitimately enjoy.[231]

While it canvassed both the judgement in *Daimler* and acknowledged the legislative policy against equality between Europeans and Asiatics[232] the majority explicitly built its reasoning on the salutary policy consideration that where legislative limits on elementary freedoms are imposed, they should be construed in a circumscribed way.[233] The provisions were unsurprisingly accorded narrow constructions.[234] To this effect it was held that the provisions prevented an Asiatic but *not* a company controlled by one to hold a stand.[235] Dadoo (Pty) Ltd was therefore naturally not considered to own its stand in contravention of the statute - Dadoo's gambit had worked.[236]

The core of the opinion is that a company is separate from its shareholders, which is a truism, and therefore that it cannot be 'loyal or disloyal', and by implication, have a race.[237] This is also true, but for one qualification. *Daimler* shows unequivocally that where appropriate, a company can be *considered* to have that which it in fact can not, like an 'enemy character'.

Despite this nuance it seems to have become understood that a company has 'no race' for any purpose.[238] This cannot be sustained.[239] If

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[231] *Dadoo* supra note 21 at 552. For confirmation of this reading of Innes CJ's judgment see Cassim op cit note 24 at 47.
[232] *Dadoo* supra note 21 at 548-9 and 555.
[233] Ibid at 552-3, 555-6.
[234] Ibid.
[235] Ibid. Commercial control had by then become the recognized basis of attribution in Anglo-American company law, which heavily influences ours. See Cyril M. Picciotto 'Alien Enemy Persons, Firms and Corporations in English Law.' (1917) 27 *Yale Law Journal* 167 at 177.
[236] Ibid.
[237] *Gumede v Bandhla Vukani Bakithi Ltd* 1950 (4) SA 560 (N) at 561, saying that Innes CJ in *Dadoo* '*pointed out that a company could not have an enemy character. It has neither body, parts nor passions. It cannot be loyal or disloyal; neither, of course, can it possess any characteristics which belong to a race of people.*' This is true, if imprecise.
[238] Ibid. See as well as Yeats op cit note 193 at 69-70: '*Also as a matter of fundamental principle, human characteristics can never be attributed to a company to give it interests to*

Dadoo is rather read to have held that such an extension was inappropriate as a matter of *application* rather than principle, as is here submitted, then by analogy a company can also 'have' a race.[240]

Returning to the judgment itself, Innes CJ wrote, and texts accept[241], that the question before the court, in contrast to *Daimler*, was whether the 'ownership of the company was in reality the ownership of the shareholders'.[242] This framing was of course *subsequent* to the court's 'limiting' interpretive exercise (outlined above) whereby it concluded that the provision prohibited direct *ownership* only as opposed to corporate *control*, in addition. The latter, wider prohibition is of course something that would have necessitated a lifting of the veil, akin as it would be to the form of the 'enemy character' rule. The answer followed easily: there was no lawful purpose for which to lift the veil.[243]

While the issue as framed by Innes CJ is correct, it takes this study of 'veil lifting' no further. Fundamentally, it *presupposes* that the rule does not 'independently' apply to the company as well.[244] In essence the argument, as it seems to have been taken, centred on i) whether a rule that applied *only* to a natural person applied *therefore* 'directly' to their controlled juristic person - untenable[245] - as opposed to ii) whether a rule that applied to a

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be protected—the courts will not make such attribution simply to justify conferring on a company the same rights or imposing on it the same duties or incapacities as those of natural persons. Such characteristics as race…will therefore not be attributed to a company.' If taken to mean that this is not possible in principle, or that no policy reason is strong enough, this would seem to be a largely unsupported contention. See however the allusion to the distinction in Yeats footnote 25 at the same page, which leads one to believe that the above assertion may be overstated somewhat.

[239] Of course the various empowerment enactments provide immediate but surmountable difficulty.

[240] See again footnote 238.

[241] See Cassim op cit note 24 at 47.

[242] *Dadoo* supra note 21 at 552.

[243] Cassim op cit note 24 at 47.

[244] I.e. apply directly, not as a case of conduct *in fraudem legis*.

[245] Given the principle of SLP and the line taken in *Salomon* supra note 185. Although this could still have been argued on the basis of it being *in fraudem legis*, as was done, this is not a viable line of attack - see the persuasive reasoning of Innes CJ in *Dadoo* supra note 21 at 544-9.

natural person would apply *also* to their controlled juristic person[246] - which is possible and depends on the grounds of policy.

In all fairness it seems counsel for the municipality did not explicitly argue this latter axis.[247] It is therefore understandable that the case did not then proceed on that basis but rather the narrower one described above at i). The learned judge is wholly correct that a rule which does not apply to a juristic person does not, as an axiom, do so because it applies to its controlling natural person.[248] With the greatest respect, however, Innes CJ's distinguishing of *Daimler* is open to clarification.[249] In comparing 'enemy character' to 'ownership', he seems to blend the rule and the reason therefor.[250]

In *Dadoo* the criterion was race - 'Asiatic [person]' - and the prohibition was on ownership.[251] In *Daimler* the criterion was 'enemy character' while the prohibition was against suing in an English Court.[252] The capacity to sue or trade, like the capacity to own, is something that a juristic person has a right to.[253] The criterion of 'race', like 'enemy character', is something that cannot 'attach to a juristic persona.'[254] Whether the *prohibition* of a given rule lies on juristic persons depends first on extending the *criterion* to them also. This extension of a criterion can only result from a preceding interpretation of policy, such as policy imperatives being taken to require, as in *Daimler*, that the mischief being one and the same it is

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[246] I.e. that Dadoo Ltd falls under the provision's bar *qua* Dadoo Ltd.

[247] Ibid at 548. '*It is not argued that the legal persona registered as Dadoo, Ltd., either belongs to "one of the native races of Asia" or is "coloured."*' See again footnote 238 above.

[248] See again footnote 245.

[249] See again footnote 231.

[250] See the discussion in Cassim op cit note 24 at 47 which seems to imply that because the issue in *Dadoo* was ownership, a company competency, that veil piercing was 'thus' not needed.

[251] *Dadoo* supra note 21. Per the Innes CJ: Section 2 of the 1885 Act, as amended by the Volksraad *besluit* of 12th August 1886, read as follows: "*With regard to the persons mentioned (i.e. the native races of Asia) the following provisions will apply...They shall not be capable of being owners of fixed property in this Republic...*"

[252] Ibid, falling within the greater prohibition of trading in England or with English subjects.

[253] Ibid at 552: the feature that Innes CJ uses to distinguish 'enemy character'.

[254] Ibid.

immaterial whether a person of 'enemy character' is natural or juristic - and therefore that the criterion must apply directly to companies as well.[255]

In the alternative, if the policy imperative is determined *not* to require extension then naturally the criterion will not be set against the company (the veil will not be lifted), nor the potentially resulting prohibition apply.

The necessary conclusion is that in *Dadoo* it was the interpretation of policy within its own circumstances that resulted in the rule (criterion, and therefore prohibition) not being extended to juristic persons. The first determination *must have been*, and was, that the rule's rationale required only that direct ownership and not corporate-controlling ownership be barred.[256] If in *Daimler* the court had already made its policy decision,[257] but with a reversed outcome, it could just as easily have stated that the question before it was whether 'the action of the company (being neutral) is in reality the action of the shareholders (being enemies)'.[258] This is to say that in *Dadoo* the policy decision as such was already reasoned and made when framing the 'question'. Naturally this is exactly what happened - the court makes very clear the policy considerations that led it to construe the provision narrowly.[259]

Reappraisal

Therein lies the true difference between *Daimler* and *Dadoo*. Not in a difference in kind between the attributes at issue but simply in how the interpretation of rule-policy played out, how the rule was delineated. Speaking plainly, there seems to be a tendency to imprecision in the writing on this point. The principle that there are inherent attributes that a company

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[255] See discussion under '*Lifting the veil*' above.
[256] As of course, it was.
[257] Cf s 20(9) of the Companies Act.
[258] *Dadoo* supra note 21 at 552: '*...whether the ownership of the company is in reality the ownership of the shareholders.*'
[259] Ibid at 552-3 and 555-6.

does not have (like enemy character or race) and the qualification that these may yet be, or not be, ascribed to it depending on the demands of policy seem to be blurred.[260] Read closely, *Dadoo* is no authority for a principle that race may not be assigned to a juristic person where the imperatives of policy are good grounds for it.

This is not to say that this interpretive terrain should be marched over in haste, warnings trampled underfoot. The court in *Dadoo* felt quite correctly that as a matter of policy statutory inroads on liberty should not be carried further than they themselves travel.[261] On its own this was a powerful guard against 'purposive' interpretation along this line of thinking. And in holding Daimler Co Ltd of enemy character Lord Parker reminded that the weighty policy imperatives at issue in that case were not mere economics, which hold pride of place in peacetime, but those of war.[262]

Dadoo a hundred years on

As with so much else, *Dadoo* has not been timeless. The policy, statutory and interpretive context has changed significantly in the century since. The most immediate challenger, empowerment legislation, provides some qualification to *Dadoo*'s legacy but should not be considered a total

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[260] Some blur more than others. Cassim seems to read *Dadoo* as distinguishing *Daimler* on the basis of attribute difference as opposed to policy interpretation, discussed above; Yeats' text seems overbroad in the light of its footnote while in Henochsberg reference is made to a more recent case, discussed below. See footnotes 24, 193 and 200 respectively.

[261] *Dadoo* supra note 21 at 552-3, 555-6.

[262] *Daimler* supra note 209 at 857. The dictum is included here for its elegance, mostly complete:

> *'The truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war....The ideal of joint-stock enterprise, that with limited liability the more unlimited the trading the better, is an ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require.'*

abrogation.[263] These statutes do not confer a race on companies *per se*, but rather recognize various statute-specific thresholds of ownership or control.[264] The difference is that the 'criterion' is race-control or race-ownership, not race itself. Though, admittedly, this difference can become ethereal.[265] In what could be called an 'equality impact challenge', as that tried in *Beadica*[266], race may need to be attributed to a company on the basis of these quantifiers.

More direct has been the impact of the Constitution itself. What is presently significant is that it recognizes a right to equality and goes on to extend this right to juristic persons.[267] This right to equality includes the prohibition of unfair discrimination and it seems a necessary implication that a company can be discriminated against.[268]

This implication manifested, somewhat unsurprisingly, in the fractious context of state tenders. In *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town*[269] the applicant company cast its failure to secure certain tenders as racial discrimination - against the company itself, that is.[270] Factual *minutiae* aside, it was held that in principle a company may indeed be discriminated against on the basis of race, which may be measured by

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[263] As alluded to in footnotes 237 and 238.

[264] The B-BBEE Act, as amended, read with the *Codes of Good Practice on Broad-Based Black Economic Empowerment* (GN 112 in *GG* 29617 of 9 February 2007).

[265] I.e. that race-control would be the constituent of race ascription. Such as if *Dadoo* had gone the other way, for instance. It will be remembered that in *Daimler* the learned judge attributed enemy character on the basis of control.

[266] *Beadica (WCC)* supra note 10 para 44. While Davis J hangs his decision on disproportionality of the *Botha v Rich* stripe, he makes clear that the remedial aspect weighed heavily.

[267] Constitution ss 9 and 8(4), respectively.

[268] Michele Havenga 'Corporations and the Right to Equality' (1999) 62:4 *THRHR* 495 at 504, 507. See ss 9(3) and 9(4) of the Constitution and s 1(xviii) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'), which forbids unfair discrimination and extends this protection to juristic persons.

[269] 2009 (1) SA 644 (EqC). This is the case referred to in Henochsberg op cit note 200 for the contention that a company may be ascribed a race - *Dadoo* is accordingly not mentioned. Though not related to this point of law, note however that in *Manong & Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) the SCA dismissed Manong & Associates' appeal and roundly rejected the court below's findings of fact.

[270] *Manong (EqC)* supra note 269 para 1.

commercial control.[271] Together with the enjoining prescripts of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act,[272] reference was made (by analogy) to the pre-1994 legislation that ascribed race itself on the basis of racial controlling interest.[273]

In the obligation lies a distinction. Unlike *Dadoo*'s interpretative exercise, these recent laws are legislation (and the Constitution) that *necessarily* make provision for lifting the veil of a company.[274] 'Necessity' is invoked here deliberately, as while there was some initial resistance to the idea of a company enjoying the right to equality in this way, this position is fundamentally untenable.[275] It would patently do the Constitutional schema a fatal violence to suggest that an actor, public or private, could publicly spurn a company on the basis that its members or employees are of a

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[271] Ibid paras 31-5. This was not contentious on appeal in the Supreme Court of Appeal, which overturned it on factual grounds.

[272] Ibid paras 13-15 and 34 regarding Act 4 of 2000, ('PEPUDA'). Oddly, because of a jurisdictional tangle - the impugned conduct occurred both before and after PEPUDA came into force – sole reliance on the Act was eschewed.

[273] Ibid para 34. The analogy was a reference to ss 15 and 16 read with s 1(xii) of the Group Areas Act 41 of 1950 which treated companies where control was in the hands of a given 'group' as a member of that 'group'. This was confirmed in *Rex v Bushveld Agencies Ltd. and others* 1954 (2) SA 457 (T). There are later enactments and amendments analogous to the original Act but a cursory review of the statutory history does not indicate a material difference until the legislative *détente* in the late 1980s. Ironically the court uses identical language, referring to the 'white group' at para 26.

[274] Explicitly, in fact.

[275] Havenga op cit note 268 at 496-7. The strongest thread of this argument went that if the right to equality was granted to juristic persons this would weaken the protection of natural persons. For the reason made clear in the example following, this cannot win out. The right to equality is similar to the right to property, in that 'property rights of natural persons can only be fully and properly realized if such rights are afforded to companies as well as to natural persons'. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA768 (CC) para 45. See David Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125 *SALJ* 754 at 775: the right of the juristic person is essentially derived from the right of the natural person; protecting individuals requires protecting them when clothed in separate legal personality as well.

certain race without falling foul of equality legislation and the Constitutional right to equality.[276]

Dadoo was concerned with the interpretation of a statute that could conceivably have gone either way.[277] While *Dadoo*'s particular outcome would no doubt be the same today (leaving aside the fact that the two statutes would be struck down as Constitutionally invalid) the *process* by which the outcome was arrived at is rather less secure. One can easily accept Innes CJ's contention that statutory inroads on rights should be read in a limited fashion.[278]

The learned judge's other assertion on the issue of interpretation, holding that there are *not* 'in effect two enactments, one expressed, and the other unexpressed, but equally operative'[279] is of little use in the face of the purposive approach to interpretation that has developed in modern times.[280] It is plain that were this current approach to interpretation to be married to the 'policy of social, political and economic inequality as between white and coloured inhabitants of the Republic'[281] recognized in *Dadoo* the enactments in issue could easily have been read to extend to juristic persons.

[276] Havenga op cit note 268 at 498-501. Except where this is an equity measure allowed by specific legislation compliant with s 9(2) of the Constitution. Arguably, this is similar to the enemy character bar in that lifting the veil is *necessitated* by the rule: both rules would be ineffective without lifting, and therefore their constituting a lawful purpose.

[277] Conceivably, but not probably. Given the judgment in *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 the outcome in *Dadoo* is surprising, to say the least. See however Innes CJ's distinguishing of this case as essentially an exception to general usages at *Dadoo* supra note 21 at 541-548.

[278] One need look no further than s 39(2) of the Constitution, which, much simplified, enjoins courts to promote the Bill of Rights when it clashes with other rules of law.

[279] *Dadoo* supra note 21 at 544. This was phrased as a question and answered in the negative somewhat later.

[280] An obligation under s 39(1) of the Constitution. Interpretation must be purposive within the language of the provision. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[281] *Dadoo* supra note 21 at 549.

Public policy as lawful purpose

What remains, in sum, is that 'race' like 'enemy character' may not be an inherent attribute of juristic persons but can be ascribed to them for the purposes of a rule, where that rule is adjudged to require it.[282] Naturally, this last step is not necessary where statute unequivocally requires action. After *Dadoo* other policy considerations may yet triumph in their own cases.[283] When this is so a lawful purpose exists and the veil may then be lifted. Ascription can be based on some nexus of control, residence or identity of the members or agents, as the case may be.

As to the central question of this study, what are the specifics of how public policy might 'operate' in the face of the lawful purpose hurdle? This is not as self-evident as might be imagined. *Dadoo* and *Manong* may be distinguished; both deal with situations where positive enactment enjoined regard to race,[284] they regulated the public sphere and entailed restriction (of discrimination) as opposed to obligation.[285] A public policy argument like the one explored in this piece, our 'equality impact challenge', would probably be a purely private affair where one party is not asking for protection from discrimination as such, but requesting for its own benefit the triumph of a wider, social, remedial goal. Unlike enactments, which provide lawful purposes by 'fiat', the question of lawful purpose in the public policy evaluation will necessitate a value judgment on the reasons both for and

[282] For an apparent hint along these lines see the thread in *Botha v van Niekerk en 'n Ander* 1983 (3) SA 513 (W) at 521B '...*of welke kleur die skild het.*' The shield here naturally refers to the veil.
[283] Such as *ubuntu* - see Chapter II above or those factors bundled up within the various empowerment statutes, but this will be addressed further at a later stage.
[284] Though *Dadoo* interpreted that enactment not to extend to juristic persons while *Manong* did. In either case, once the interpretative stage is complete and the provision delineated, the policy desirability of extension is irrelevant for the purpose of the statute (conduct *in fraudem legis* aside).
[285] 'Obligation' being the remedial propagation of equality, discussed in Chapter II above.

against lifting the veil.[286] Unlike discrimination, which is prohibited subject to set exceptions[287] a claim on remedial equality in the context of public policy finds arrayed against it in full panoply all the factors that this evaluation might call upon. This is the difficulty - contract scholars know well that public policy can be vexingly inscrutable.[288]

Some things, however, will never change.[289] Take for instance the English rule of public policy[290] which recognizes the enemy character of juristic persons controlled by alien enemies.[291] It is a 'lawful purpose' that has become settled by an unchanging imperative,[292] albeit that the rule's granular outcome in application will vary.[293]. Akin to the 'fiat' of legislation,[294] the rule's rationale has been interpreted - in other words the public policy judged - to *always* require that the veil be lifted.[295] And, once so lifted the impact of the bar is peremptory: if the plaintiff company has an enemy character it is *per se* barred.[296] There is no gainsaying it. Both the question of lifting and the consequence of what is discovered have in essence been carved in stone, quite unlike other less 'regularized' questions

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[286] Not by default, as with statute.
[287] Constitution s 9(3) and 9(4). Such discrimination must be fair or justifiable in terms of section s 36.
[288] See discussion in Chapter II above. Regrettably, no equine metaphors will be indulged in at present.
[289] Or become settled by long usage.
[290] See the judgment of *Porter v. Freudenberg (C. A.)* [1915] I K. B. 857 at 868, 880, overtaken on the issue of domicile in the end by the House of Lords' judgment in *Daimler*.
[291] See Picciotto op cit note 235 at 167-77 for an account of the origin of this interpretation of commercial domicile. It was preceded by the view that it, though being the yardstick of enemy character, was the place of incorporation as opposed to control or administration.
[292] Ibid. While the public policy rule against actions by alien enemies is trite at English law (contrast the rule in the German Empire which did not by default extinguish the suits of enemy aliens) the veil lifting aspect thereof cannot conceivably become obsolete as common sense dictates that where such a bar exists it must look further than the man of flesh and blood only.
[293] See *Daimler* supra note 209 at 855. In a given case the test may be satisfied by the incident of enemy registration, but the absence thereof is not dispositive. Succour to the enemies or the discussed *enemy character*, as in *Daimler*, can also lead to the barring of the suit.
[294] Put differently, a resolution of competing considerations by legislative choice.
[295] *Daimler* supra note 209 at 857-8
[296] Ibid. See again footnote 292.

of public policy. These others, with no fixed usage, are inscribed on vellum only, grandly illustrated perhaps but erasable, changeable.[297]

In judging such a recourse to 'uncarved' public policy, neither its status as 'lawful purpose' nor the implication of what is unveiled can be derived from settled principle or precedent. Self-evidently, novel public policy arguments require deductions from first principles, starting anew in every case. For now, this is the nature of an equality impact challenge. In the future it might become settled that courts may always look at the equality impact by lifting the veil, for instance - but that is naked speculation.

Equality impact challenges

Still, something more than primordial reasoning is indeed possible at present, as not *all* the 'variables' are a mystery. What is certain is that where the veil is so lifted the 'prohibition' would be on enforcing the contract or its having a certain outcome while the 'criterion' would be 'race *qua* public policy'.[298]

Venturing into the unknown, the query in the broad sense is whether public policy requires consideration of the equality impact of a given contract. Where a juristic person is at issue the further question of lawful purpose arises - that is, whether the veil should be lifted. The rule's delineation, either as a principle or in each case, must come before application, similar to the policy interpretation discussed above in *Dadoo*.[299]

The crisp issue is therefore *when* public policy's imperative of equality would require lifting the veil. One view might be that public policy *always*

[297] 'Palimpsest' in Hugh Chisholm (ed) *Encyclopædia Britannica* 11 ed (1911).
[298] Race in the context of the equality considerations inlcuded in public policy. This could be transformational impact, or equality impact, as one prefers. See the discussion in Chapter II above.
[299] *Dadoo* supra note 21. In this case the reasoning was around the interpretation of a statute as opposed to the common law power to hold outcomes contrary to public policy.

serves as a lawful purpose to look behind the veil and evaluate the race qualities of the company, given the remedial focus of public policy.[300] But this is not the sum of what public policy entails. Public policy is wider than explicit constitutional values[301]; SLP and the corporate form have their weight as well.[302] It should not be hand-waved and a place for its consideration should be preserved - before it is lifted, ideally.

Working backwards from the 'outcome' presents another problem. Lifting the veil to look at the identity of the controllers or directors does not mean that such identity is *decisive*, merely that it is weighed - not every result adverse to equality will mean the contract is contrary to public policy. Herein lies the rub. The enemy character formulation is a binary test; enemy character is either present or not present.[303] There is always necessarily a positive or negative result.

In an equality impact challenge matters are less 'final'. The harm to the company might be great - or not - and the frustrating of equality drastic, or not. The harm could be trivial, a fraction of a tithe on the company's liquidity. Or, where it is great, the impact on *equality* could still be negligible.[304] Even where the damage to genuine disadvantaged individuals

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[300] As the 'possibility' of enemy character is always regarded as justifying lifting the veil.
[301] *Bredenkamp* supra note 124 para 39: 'This does not mean that public policy values cannot be found elsewhere.' Note that Davis J criticizes this view in *Beadica (WCC)* supra note 10 para 14. However, in *Beadica (CCT)* supra note 4 paras 40 and 154, respectively, this statement is quoted without rancour by the majority of the Constitutional Court, and was indeed even accepted in a dissent which tended more heavily *toward* an equitable cast to public policy.
[302] Ibid. Certainty in commerce, of which the corporate status is a keystone, has long enjoyed apex recognition. *Barkhuizen* supra note 13 para 57. *Beadica (CCT)* supra note 4 para 83.
[303] And where it is present, the suit is barred *as a rule*.
[304] The simple case is where the stake (of those previously disadvantaged) is present but miniscule. One might have regard to Moosa J's disdain in *Manong (EqC)* supra note 269 for a policy recognizing firms as previously disadvantaged with a threshold ownership of 1%. In discussions with my supervisor the person of Patrice Motsepe (previously disadvantaged and commonly known to be one of the richest individuals in South Africa) also came to be a common rejoinder. The argument goes that, surely, harm to a rich individual cannot factor. Perhaps.

is great, other factors might win the day.[305] Some of these can only be decided once the veil is lifted, but not all.

Consider the case where the harm is trivial relative to the position of the company and where it is common cause that the 'punishment' is less 'capital' and more in the nature of a traffic fine.[306] If the basis of the challenge may be reduced to two parts, 'harm' *to* 'equality', it follows that there can be no weighing of equality where there is no harm. While the sketching of 'harm' to 'equality' is rather crude, it works whether one has a purely negative[307] or a redistributional conceptualization of harm.[308] In such a case the equality impact can arguably never win out, no matter the circumstances or identity of the shareholders. What then would be the basis for lifting the veil, if the rule does not, *can not* require it? Put differently, how can the 'search' for an equality impact serve as justification where one knows there can be none such *without* looking behind the veil?

While one is understandably leery of mathematical notation, the following is useful.[309] The test may be reduced to $h \times e$ (harm and equality, respectively) and the relative weight in the public policy evaluation is the product of these. The factor e is only knowable by lifting the veil - which

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[305] This could be *pacta sunt servanda* itself, the failure of the company in some respect or a myriad other facets of public policy. In *Beadica (CCT)* supra note 4 para 101 the majority of the Constitutional Court put much emphasis on the unintended consequences that might flow from the overzealous use of equality in the public policy evaluation. See also LR Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 353, 365-68, 393-95, 397-98 for Fuller's conceptualization of a 'polycentric problem'; a decision which engages various axes in both the process and result and which may lead to remote unintended consequences due to its multi-layered nature. This is a useful if perhaps overbroad approach, as the potential results of an equality challenge are somewhat less numerous, if as totally unknowable.

[306] Davis J in *Beadica (WCC)* supra note 10 para 39 used the metaphor of punishment, where an outcome resulting in the shuttering of the business was deemed to be the death penalty.

[307] Put differently, mitigating downside risk; an argument, for instance, that a given previously disadvantaged firm should not be allowed to go under.

[308] This would be protecting or gaining upside potential, for example the barring of a contractual outcome which would seriously reduce future opportunities.

[309] And tentatively follows in the tread of Learned Hand J, who settled the negligence formula for the American adjudicator in the landmark case of *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947).

would provide the lawful purpose - but this is irrelevant where *h* is known to be 0.[310] It does not matter what *e* is where it is known that *h*, and therefore the product, is 0. Hence, no reason to know *e*.

Doctrinally, it would not provide a lawful purpose for lifting the veil, as there would logically be no possible justification therefor. In contrast to a view that a court could always look at the equality impact, a test might rather proceed on the following question:[311] 'Is the harm egregious or the gain substantial enough to justify lifting the veil?'[312]

It is submitted that this is the better view. It is both doctrinally sound in that it prevents circular reasoning - 'what we found behind the veil justifies its lifting' - as well as preserves a residual place for SLP to factor before the veil is lifted. In asking the question above the value accorded SLP should be used as the counterweight.[313] This both keeps it firmly in the mind of judges as well as introduces a conceptual hurdle to any equality impact challenge.[314] This results in a two-step enquiry, firstly whether the veil should be lifted and secondly whether what is found is worthy of being decisive.[315] In time, there will no doubt be worthy cases but the initial hurdle might, by its addition, prevent overzealousness as well as the scourge of opportunism that generally follows the reported triumph of any seemingly ameliorative principle.[316]

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[310] Or close enough to 0 to be deemed such.

[311] It is drafted for either the downside or upside approach, which is a separate decision. See Chapter II.

[312] One should note that only the first step is engaged to decide whether to lift the veil: it is in essence asking whether in a given case the 'criterion' should be applied to the company. Referring to the above arithmetic in the main text, this is in essence asking whether *h* is sufficiently above 0 to justify following through with the inquiry.

[313] One can ask: 'In the light of SLP, should this non-zero harm be allowed to override it, no matter the equality aspect?'

[314] Truly, what is idealism without formalism?

[315] The second leg is naturally part of the public policy evaluation proper.

[316] See Hutchison op cit note 1 at 107-8. After the decision in *Sasfin* supra note 7 many surety debtors tried to emulate Beukes' success. These floodgates resulted in a curial disciplining in *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) 381F–I, quoted by Hutchison. Kriegler J scolded that *Sasfin* was not '*a free pardon for recalcitrant and otherwise defenceless debtors*'. More recently, some judges in the lower courts gave legs to

the equality and *ubuntu obiter* of the Constitutional Court prevalent in the last decade. See the recent decision in *Liberty Group Ltd and Others v Mall Space Management CC* 2020 (1) SA 30 (SCA), where the direct application of *ubuntu* by the court *a quo* was overturned with some exasperation.

IV *Beadica: a drama in three acts*

The centrepiece of this chapter, the Beadica saga, had its beginning in the Western Cape High Court[317] before threading its way to the Supreme Court of Appeal[318] in Bloemfontein and, at long last, its finale in the Constitutional Court.[319]

As noted above, the judgment of the apex court largely settled the 'burning issue' in the law of contract at the time.[320] Cast in this long shadow, the discussion below will predominantly be oriented toward the issues raised in the preceding chapters; the question of *Botha* disproportionality, the place of ubuntu in public policy and, more narrowly, the possibility and potential of a challenge to a contractual outcome based on substantive equality as a goal in and of itself. Like the morning dew it falls on the embers, not the flames.

Stripped bare,[321] the pertinent facts are that pursuant to an empowerment initiative organized by the National Empowerment Fund (the 'NEF'), Sale's Hire CC spun off several branches of its tools-for-hire business into franchises at the NEF's expense.[322] Previously disadvantaged senior employees of the firm took over these branches pursuant to franchising agreements. These agreements were to endure for 10 years. Contracts of lease were entered into between the new franchises and the Oregon Trust (the 'Trust'), which owned the premises from which the franchises were to be run. These leases were to run for 5 years and had to be renewed 6 months before the end of this initial period by the franchisees exercising, in

[317] *Beadica (WCC)* supra note 10.
[318] *Beadica (SCA)* supra note 18.
[319] *Beadica (CCT)* supra note 4.
[320] And this is covered ably elsewhere. A well written note on *Beadica* in the context of the wider contract maelstrom may be found at Simon Thompson '*Beadica 231 CC*: *an end to the trilogy?*' (2020) 137 *SALJ* 641. The theatrical analogy is drawn from this contribution.
[321] Ibid at 646 may be referred to for a more complete summary.
[322] *Beadica (WCC)* supra note 10 para 1.

writing, their option to renew.[323] This did not happen and so the Trust proceeded to move for ejectment.[324]

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Davis J began his judgment on the franchises' resistance to ejectment in a suitably[325] dramatic manner, writing that it '...goes to the heart of the debate as to what now constitutes the law of contract in constitutional South Africa.'[326] He went on to use the long-demolished *exceptio*'s prior role in contract to arrive at the relatively uncontroversial conclusion that certainty provides no inviolable sanctum.[327]

In reciting the facts Davis J took much care to detail the equality implications of the matter in light of the empowerment initiative of the NEF that had been operative in the background.[328] Having set the scene thus, it is no surprise that the concession by the applicants' counsel that a straight-laced enforcement of the contract would be dispositive of his case was the beginning and not the end of the learned judge's application of the law to the facts.[329]

And what law it was: *Botha* disproportionality in its undiluted form[330] was the order of the day.[331] The usual dicta from *Everfresh* made their

[323] Ibid paras 2-3.
[324] Ibid para 4.
[325] Davis J is of course much enamoured of the question. Cameron and Boonzaier op cit note 116 at 831 make this point with reference to the learned judge's opinions in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) and *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C).
[326] *Beadica (WCC)* supra note 10 para 1.
[327] Ibid paras 6-16.
[328] Ibid paras 17-30.
[329] Ibid para 30.
[330] *Botha* supra note 9. As a ground in and of itself, not a statutory context- specific application of legislative purpose. One is referred back to the discussion under the heading *Hic sunt dracones* in Chapter II.
[331] *Beadica (WCC)* supra note 10 para 35.

appearance in support,[332] bolstered further by the then recent endorsement of *Botha* by the High Court in *Mohamed's Leisure Holdings*[333] - at that stage not yet overturned on appeal.[334]

After giving legal certainty some small measure of regard[335] - he also calls it 'a legal shibboleth'[336] - Davis J proceeded to his conclusion that the strict outcome of the lease provisions would be disproportionate in the circumstances.[337] In his proportionality analysis, quite apart from the serious consequences for the parties themselves[338] and their proffered reason for non-compliance ('unsophistication')[339] much is made of the equality implications in the context of the broader empowerment process.[340]

This is made explicit. Granted, disproportionality is pinned on the point that the contract as signed 'maximised the interests of both parties'[341] and, generally, that

> 'honouring a contract is not merely a matter of each side pursuing his or her own self-interest with regard to the other party's interest'.[342]

Yet, the learned judge went on to write that,

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[332] *Everfresh* supra note 130 paras 24, 36, 71-2.
[333] *Beadica (WCC)* supra note 10 paras 32-5, making reference to *Everfresh* supra note 130 paras 24, 71-2 and *Mohamed's Leisure Holdings* supra note 131, respectively.
[334] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA). The appellate court roundly rejected this extension, writing that, 'It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question.'
[335] Ibid para 41.
[336] Ibid para 44.
[337] Ibid para 42.
[338] Ibid para 39.
[339] Ibid para 27. Per para 44 this contention was accepted as valid (!), albeit not decisive. It will be remembered that this factor, which looks at the circumstances of non-compliance falling short of impossibility proper was established by the Constitutional Court in *Barkhuizen* supra note 13. See again footnote 121.
[340] Ibid paras 29, 44. A point made out more strongly by the NEF than the parties themselves, interestingly
[341] Ibid para 42.
[342] Ibid para 40.

> '*It does not follow that this conclusion implies that in every case a court will dispense with the strictures of a legal rule...'*[343]; and

> '*I venture to suggest that in the vast majority of cases the approach adopted in this dispute on its specific facts will not necessarily be followed, where the consequence of a breach is so reasonably foreseen and the remedy is appropriate.*'[344]

With this he placed the outcome firmly in the nature of an exception and, next, he provided the basis, as he must:

> '*But in this case, when the very idea of the transaction was to promote the interests of historically disadvantaged applicants to participate fully in the economy and to be embraced not simply as political but economic citizens in terms of agreements which were entered into for this purpose, more is surely required...*'[345]

Here, then, is the thumb on the scale. *Botha* disproportionality grounded in fairness and *ubuntu* understood in the communitarian, egalitarian sense. Put differently, the impact on societally scaled equality.

This marriage of disproportionality to a communitarian emphasis can easily be read as the culmination of the historical yawning gulf between the 'traditional' and 'new' views on the *grundnorm* of our law of contract. Appeal was near inevitable and the judgment of the SCA is turned to imminently.

The two issues to be underlined here are the ground upon which Davis J refused enforcement and the complete absence of any reference to separate legal personality.

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[343] Ibid para 42.
[344] Ibid para 44.
[345] Ibid.

While it is manifest that *Botha* disproportionality was applied directly[346] - and this *per se*, not in the 'underlying legislative purpose' sense posited by Boonzaier[347] - one could theoretically still 'properly situate' the opinion. In the more generous light of the acknowledged primacy of public policy and the academic rescue of *Botha*'s rule as being within public policy itself,[348] there are two face-saving ways to understand Davis J's opinion: a murky application of public policy or, alternatively, as a legislative-purpose adjudication of a statute-adjacent contract[349] - in either of which cases equality and *ubuntu* featured heavily.

To the embers: on the vexed issue of the corporate veil the reasoning (or lack thereof) is threadbare. No reference to the veil or separate legal personality is made in the judgment of the Western Cape High Court.[350] Though the parties were close corporations - *juristic* persons[351] - their 'status' of previous disadvantage was acknowledged. A tempting answer might be that the veil was not lifted, that it was an empowerment transaction on its face and therefore Davis J did not 'really' look at the persons behind the veil.

It is not so. The transaction *started* as an empowerment initiative to be sure, but if on the day the case came to court the franchisees had transferred their franchises to non-previously disadvantaged persons it cannot be denied the outcome would have been very different. In the

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[346] Davis J himself makes this clear as the words public policy do not feature in the 'mechanical' part of the judgment. Thompson op cit note 320 at 647-8 also reads it so. See further confirmation in the judgment of Vally J in *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 JDR 0983 (GJ).
[347] Cf discussion under heading *Hic sunt dracones*, above.
[348] Ibid.
[349] Given the NEF's proximity this could perhaps be the National Empowerment Fund Act 105 of 1998, however this would be adding tension to an already overstretched interpretation.
[350] A word search of the judgment provides no results.
[351] Ss 63, 64 and 65 of the Close Corporations Act 69 of 1984 still provides for the separate legal personality of the corporation, though with some technical exceptions - or in the case of fraud. Referring again to footnote 273, to my knowledge no provision analogous to s 12 of the Group Areas Act of 1950 has been added to the Close Corporations Act.

absence of disingenuousness it is submitted that it is abundantly clear that Davis J had regard to the persons, control and economic interests of the applicants - being incorporated franchises all.

In other words, he lifted the veil. Be it because of equality *qua* public policy or *ubuntu* within an application of *Botha* legislative-purpose adjudication, this implicitly but necessarily entails an acceptance that the *potential* implication for substantial equality - the equality impact of a contractual outcome - is a sufficient reason and lawful purpose to lift the veil.[352]

By working backwards from this outcome (being lifting the veil) there must have been a lawful purpose, and this lawful purpose was the need to assess the equality impact. With this, as well, was the advance of racial equality confirmed to be a public policy factor in deciding to refuse the enforcement of a private contract.[353]

Bloemfontein

On appeal to the SCA the story, reported in this telling as *Trustees for the time being of Oregon Trust v Beadica 231 CC and Others*,[354] kept to the well-worn formula familiar to those who followed the more contentious contractual matters: the High Court went out on a limb and the SCA cut it off.[355]

In a considered, unanimous opinion the SCA chided Davis on various points before restating its position and upholding the appeal. The first chiding was for his purported disregarding of its binding judgment in

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[352] See again the discussion in Chapter III above.
[353] Refer again to the conclusion of Chapter II above,
[354] *Beadica (SCA)* supra note 18.
[355] Hutchison op cit note 1 at 122. See the judgments in *Mohamed's Leisure* supra note 334 (SCA), *Liberty Group* supra note 316 and *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA).

Bredenkamp[356] and those that followed, with the court testily remarking that the principle of the SCA's superior place in the hierarchy of precedent 'is still good law'.[357]

To be fair, it must be granted that *Botha* muddied the situation. It stands as a judgment of the Constitutional Court - no mere dictum.[358] Nevertheless the SCA clearly considered *Bredenkamp* to have remained the last word on the judicial control of contracts, and therefore its disregarding by a High Court inexcusable.[359]

The second and more serious chastisement was for the ground upon which he fixed his judgment, namely *Botha* disproportionality.[360] It held that the correct approach should have been a public policy evaluation along *Barkhuizen* lines,[361] a consideration of all the relevant factors in which the question of the circumstances of non-compliance is vital.[362] In the event the averment by franchise managers of some years that they were too 'unsophisticated' to comply was, unsurprisingly, given short shrift.[363]

In this treatment the court all but condemned *Botha* as being *per incuriam*,[364] referring for support to academic commentary calling it '…embarrassingly poor'[365] and writing that,

> '*The notion that a sanction for breach, or failure to comply with the terms of a contract, agreed on by the parties is disproportionate and therefore unenforceable, is entirely alien to South African contract law.*'[366]

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[356] *Bredenkamp* supra note 124.
[357] *Beadica (SCA)* supra note 18 para 25.
[358] It will be noted that the SCA has in one outlier judgment, *Louw* op cit note 150, applied *Botha* 'disproportionality' - a high watermark in which Davis appears as Davis AJA.
[359] *Beadica (SCA)* supra note 18 para 25.
[360] Ibid para 37.
[361] Ibid para 33-4.
[362] Ibid paras 41-2.
[363] Ibid para 39.
[364] One is referred to the discussion, and rescue, of *Botha* in Chapter II.
[365] *Beadica (SCA)* supra note 18 para 37. Here Lewis AJP quoted from Hutchison op cit note 1.

Admirably, the SCA went on to resolutely defend the principle of *pacta sunt servanda* in its judgment,[367] with the court trying to carve its view of, and approach to, the law of contract in stone. With reference to its recent judgment in *AB v Pridwin Preparatory School*[368], the court reaffirmed that the principles underlying contract and public policy are that,

> '*(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;*
>
> *(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*

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[366] Ibid para 38.
[367] Ibid paras 25-6, 35.
[368] 2019 (1) SA 327 (SCA). On appeal the Constitutional Court, which delivered its judgment the same day as in *Beadica (CCT)* supra note 4, would go on to sidestep the contract morass and hold the matter to be constitutional as opposed to contractual.

> *of a contract because they are not substantive rules that may be used for this purpose.'*[369]

This formulation tends palpably toward certainty and was not the middle ground hoped for by some.[370] The court's view of the equality argument, triumphant in the court *a quo* and of which it was very aware,[371] is far more cagey, by contrast. The court essentially refuses to engage with this 'policy consideration' because the reasons advanced for non-compliance were insufficient.[372] Because the court does not engage with the merits of the equality impact challenge, it did not lift the veil nor intimate that it would be prepared to do this. Nothing further need be said on this point.

To sum up, in its judgment the SCA foregrounded certainty; fixed public policy as the sole judicial controller of contractual enforcement by essentially relegating *Botha* disproportionality to aberrant status; and, lastly, on the question of an equality impact in public policy and its interface with the veil - left the question open, as it were.

No compromise then, on the 'burning issue'. But it was soon in the coming. After the missed opportunities for apex judgment in *Mohamed's Leisure* and *Roazar*, at last, a call for certainty by the SCA was properly taken on appeal to the highest court in the land.

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[369] *Beadica (SCA)* supra note 18 para 25, quoting *AB Pridwin* supra note 368 para 27.

[370] See for instance the call for compromise by Hutchison op cit note 1 at 123, Cameron and Boonzaier op cit note 116 at 830 and Deeksha Bhana in 'The Constitutional Court as the apex court for the common law of contract: Middle ground between the approaches of the Constitutional Court and the Supreme Court of Appeal' (2018) 34 *SAJHR* 8.

[371] Ibid para 18. The court lists as one of the grounds it views as the basis for Davis J's finding of disproportionality the point that,

> *'(b) The purpose of the whole scheme...with the NEF was to promote black economic empowerment (BEE) and the full participation by [the] previously disadvantaged in the economy. The application of the strict terms of the contracts would have been inimical to the empowerment project.'*

[372] Ibid para 44.

Constitutional Hill

On its arrival in the Constitutional Court *Beadica* caused fracture in both the court and the law.[373] Still, in the split of 7 to 3 the majority opinion penned by Theron J is a study in judicial reconciliation while the two dissents of Victor AJ and Froneman J, the latter joined by Madlanga J,[374] run the rest of the gamut of jurisprudential responses to the 'burning issue' in our law of contract.[375] Because of this split the various approaches to the broader question of fairness in contract will be touched upon before the embers of *Botha* and the veil are turned to.

The place and content of public policy

Theron J at the outset admitted the issue as being the 'proper constitutional approach' to the judicial control of contract and the range of 'public policy grounds upon which a court may refuse to enforce [its] terms.'[376]

Proceeding with no prevarication the learned judge acknowledged the general perception that on this issue the Constitutional Court and SCA had come apart.[377] The 'widely held view'[378] was, with no small justification, that the distance was about twenty strides or so, the parties under arms and in the presence of their seconds.[379]

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[373] See again the discussion on *Botha* as well as footnote 368, regarding *Pridwin*. These are left aside for now and touched upon in Chapter V.
[374] Theron J wrote for the majority wherein Khampepe ADCJ, Jafta J, Majiedt J, Mathopo AJ, Mhlantla J and Tshiqi J concurred. Froneman J, with whom Madlanga J concurred, wrote one dissent while Victor J wrote the other. *Beadica (CCT)* supra note 4 paras 1-104, 105-203 and 204-232, respectively.
[375] *Beadica (CCT)* supra note 4 para 1. See again footnote 114.
[376] Ibid. Paraphrasing own.
[377] Ibid.
[378] Ibid. Whether this is merely a 'view', as Theron J had it, is another matter.
[379] Ibid. I refer to the *Royal Code of Honour* contained in Joseph Hamilton *The Only Approved Guide Through All The Stages Of A Quarrel* (1829) 5-22.

To wit, a duel. One that, in fact, turned out to result in a *détente* rather than a death.[380] Theron J prefaces her account with the startling allegation of a judicial *consensus* on the question of fairness[381] - a clearer signal there could not be that the time had come for a resolution and that it would, at first blush, be largely on the terms of the SCA.[382]

After dealing quickly with the facts and the matter of leave to appeal, Theron J turned to the history of equity in contract through the cases. Here the contested death of the *exceptio doli generalis* and convenient ascent of public policy in the jurisprudence of the erstwhile Appellate Division is merely described[383] - the description is all the more bloodless when one recalls the impassioned *dicta* in *Everfresh* and *Botha.*[384]

The opinion leads on to the Constitutional-era mileposts of *Brisley*, *Afrox*, *York Timbers* and finally, *Barkhuizen* and these are traversed in succession and handled credibly, if each account is taken in isolation.[385] The SCA triumvirate is, fairly, accorded its role of having entrenched public policy and rejected a 'free-floating' formulation of fairness, outside public policy.[386] *Barkhuizen*'s strides in establishing the two-stage test and bringing fairness and *ubuntu* up alongside certainty are recognized as well, but this is then tied off by the closing line, 'This Court [in *Barkhuizen*] accordingly affirmed the position of the Supreme Court of Appeal in *Brisley.*'[387] Bold indeed.[388]

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[380] *Beadica (CCT)* supra note 4 paras 105 and 204 wherein both dissents begin by stating that the majority has resolved the - as yet unresolved - conundrum.
[381] Ibid para 20. This also means, necessarily, that the court's *account* of the SCA's jurisprudence is an *endorsement* of it.
[382] Although this is complicated by the other implications of the judgment
[383] Ibid paras 21-8.
[384] Ibid. See again footnote 130.
[385] Ibid paras 29-38.
[386] Ibid paras 29-31.
[387] Ibid paras 32-8. Addition own.
[388] As this is not quite the full picture: in relation to the SCA judgment in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), which runs well *Brisley*, *Barkhuizen* para 72 reads that, 'To the extent that the Supreme Court of Appeal appears to have held [that fairness can be excluded by reliance on *pacta sunt servanda*], that dictum cannot be supported.' Paraphrasing own - see again footnotes 119 and 120. This contention is all the more tenuous the more 'radically' one reads *Barkhuizen*, which I do not.

Four short paragraphs in which no academic writing[389] is referenced follow for the broadside that was *Bredenkamp*.[390] Its truly wayward assertions are read as hewing toward the middle ground approach being laid down in her opinion rather than away.[391] The court's *dicta* in *Everfresh* are also merely introduced along the judgment's path to the final reconciliation.[392]

Botha v Rich, however, is by far *Everfresh*'s 'larger twin' in its estrangement to *Bredenkamp* and potential awkwardness, depending on interpretation.[393] Entirely apposite then that it is granted considerably more ground.[394] Theron J took what is probably the only escape route other than proverbially giving the SCA the satisfaction: Boonzaier's excising is given a stamp of approval and *Botha* is read into line with the rest, tamed prior.[395] Ironically, it was the SCA's reading and rejecting of *Botha* that was said to be erroneous.[396]

The not-so-thinly veiled rejoinders do not end there. After a comparative survey wherefrom no conclusive guidance is ultimately derived,[397] Theron J proceeds to make up some of the equitable ground 'lost' to the SCA in discussions couched as 'elucidation'.[398] True divergence from

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[389] And there is no scant literature on the subject: see again footnote 125 above.
[390] *Beadica (CCT)* supra note 4 paras 39-42.
[391] As it credibly can be: see again footnote 122 in relation to Harms JA's assertion in *Bredenkamp* that *Barkhuizen* notwithstanding, in constitutionally 'mundane' cases '*it is strictly unnecessary to consider the facts relating to fairness...*'.
[392] *Beadica (CCT)* supra note 4 para 43. Not that there is much to criticise in this: any deeper discussion would have quickly derailed the exercise being undertaken. *Everfresh*'s numerous abortive offshoots at High Court level are not mentioned.
[393] Ibid para 59. See again the discussion of *Botha* in Chapter II, with the *Beadica* matter itself being a clear example. *Botha* supra note 9 and *Everfresh* supra note 130. The Constitutional Court's discussion on fairness in either case notably made no reference to *Bredenkamp*, hence 'estrangement'. Hutchison op cit note 1 at 119.
[394] *Beadica (CCT)* supra note 4 paras 44-60.
[395] Ibid para 59 fns 137, 139 and 140, which make reference to Boonzaier op cit note 141.
[396] Ibid. The SCA's reading is veritably excoriated, given its entirely plausible reasoning. The opinion reads that, 'The Supreme Court of Appeal's failure to either apply or distinguish Botha in this matter is most unfortunate.'
[397] Ibid paras 61-70. Rational, at the least, given our particular contextual realities.
[398] Ibid para 82.

the formula of the SCA, laid out above, is introduced.[399] The first is that the exceptional 'clearest of cases' formulation of the remedy is dialled down to the requirement that the case be 'worthy' - a marked contrast.[400] What is worthy depends necessarily on the metric by which worthiness is judged, and here lies the second twist.

In what is clearly its attempt to pull away from the excesses it feared might attend an untrammelled equitable discretion, the SCA's reasoning in *Beadica*, though not its result, may fairly be accused of being over-zealous toward certainty.[401] This privileged position for certainty is rejected, though care is taken to explain its moral grounding and, novelly, its economic value.[402] The majority judgment thus brings considerations of fairness and *ubuntu* back into line alongside certainty.[403] To its credit, these are lead no further.[404]

To a large extent, the majority is therefore a papering over of the cracks with the convenient facet of being peremptory.[405] Both dissents are to be found rooted in these gaps.

Froneman J recognized the harmonizing consequence of the majority but argued for a more unabashed shift in the values at play in the adjudication of contracts.[406] *Pacta sunt servanda* was to have 'space to operate', as per *Barkhuizen*,[407] but without much of the regard towards it

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[399] See the list of principles set out at the end of the discussion of the SCA's judgment under the heading *Bloemfontein*, above - specifically v) and vi).
[400] Ibid para 89.
[401] *Beadica (SCA)* supra note 18 paras 35-8. *Ubuntu*, for instance, goes unmentioned in the discussion on fairness - something that does not accord with the apex court's repeated appraisal of the values at play.
[402] *Beadica (CCT)* supra note 4 paras 83-7.
[403] Ibid paras 71-8, 83-7.
[404] Ibid para 87: '*...a careful balancing exercise is required...*'
[405] Ibid para 60: as the majority purports to remind the SCA; '*The fundamental doctrine of precedent is a core component of the rule of law.*'
[406] Ibid para 105.
[407] Ibid para 147, 175. At the former paragraph the learned judge quotes from *Barkhuizen* supra note 13 paras 28-30.

that is traditional, and which the majority displays.[408] His dissent eschews the majority's urge for an appearance of uniformity and would arguably have represented more of a victory than the seeming negotiated ceasefire of the majority. 'Seeming', only, as the majority by no means closed the book on future development.[409]

Victor AJ's rather less shy dissent, by comparison, could have been what many feared was the inevitable shift to the contract-as-social-lever approach. Perhaps the next logical jurisprudential stride after the foreshadowing *dicta* in *Everfresh*,[410] much of the opinion is a ground-lying excursus on *ubuntu* in which the social imperatives and transformational basis of the Constitution which *ubuntu* encapsulates take pride of place.[411] Exceeding the more moderate dissent of Froneman J, she endorses whole heartedly a relational and purposive approach to contract.[412]

There is much more to be said as regards the clash in the wider law of contract, the true threshold of 'worthiness', the correctness of Theron's treatment of the cases and indeed the future direction of development - but this is sufficient for present purposes. No doubt it will shortly be covered extensively by abler writers, elsewhere.

The veil and equality

Unlike the SCA, which precluded the question, the equality argument is fully addressed by two of the three opinions at Constitutional Court level.[413]

Froneman J notably mentions the equality argument of the Beadica entities only in passing.[414] Rather, a profoundly more cynical interpretation

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[408] Ibid paras 177, 180.
[409] Ibid para 78.
[410] Ibid paras 204-5. The *obiter dictum* of Moseneke DCJ at paragraph 71 is Victor AJ's point of departure. See again footnote 130.
[411] Ibid paras 206-214.
[412] Ibid para 216.
[413] Ibid paras 99-101, 197 and 228 in respect of the majority, the dissent of Froneman J and that of Victor AJ, respectively.

of Sale's Hire CC and the Trust's conduct together with a differing factual finding on the question of their 'unsophisticated' nature lead to his finding that the lapse of the leases was invalid as against public policy.[415] Whether it truly did not weigh at all cannot be said but at face value it is not taken into account. The finding is, however, essentially one of 'disproportionality', but this is addressed further below.

The equality impact argument's treatment in the majority opinion is of more interest both for its greater precedential force and for its being in the midst of the conciliatory exercise undertaken by Theron J. The reasoning begins with the appropriate dues being given to the place and imperative of substantial equality.[416] This acknowledgement is not muted; quoting from prior judgments the majority reiterates that, '[The equality clause in the Constitution], as an instrument for transformation and the creation of an equal society, is powerful and unapologetic.'[417]

One could be forgiven for thinking that in spite of the preceding near-hundred paragraphs of compromise the Constitutional Court was about to make a dramatic *volte-face* and raise the advancement of the previously disadvantaged into a veritable veto on the vaunted commercial contract.[418] There is, to its lasting credit, instead a reflection on the implications for incentive and economics of such a decision.[419] The freewheeling days of *Botha* seemingly long behind, the majority held that to grant the appellants relief on that basis would, in the circumstances, 'have the undesirable result of defeating the Funds own objects.'[420]

As in the discussion of Davis J's decision above, there is a crucial implication of this reasoning. The equality impact argument is weighed and

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[414] Ibid para 197.
[415] Ibid paras 196-203.
[416] Ibid paras 99-100.
[417] Ibid para 100 quoting from *van Heerden* supra note 165 para 87.
[418] All the whispered nightmares of the boardroom come true?
[419] Ibid para 101.
[420] Ibid.

found wanting on the merits, *not rejected outright*. As shown in the preceding chapter, to have even arrived at a discussion of the benefits and consequences, the weight, of the equality impact argument it is a *necessary* precondition that Theron J - and all those who concurred with her - looked past the juristic personhood of the Beadica entities and had regard to the identity of the directors and shareholders behind. The majority lifted the veil.

Their lifting is admittedly less immediately apparent than Davis J's transparent adventure: here reference is made to 'a black economic empowerment initiative financed by the Fund' rather than previously disadvantaged individuals themselves and, after all, the argument is not successful.[421] As above, so below - there would be no serious discussion of an empowerment initiative if it was plain to the court that the original beneficiaries had moved on. The relief would be moot, rather than rejected on the merits.

Indeed, that the relief was rejected in this case does not mean it will always be spurned so, albeit that this finding sets a high bar. The prefacing paean to substantive equality should not be read merely as the pleasantries and nothings preceding a 'but'. Far from the ground itself being rejected as irrelevant; it was held that in *this* case, because of the likely unintended consequences, that '*these* outcomes' were undesirable.[422] Once this finding was made Theron J had only left to dismiss the appeal, which she duly did.[423]

Still, here is the definitive confirmation promised in the preceding chapters: the veil is well and truly lifted and the equality impact on who was found behind has been considered by a majority of the Constitutional Court. Though cautious, their reasoning leaves credible space for a case where the damage to the position (or potential for the advancement) of the previously

[421] Ibid.
[422] Ibid. Emphasis own.
[423] Ibid paras 102-4.

disadvantaged is so compelling as to outweigh the more abstract undermining of 'the very objects that the Fund and section 9(2) seek to achieve.'[424]

Victor AJ has no such qualms. Asserting that, 'the time has come to vindicate African jurisprudence'[425] her affirmation of a communitarian ideal like *ubuntu* unsurprisingly leads to the conclusion that the appeal should succeed based on the equality impact of allowing lapse, amongst others.[426] Her vision for public policy - not to be - aside, Victor AJ also makes reliance on the statutory scheme at play and the equality imperative bound up within it - on *Botha*.[427]

Botha

This brings the discussion neatly to the issue of *Botha*. For Victor AJ applies this purposive approach to both the terms of the contract and the affirmative statutory purpose in the background.[428] True, no mention is made of *Botha* and Victor AJ purports to concur with the dissent of Froneman J who interprets *Botha* as having introduced 'disproportionality' into our formulation of contractual equity. Yet, she purports to apply alongside *ubuntu* the 'normative framework'[429] of the B-BBEE Act. Unless one believes this was conjured out of thin air, her heavy emphasis on the statutory context of the contract can plausibly be read as an application of Boonzaier's reading of *Botha*: that she applied the statutory *purpose* to what she seemingly regarded a statute-adjacent contract.[430]

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[424] Ibid para 101.
[425] Ibid para 212
[426] Ibid paras 231-2. The supposed lack of gain on the side of Sale's Hire and the Trust also factor.
[427] Ibid para 228.
[428] Ibid paras 216, 228.
[429] Ibid para 222.
[430] See discussion in Chapter II.

This part of her judgment might well outlive the rest, seeing as the majority also endorsed Boonzaier's reading. While a restrictive interpretation of Theron J's reasoning on the *Botha* issue might well hold that she limited its scope to the statute *then* in question, as much of her reasoning would initially seem to suggest,[431] this may be rebutted by that reasoning's conclusion. The text must stand for itself: she wrote that it was 'most unfortunate' that the SCA did not 'distinguish or *apply*' *Botha* to the case before it.[432] If *Botha's* ambit was limited to an exception in the context of sales of immovable property, then on its face the SCA could not have applied it to the current case - which did not involve the Alienation of Land Act.

While the majority in *Beadica* did not explicitly *apply* the new reading of *Botha*, it throws new light on its discussion of the statutory objects of the NEF Act which follows later in the judgment. Happily, even read from the *Botha* angle the majority's reasoning encourages a nuanced view of the empowerment objects of the statute, warning against the perverse and unintended consequences of seizing immediate gains. But, it is still conceivable that a very similar outcome to a successful equality impact challenge in the public policy test could be achieved by avoiding the test altogether were a Court to apply the legislative purpose to a statute-adjacent contract, where the statutory scheme in issue is the system of empowerment legislation. The future is, as it were, yet to be decided.

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[431] *Beadica (CCT)* supra note 4 para 59.
[432] Ibid para 60. Emphasis own.

V *Semble*

As can be seen from the numerous, supremely ably-written essays and opinions on the fairness question referenced throughout, an ocean of ink has been spilled on the 'burning issue' at the centre of this paper. Having delved into a seemingly novel question around the interaction between equality *qua* public policy and the corporate veil and its lifting - the embers - this study has been an attempt at ink of a different shade.

The long development of contract law's doctrinal check, public policy, has been provided with new impetus by *ubuntu* and something novel has occurred. Whatever the original intention was the treatment - or lack thereof - of the *Beadica* entities' juristic personalities by our courts has implied the permissibility of an equality impact challenge.

It is readily granted that the threshold has been set high and that the likelihood of such a challenge succeeding in a public policy evaluation is slim in light of the insightful restraint displayed under the pen of Theron J.[433] Yet, there is now *inescapably* a possibility, however remote, of a successful challenge to a contract or its outcomes on the basis that the results of private contractual autonomy, freely exercised, would have a deleterious impact on the achievement of equality and thereby be contrary to public policy. Hahlo's 'law of nature' has been decisively abrogated.[434]

Last reflections

Beadica settled the rivalry between fairness and public policy as freestanding grounds and indeed it lends itself easily to a reading that it has, at last, doused the flames. Though the equality impact challenge has been shown to be handled with caution, if not transparency, by a majority of the

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[433] Refer to the discussion of Theron J's caution in Chapter IV, above.
[434] See again footnote 89.

Constitutional Court, this is not to say that it is the final word that can, or should be said. This piece does not, nor could it, adequately traverse all the ways that an outcome predicated on the identity of a company's shareholders or directors could conceivably be reached.

Aside from those excluded at the outset,[435] there is the matter of *Botha* legislative-purpose adjudication, discussed as it emerged throughout the story that unfolded above. With this a court can neatly side-step the public policy evaluation by direct recourse to statutory purpose, Theron J's seeming acquiescence to the SCA notwithstanding.

And this is not the only aspect in which the reconciliation of the courts has been more apparent than real. In *AB and Another v Pridwin Preparatory School and Others*,[436] delivered on the same day as *Beadica*,[437] the Constitutional Court intervened in a fractious schooling relationship, governed by a private schooling *contract*, via direct reliance on the right to education in the Constitution.[438] As well explained elsewhere,[439] in so doing it chose to totally divorce the dispute from its contractual context, again blithely evading the hindrance of a public policy evaluation.[440]

These newly opened avenues, purposive adjudication and direct horizontal application[441] share this trait. They allow the law of contract, its commitment to certainty newly reordained, a 'space to operate'[442] that is - potentially - highly circumscribed.[443] Aside from knowing that an equality impact challenge is in principle permissible, it is difficult, therefore, to predict

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[435] See again footnote 27.
[436] 2020 (5) SA 327 (CC).
[437] *Beadica (CCT)* supra note 4.
[438] *Pridwin* supra note 436 para 45: s 29 of the Constitution.
[439] Meghan Finn '*Befriending The Bogeyman: Direct Horizontal Application In AB v Pridwin*' (2020) 137(4) *SALJ* 591.
[440] Ibid at 599-600. *Barkhuizen* supra note 13 paras 23-26.
[441] Finn op cit note 439 at 592.
[442] See again footnotes 407 and 408.
[443] See again footnote 440.

what would ensue were such a dispute to reach the courts. But then, it always is.

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