Contract law and the Constitution: Bredenkamp v Standard Bank of South Africa Ltd (SCA)*

1 Introduction

The concept of fairness has long been a point of contention in our common law of contract.[1] Indeed, many academic commentators have argued for greater (substantive) fairness in contracts on the basis of the horizontal application of the Constitution of the Republic of South Africa, 1996.[2] Nevertheless, the Supreme Court of Appeal (SCA) has maintained consistently that fairness *per se* is not a legitimate ground for striking down a contract as invalid. In the words of Cameron JA (as he then was), 'the Constitution and its value system [do not] confer on Judges a general jurisdiction to declare contracts invalid because of what they perceive as unjust, or power to decide that contractual terms cannot be enforced on the basis of imprecise notions of good faith'.[3]

In light of this, the Constitutional Court's (CC) introduction of the two-staged reasonableness test in *Barkhuizen v Napier*[4] was a significant step in the direction of (substantive) contractual fairness. In terms of this test, a contractual term must be objectively and subjectively reasonable in terms of the rights and values of the

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*2010 4 SA 468 (SCA). This note draws on aspects of ch 2 and ch 3 of my PhD thesis *Constitutionalising contract law: Ideology, judicial method and contractual autonomy*' at the School of Law, University of the Witwatersrand, Johannesburg (2013). Thank you to Marius Pieterse (my supervisor) and Minette Nortje for their comments on an earlier draft of this piece.

[1]In this note, I use the terms fairness, reasonableness, justice and good faith loosely and interchangeably. No significance should be attached to the use of one term or the other.

[2]See for instance Lewis 'Fairness in South African contract law' (2003) *SALJ* 330; Hawthorne 'Closing of the open norms in the law of contract' (2004) *THRHR* 294; Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) *SALJ* 395; Bhana and Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) *SALJ* 865 and Glover 'Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?' (2007) *SALJ* 449.

[3]*Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 7; see also *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 22; 24; 93; *Afrox Healthcare Bpk v Strydom* 2002 4 SA 1 (SCA) para 32; *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) para 30.

[4]2007 5 SA 323 (CC) para 56.

Constitution, that is, the clause itself must be (objectively) reasonable when considered in the abstract and its enforcement must be (subjectively) reasonable in the particular circumstances of the parties. Be that as it may, the CC was unclear as to the precise nature and scope of application of this newly-formulated reasonableness test.[5]

The subsequent case of *Bredenkamp v Standard Bank of South Africa Ltd* purports to clarify the ambit of *Barkhuizen* in so far as it deals with the reasonableness of enforcing a contractual term. In this note, I evaluate this judgment of the SCA. I argue that whilst the SCA is correct in interpreting *Barkhuizen* in light of its position that a 'free floating' notion of fairness cannot be employed in our contract law, its underlying understanding of the nature, content and manner of operation of the foundational constitutional values and their impact on the validity and enforceability of contractual terms continues to be problematic.

2 *Bredenkamp v Standard Bank of South Africa Ltd*

In this case, Bredenkamp appealed against the court *a quo's* dismissal of the interim interdict against Standard Bank. In terms of this interdict, Standard Bank was restrained from cancelling the contracts it had with Bredenkamp and thus from withdrawing its banking facilities and closing the bank accounts that Bredenkamp had with it.[6]

Briefly stated, Standard Bank had purported to cancel its contracts with Bredenkamp based on an express term in each contract that entitled it to cancel such ongoing contracts with reasonable notice.[7] It appears that the bank did so because Bredenkamp had been listed as a 'specially designated national' by the United States of America (US).[8] In terms of US law, a business is not allowed to deal with a person listed as a 'specially designated national'.[9] Strictly speaking, Standard Bank was not legally obliged to terminate its relationship with Bredenkamp on this basis.[10] However, it was concerned that if it did not, 'domestic and foreign onlookers might reasonably believe or suspect that accounts held at Standard Bank would or could be used to facilitate unlawful

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[5]See generally Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 1' (2008) *Stell LR* 390; Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2' (2009) *Stell LR* 50; Woolman 'The amazing vanishing Bill of Rights' (2007) *SALJ* 762 and Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) *SAJHR* 300 at 314-317.

[6]Paragraph 5.

[7]Paragraph 6.

[8]Paragraph 12.

[9]Paragraph 13.

[10]Paragraphs 13-20.

and/or unethical acts' and its association 'might well undermine a bank's hard-won and fragile national and international reputation'.[11]

It is against this backdrop that Bredenkamp applied for an interdict against Standard Bank. In the court *a quo* and later on appeal before the SCA, Bredenkamp based his case on the two-staged reasonableness test that was developed in *Barkhuizen*.[12] At the outset, Bredenkamp accepted that the tendency of the contractual clause entitling Standard Bank to cancel its contracts with him on reasonable notice was fair, reasonable and in line with the Constitution. Rather, Bredenkamp's issue was that the bank's exercise of its right to cancel the contracts, as conferred by the termination clause, was unfair. In other words, Bredenkamp argued that in terms of the *Barkhuizen* test, although the clause itself was (objectively) reasonable, the manner in which the bank purported to *enforce* the clause was (subjectively) unreasonable in the particular circumstances. Bredenkamp argued *inter alia* that Standard Bank's cancellation of its contracts with him was procedurally and administratively unfair and moreover, would effectively 'unbank' him because in South Africa 'the banking industry is in the hands of few who enjoy significant market power'.[13] According to Bredenkamp, this was a case 'where private power approximates public power or has a wide and public impact', where everyone 'is entitled to effective relief in the face of unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'.[14] Also, the bank could have taken less drastic steps such as to ask Bredenkamp to undertake to reduce his risk and for the bank to monitor his accounts closely for suspicious transactions.[15] In the end, Bredenkamp's essential contention was that given these circumstances, the bank's purported enforcement of the termination clause was unfair and thus unconstitutional and invalid.[16]

Harms DP, in the unanimous judgment of the SCA, unequivocally rejected Bredenkamp's argument on the basis that it misinterpreted the nature and scope of the *Barkhuizen* test. To begin with, Bredenkamp glossed over the important fact that the court in *Barkhuizen* was dealing with a time limitation clause which implicated the right of access to court as enshrined in s 34 of the Constitution. In particular, the CC focused on 'whether the [time limitation clause] should be enforced in the light of the circumstances *which prevented compliance with [it]*'.[17] In glossing over this aspect, however, Bredenkamp had proceeded incorrectly

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[11]Paragraph 17; see further paras 18-20.
[12]Paragraph 26.
[13]Paragraph 55.
[14]Paragraph 55 footnotes omitted.
[15]Paragraph 61.
[16]Paragraph 27.
[17]Paragraph 26 as quoted from *Barkhuizen* para 56 *added emphasis*.

from the somewhat radical premise that *Barkhuizen* has rendered fairness *per se* 'a core value of the Bill of Rights'; the result being that all contracts (including their enforcement) must be (substantively) 'fair' lest they be struck down for being unconstitutional and thus invalid.[18] According to Harms DP, this could not have been what the CC had in mind, particularly because it would require established principles of contract law to give way to broad, imprecise notions of 'constitutional fairness', whatever they may be deemed to be in a particular case.[19]

Harms DP then went on to interpret *Barkhuizen*. In doing so, Harms DP reiterated what he termed the 'first principles' of contract law. First, *pacta sunt servanda* (honour your agreements) remains a cornerstone principle of modern contract law. Indeed, it is a universal principle that contracts be recognised and enforced unless this would be contrary to public policy.[20] Secondly, the common law of contract now 'derives its force from the Constitution and is only "valid" to the extent that it complies or is congruent with the Constitution'.[21] In other words, the Bill of Rights and its foundational values of freedom, dignity and equality now comprise a primary (although not exclusive) source of public policy.[22] Significantly, the Constitution also re-legitimates *pacta sunt servanda* as one of the core principles of South African contract law operating in a constitutional context. This position is bolstered by the constitutional principle of legality which maintains that '[m]aking rules of law discretionary or subject to value judgments may be destructive of the rule of law'.[23]

Against this backdrop, Harms DP interpreted the *Barkhuizen* test as requiring the reasonableness of the clause and its enforcement to be grounded in public policy as informed by the Constitution. In other words, fairness cannot be a 'free floating' or 'overarching principle' whose interpretation and application is subject purely to the discretion of judges.[24] Indeed, the essential question posed by the *Barkhuizen* test is whether the (time limitation) clause itself, and/or its enforcement in the circumstances, is in line with public policy (including relevant constitutional rights – that is, s 34 of the Constitution – and values) or not. If yes, it is fair. If not, one needs to consider whether or not the implicated policy consideration (or constitutional right or value) is reasonably and justifiably limited/affected.[25] If yes, the clause is valid and enforceable. However, if not, the

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[18]Paragraph 27.
[19]Paragraphs 27-28.
[20]Paragraphs 36-38; 40.
[21]Paragraph 39.
[22]Chapter 2 of the Constitution, 1996.
[23]Paragraph 39.
[24]Paragraphs 47-52 especially para 50.
[25]For this purpose, the meaning of 'reasonable and justifiable limitation' contemplated by s 36 of the Constitution would be decisive – para 48.

clause itself and/or its enforcement would be against public policy and thus void and/or unenforceable.[26]

In *casu*, the court held that Bredenkamp's argument that the bank's enforcement of its right to cancel in terms of the termination clause was unfair, did not implicate any public policy consideration or constitutional right, value or principle. Bredenkamp's argument relied purely on fairness 'as an overarching principle, and nothing more'.[27] As such, Bredenkamp's argument failed.
Interestingly enough, the SCA then went on nevertheless, to determine whether the bank's exercise of its right to cancel was in fact fair or unfair. At the outset, the SCA acknowledged that fairness is a 'slippery concept' as illustrated by the earlier conflicting judgments of Jajbhay J and Lamont J respectively.[28] In terms of the argument that Bredenkamp would effectively be 'unbanked', the SCA rejected this argument on the basis that Bredenkamp did appear to have accounts with other banks, albeit not necessarily with other *local* banks.[29] In any event, even if Bredenkamp was to be 'unbanked', this was caused by his listing as a 'specially designated national' rather than by Standard Bank's termination of their contracts with him.[30] Conversely, it would be unfair to Standard Bank if, absent any public policy or constitutional consideration, it were forced to retain Bredenkamp as a client for the mere reason that other banks are unlikely to take him on as a client.[31]

The SCA was further satisfied that there was no procedural or administrative unfairness.[32] The viability of the less drastic steps which the bank could have taken was also questionable.[33] In the final event, the SCA was satisfied that Standard Bank had exercised its right to cancel the contracts with Bredenkamp lawfully and in good faith. It gave Bredenkamp reasonable notice of the termination and did not contravene any public policy consideration or constitutional right, value or principle.[34] This sufficed – it was not for the court to go further to evaluate the merits of the business decision taken by Standard Bank.

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[26]Paragraphs 44-48.
[27]Paragraph 30.
[28]Paragraph 54.
[29]Paragraph 57.
[30]Paragraph 58.
[31]Paragraph 60.
[32]Paragraph 61.
[33]Paragraph 62.
[34]Paragraphs 64-65.

The end result therefore was that the SCA dismissed the appeal.[35]

3 Critique

In this case, the SCA's conception of contractual fairness warrants closer examination.

First, I look at the nature and content of fairness as a concept in our common law of contract. I begin by explaining briefly the classical liberal conception of contractual fairness as it operated in the pre-constitutional era. I then outline the SCA's corresponding understanding of fairness operating in the constitutional era. In this respect, I argue that whilst the SCA is correct in maintaining that a 'free floating' or vague 'overarching' notion of fairness cannot be employed in our contract law, the court's continued employment of a classical liberal understanding of fairness prevents the realisation within contract law of the substantively progressive and transformative goals of the Constitution.

Secondly, I assess the SCA's liberal legalist approach to adjudication as based on its particular understanding of the principle of legality and the rule of law. In particular, I consider the impact thereof on the court's delineation of the scope of application of *Barkhuizen's* two-staged reasonableness test.

3.1 The nature and content of fairness as a concept in our common law of contract

To begin with, fairness is not a foreign concept to our common law of contract. Indeed, in the pre-constitutional era, contractual justice was said to manifest in the principle of sanctity of contract (and *pacta sunt servanda*) as grounded in the classical liberal understanding of the values of freedom of contract, good faith and equity.[36] Articulated further, if two or more parties enter into a contract freely, honestly and on a (formally) equal footing, upon the basis of their respective self-interests, self-reliance and self-determination, then logically speaking, the resulting contract should be fair and reasonable to both parties.[37] As such, contracting parties are legally bound to honour their contracts.

So, the point of departure in our (pre-constitutional) understanding of contract law is that a court of law is required strictly to enforce contracts whenever called upon to do so. Importantly, emphasis is placed on *procedural fairness* (it relating to the *process* by which the parties reach agreement) in the sense that consensus must be voluntary, informed and free from State/legal interference (that is, *laissez faire*). Here, classical liberalism has articulated procedural fairness

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[35]Paragraph 65.
[36]Bhana and Pieterse (n 2) 867-868.
[37]Bhana and Pieterse *id* 867 and authorities cited there.

and the ensuing exercise of autonomy in our contract law rules of agreement in an essentially negative manner. In other words, upon the essentially objective determination of a valid offer and acceptance, subjective consensus is presumed to be present.[38] In particular, a contracting party's exercise of autonomy is presumed to be voluntary and informed unless he or she alleges and proves that one of the legally recognised instances of improperly obtained consensus finds application (that is, misrepresentation, duress, undue influence or bribery).[39] Likewise, if a party is mistaken as to the terms or parties to the contract or does not have the requisite *animus contrahendi* to enter into the contract, he or she can avoid the contract only if he or she alleges and proves the mistake was *justus* and/or the other party did not reasonably rely on the appearance of consensus.[40]

At this juncture, it is important to take cognisance of the (pre-constitutional) counterpart to procedural fairness, namely, *substantive fairness* (it relating to the fairness of *what* the parties agree to). Here, classical liberalism has articulated substantive fairness and the ensuing limits of an exercise of contractual autonomy in the somewhat narrow doctrine of legality. This stands to reason, given that the procedural fairness leg is meant, by and large, to render the contract automatically fair to both parties. Briefly stated, if the contract (when considered in the abstract) implicates a strong public policy consideration which is weighty enough to override the generally prevailing freedom of contract and *pacta sunt servanda* (and the attending legal certainty), the contract is illegal and void for being against public policy.[41] In this context, it is important to note that traditionally speaking, the underlying value of good faith has had a role to play.[42] So for instance, the underlying value of good faith prevents a contractant from behaving fraudulently. Moreover, the value of good faith forms the basis of the doctrine of unconscionability as developed in *Sasfin*.[43]

The upshot is that with the advent of the Constitution, fairness (as grounded in freedom, good faith and equity) was already a recognised concept in contract

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[38]See Pretorius 'The basis of contractual liability (2): Theories of contract (will and declaration)' (2005) *THRHR* 441 at 442-457.

[39]For a general discussion of these rules see Van der Merwe *et al Contract – General Principles* 4th ed (2012) at ch 4.

[40]For a general discussion of the rules on 'Mistake' see Van der Merwe *et al* (n 39) at 22-45.

[41]Bhana and Pieterse 867 and authorities cited there; see also Van der Merwe *et al* at ch 7.

[42]*Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) at 606A-610B; the judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA); *cf Brisley* paras 16-17; Bhana and Pieterse (n 2) 867-869, 889-891.

[43]*Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 8C-D; 9B-C – briefly stated, where a contract is so extremely unfair as to be unconscionable, the need to do 'simple justice between man and man' will require the contract to be held to be against public policy. In *Sasfin*, the contract was held to be unconscionable on the basis that it was tantamount to reducing Beukes to being a slave. To date however, the judiciary has been exceptionally cautious in invoking this doctrine.

law. The big debate related rather, to whether the above-outlined *classical liberal* articulation of contractual fairness (and its underlying values) could continue to stand in a post-apartheid, democratic South Africa as grounded in the constitutional values of freedom, human dignity and equality.[44]

The SCA has maintained that it can and continues to maintain as much in *Bredenkamp*.[45] Indeed, as outlined earlier, *Bredenkamp* simply reiterates the now trite position of the SCA that the classical liberal principle of freedom of contract (and *pacta sunt servanda*) finds legitimacy in the foundational constitutional value of freedom as bolstered by its counterpart value of human dignity.[46] According to the SCA, in the context of contract law, an individual's dignity lies in the legal recognition of his or her autonomy (save for 'obscene excesses') to govern his or her own life through contract.[47] Likewise, in terms of the remaining foundational constitutional value of equality, the SCA continues to proceed from the premise that parties are on an equal footing – where this is not the case, the affected party must present evidence of unequal bargaining power, which the court must then take into account in so far as it actually affects the contractual autonomy of the party in question.[48]

Interestingly enough, the CC too, has accepted such re-legitimation of the classical liberal conception of freedom of contract and *pacta sunt servanda* by the SCA.[49] Accordingly, as in the pre-constitutional era, contracts concluded in the constitutional era are said to be inherently fair because parties on a (formally) equal footing enter into contracts freely and in good faith, in a manner that recognises each individual's basic dignity as an autonomous moral agent (in the classical liberal sense). As a result, even in the constitutional era, the notion of substantive unfairness as articulated by the common law of contract's doctrine of legality continues to be viewed with extreme circumspection. This is borne out by the fact that the SCA is yet to strike down a contract or term for being against

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[44]As per ss 7; 8 and 39 of the Constitution.
[45]Paragraphs 36-40.
[46]*Ibid*; *Brisley* (n 3) paras 94-95; see also *Afrox* (n 3) paras 17-24 where the court went further to identify freedom of contract as a constitutional value.
[47]*Brisley* (n 3) paras 94-95.
[48]*Afrox* (n 3) para 12 and *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 14; unfortunately to date, an apparent lack of evidence of unequal bargaining power has prevented the SCA from dealing any further with this issue – see Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) *SALJ* 269 at 275-278. Indeed, in *Bredenkamp*, this issue was not even canvassed notwithstanding the fact that the court was dealing with a standard form contract that was 'imposed' by Standard Bank, a bank which Bredenkamp argued had significant private power (para 55).
[49]*Barkhuizen* (n 3) paras 15; 57; 59; 70.

public policy (which must now be grounded in the Constitution) and therefore substantively unfair and outside of the traditional parameters of illegality.[50]

Still, although the CC in *Barkhuizen* accepted the SCA's classical liberal point of departure, it also paid special attention to the SCA's constitutional caveat of 'obscene excesses' of contractual autonomy operating in a post-apartheid South African context.[51] In particular, the CC appeared explicitly to delineate the limits of freedom of contract and *pacta sunt servanda* in terms of a *constitutionalised* notion of 'substantive contractual fairness' that ought now to feature under the common law of contract's doctrine of legality. To be sure, it was in the locating of the constitutional fringe of 'obscene excesses' of contractual autonomy (albeit in relation to the time limitation clause in the case before it) that the CC developed the two-staged contractual reasonableness test in *Barkhuizen*.[52]

It is my contention that the test developed in *Barkhuizen* has the potential to constitutionalise our common law of contract's doctrine of legality in a manner that continues to take cognisance of the traditionally objective public policy considerations at an abstract level. However, in so doing, it necessarily must espouse a substantively more progressive and transformative (as opposed to a classical liberal) conception of the foundational constitutional values of freedom, dignity and equality as well as applicable enumerated rights, if any. At the same time, the introduction of the secondary enforcement level to the doctrine of legality can render it sufficiently context-sensitive (and therefore appropriately outcomes-focused) to take account of how the considerations, identified at the objective level of the contractual reasonableness test, impact subjectively on the parties before the court, in the particular circumstances of their case.[53] In this respect, it is submitted that the two-staged contractual reasonableness test, if properly applied, can ensure that the outcome in *every* contract law case is constitutionally just or reasonable (as required by s 39(2) of the Constitution). For example, the subjective reasonableness level of the test should be able to accommodate the likely impact of an instance of inequality of bargaining power in a particular case (that is, a substantively unfair contract/term), or an undermining of a specific contractant's dignity[54] or enumerated constitutional right, in contracts where, objectively speaking, these do not tend to be undermined or in the case of any of the enumerated rights, even implicated.

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[50]See generally *Brisley*; *Afrox*; *Napier*; *Bredenkamp* and *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA); *cf Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) para 12.

[51]*Brisley* (n 3) paras 91-95; *Barkhuizen* (n 48) para 70.

[52]Paragraphs 56-60.

[53]See Bhana 2008 *SAJHR* at 307-308; 315-317.

[54]See Bhana and Pieterse (n 2) at 881 and Lubbe at (n 2) 420-421 where the concept of dignity 'as a constraint on liberty' is discussed.

To sum up, in every case, the tendency of a contract/clause as well as its enforcement in the particular circumstances of the parties ought to be objectively and subjectively reasonable in terms of the foundational *constitutional* values of freedom, dignity and equality. Importantly, the application of a constitutionalised concept of contractual reasonableness does *not* depend on whether a substantive constitutional right is implicated or not. Rather, where s 34 or any other enumerated constitutional right is applicable, such right(s) would serve to *inform* the interplay of the foundational values of freedom, dignity and equality in relation to the doctrine of legality.[55]

From the above, it should be clear that the *Barkhuizen* test is a potentially significant step towards the realisation of substantive contractual fairness in our common law of contract. Accordingly, the subsequent judgment of the SCA in *Bredenkamp* is unfortunate in so far as it appears to narrow the scope of application of the *Barkhuizen* test to time limitation clauses that implicate s 34 of the Constitution.

Even more puzzling however, is the apparent failure of the SCA to take its own understanding of fairness to its logical conclusion. If, as the SCA in *Bredenkamp* itself submits, fairness essentially is the end-product of the interplay between the foundational values of freedom, dignity and equality (albeit the classical liberal articulation thereof), then by definition, fairness can never be a 'free floating' concept, even when it appears to be so invoked by a litigant. Indeed, if one accepts the 'constitutionalised' classical liberal conception of fairness, as the SCA appears to do, one needs equally to appreciate that an *implicit* dimension of any substantive contractual fairness argument is that the contract and/or its enforcement has breached the acceptable parameters of contractual autonomy as denoted by the classical liberal interplay of freedom, dignity and equality under the doctrine of legality. In other words, it is alleged that the contract or term has entered the realm of so-called 'obscene excesses' of contractual autonomy and is therefore void for illegality.

Accordingly, whenever a litigant raises a fairness argument, it is necessary for a court at least to consider whether the contract or term constitutes an 'obscene excess' of autonomy that ultimately *undermines* (rather than enhances) the values of human dignity, equality and even freedom itself (as normally expressed by the entrenched values of freedom of contract and *pacta sunt servanda*). Indeed, a court ought to do so even if the litigant fails explicitly do so, at least in the transitional period where litigants and the courts alike are developing the post-apartheid concept of substantive contractual fairness as

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[55]Bhana *Constitutionalising contract law: Ideology, judicial method and contractual autonomy*' PhD thesis University of the Witwatersrand (2013) ch 2 at 93-95.

grounded in the rights and values of the Constitution.[56] Arguably, this is what the SCA purported to do when it assessed the potential unfairness of the bank's enforcement of the termination clause in question, notwithstanding its position that no 'public policy consideration or constitutional right, value or principle' had been implicated. It is submitted that had the SCA appreciated this particular nuance of substantive contractual fairness operating in a constitutional context, it would not have interpreted the *Barkhuizen* test as narrowly as it did.

3.2 The SCA's liberal legalist approach and the two-staged Barkhuizen test

At the outset, the SCA in *Bredenkamp* appeared to accept *Barkhuizen's* introduction of the second enforcement level to the traditional public policy scale, at least where the s 34 constitutional right of access to courts was implicated.[57] Nevertheless, it is unclear whether the SCA accepts the second level of the scale as applying more generally to contracts.

On the one hand, the SCA rejected the addition of the enforceability level to the public policy scale on the basis that it espouses a 'free floating' concept of fairness. To this extent, I would agree with the court because such a conception of fairness would create an unacceptable level of uncertainty. On the contrary, I would argue that it is imperative that the substantive reasonableness of a contract and/or its enforcement always be determined in terms of a methodical public policy exercise (that must now be grounded in the Constitution), in accordance with concrete guidelines and factors that are established over time.

To illustrate, neither the tendency nor the enforceability of contracts in restraint of trade has been the subject of judges' 'individual whims or fancies' as to what is fair or reasonable, notwithstanding the fact that the enforceability of a restraint of trade entails a value judgment as to its reasonableness in the circumstances. Nor has this area of law been rendered unacceptably uncertain by the more fluid nature of the purposive adjudication that it fosters.[58]

On the other hand, the SCA appears also to reject the enforceability level of the scale upon the basis of the long-established, liberal legalist approach to adjudication. In the words of the SCA:

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[56] See the minority judgment of Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

[57] Paragraphs 26; 44-46.

[58] For a general discussion of the law on restraints of trade, which uses a public policy scale that is largely similar to the one developed in *Barkhuizen*, see Van der Merwe *et al* at 183-188; see further *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) especially paras 16-17.

> A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.[59]

To this extent, I cannot agree with the SCA. Briefly stated, 'liberal legalism' sees adjudication as 'an exercise purely in deductive legal reasoning as constrained by a conservative (classical liberal) conception of the rule of law'. 'The work of the judge strictly [i]s "to interpret and apply the law but *not* (at least not overtly) to make the law".'[60] So, in relation to our common law of contract and according to the SCA in *Bredenkamp*, the emphasis must continue to be on the highly certain body of contract law principles where rules, as applied somewhat mechanically to facts, is to be preferred to the more open-ended standards invoked in relation to broader (and usually competing) normative/policy concerns under the traditionally narrow doctrine of legality.[61]

I have argued previously that liberal legalism, understood as such, presents an uneasy fit with a constitutionalised contract law.[62] In relation to the doctrine of legality in particular, I explained that contract law's traditionally circumspect attitude toward normative reasoning (purposive adjudication) and concomitant preference for deductive reasoning, may be leading courts to conduct the post-apartheid public policy exercise in a constitutionally deficient manner.[63]

This shortcoming is evident in *Bredenkamp*. When invoking the doctrine of legality, the SCA basically adopted the traditional public policy scale to assess the objective tendency of the termination clause.[64] Significantly, in doing so, the SCA proceeded from the traditional (pre-constitutional) classical liberal premise that the relevant contractual clause was valid and enforceable. The party who wants to escape the clause (that is, Bredenkamp) is therefore at a distinct disadvantage. In other words, the point of departure of the SCA was that both Bredenkamp and Standard Bank had validly exercised their autonomy (in the classical liberal sense) in relation to the relevant contracts. This notwithstanding the fact that the court was dealing with a set of standard form contracts that were drafted and presented to an individual customer on a 'take-it-or-leave-it' basis by one of South Africa's largest (and arguably, most powerful) commercial banks – the reality of unequal bargaining power between the parties and its (potential) impact on Bredenkamp's exercise of contractual autonomy was not even considered.

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[59]Paragraph 39.
[60]Bhana 'The role of judicial method in contract law revisited' 2015 *SALJ* forthcoming; see also Bhana 2008 *SAJHR* at 303 and the authorities cited there.
[61]Bhana 2008 *SAJHR* at 303-308.
[62]*Ibid*.
[63]*Ibid*.
[64]*Id* 304-305.

Conversely, Standard Bank's superior bargaining power (by virtue of its position in the market) similarly was not factored into the enquiry.[65]

The basic upshot of the public policy scale therefore, operating in terms of the doctrine of legality, is that it continues implicitly to complement classical liberal ideology (and the attending preference for legal certainty over fairness) even when the SCA purports expressly to effect contractual justice in accordance with the post-apartheid mandate of substantively progressive and transformative constitutionalism. Articulated further, the public policy scale effectively carves down the normative factors/competing considerations that can be put onto the scale – logically speaking, only those factors that are congruent with the basic premise of the parties having actually exercised contractual autonomy (in the classical liberal sense) can effectively be taken into account.[66]

To compound matters then, the conservative nature of the traditional public policy scale itself becomes relevant in relation to those normative factors/competing considerations that manage actually to make it onto the scale. As explained in a previous article, the traditional public policy scale is not a balanced one.[67] Rather, it is one which at the outset is tipped heavily to the liberal side of freedom of contract and *pacta sunt servanda* (As explained above, the point of departure is that the contract, being an exercise of contractual autonomy, is valid and enforceable). Moreover, the public policy scale fosters an 'all or nothing' approach in terms of which the tendency of the term or contract is assessed against the relevant (competing policy and now constitutional) considerations. What this means is that the contract or clause is considered in the abstract and is held either to be fully valid or completely void.[68] So, unlike the approach fostered by the 2-staged *Barkhuizen* test, the traditional public policy scale is unable to accommodate the circumstances of the parties before the court.[69] However, as outlined earlier, a constitutionalised doctrine of legality must be able sufficiently to address the fairness of the outcomes for the particular parties before the court. Accordingly, the pre-constitutional public policy scale itself significantly undermines the (potential) role that can be played by what are (and ought to be) relevant competing considerations, within the post-apartheid constitutional era.

So in the end, the SCA appears to be immersed still, in the conservative legal culture that is steeped in liberal legalism. As a result, the SCA purports to revert largely to the pre-*Barkhuizen* public policy scale.

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[65]Paragraphs 55-57.
[66]See Bhana *PhD thesis* ch 3 at 148; Bhana 2015 *SALJ* forthcoming.
[67]Bhana (n 5) *SAJHR* at 304-305.
[68]*Ibid*.
[69]*Id* 304.

4 Conclusion

To sum up, *Bredenkamp* is significant in so far as it purports to clarify the ambit of the two-staged reasonableness test as formulated in *Barkhuizen*. Nevertheless, I have argued here that whilst the SCA is correct in interpreting *Barkhuizen* in light of its position that a 'free floating' notion of fairness cannot be employed in our contract law, its underlying classical liberal understanding of the nature, content and manner of operation of the foundational constitutional values continues to be problematic. In particular, in relation to the doctrine of legality, the SCA fails to appreciate the manner in which the continued application of the classical liberal framework covertly excludes extra-contractual policy concerns that ought to feature in a constitutionalised contract law.

In the end, the SCA in *Bredenkamp* seems to narrow the scope of application of the *Barkhuizen* test to time limitation clauses that implicate s 34 of the Constitution. At best, the test may be applicable if one or more of the other enumerated constitutional rights are implicated. In all other cases, it would seem that traditional (objective) public policy test must continue to will apply. As such, the SCA missed a crucial opportunity to make contract law more context-sensitive and this is regrettable.

Deeksha Bhana
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