

# THE ROLE OF UBUNTU IN THE LAW OF CONTRACT

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by Pooja Pundit\*



## Abstract

*The history of South African law is quite unique. It has aspirations of transformative constitutionalism, yet the law is deeply rooted in the common law. Of particular interest are the roles of two principles in the South African law namely; *pacta sunt servanda*, which is one of the principles found in the common law of contract; and *ubuntu*, which is a unique African principle of humanness. The law of contract and the Constitution exist side-by-side, however, this is not without conflict. The article will provide a gentle walk through the principles in the law of contract, the *Mohamed's v Southern Sun* case, and will finally comment on the applicability of the principle of *ubuntu* versus that of the principle of *pacta sunt servanda*.*

## 1 Introduction

The law of contract may, *prima facie*, appear to be very simple. The underlying principle of the law of contract is the sanctity of contracts (*pacta sunt servanda*). *Pacta sunt servanda* holds that contracts that are seriously entered into must be honoured by the respective parties.<sup>1</sup> These agreements are, however, to the exclusion of those against public policy as such agreements remain unenforceable.<sup>2</sup> Public policy is value-laden and involves policy considerations such as

\* BCom Law, LLB (*cum laude*), University of Pretoria; LLM Candidate (Labour Law), University of Pretoria. ORCID iD: 0000-0003-2302-1579.

1 M Pillay 'The impact of *pacta sunt servanda* in the law of contract' LLM dissertation, University of Pretoria, 2015 at 2.

2 Pillay (n 1) 2.

fairness, justice, and equity.<sup>3</sup> Public policy and the common law demand that contractual relationships between parties are both equitable and just, whilst the principle of *pacta sunt servanda* preserves the very content of the contract. This principle speaks to the parties' moral obligation to uphold and honour their intentions which are crystallised in the contract. If a party does not uphold the duties and obligations of the contract, *pacta sunt servanda* can be used to enforce the aggrieved party's rights in terms of the contract.<sup>4</sup>

The evolution of two competing principles in the law of contract, *pacta sunt servanda* and ubuntu, is perfectly encapsulated in the case *Mohamed's v Southern Sun*.<sup>5</sup> This article will delve into the cornerstones of contract law and will consider its underlying principles through a three-stage analysis of the case and its established judicial precedent. First, the analysis will consider whether an illiberal contractual clause is, on its own, contrary to public policy. Second, the relaxation of the *pacta sunt servanda* principle will be considered against the freedom to contract, and third, the value of ubuntu will be considered as a tool to developing the common law.

## 2 Legal framework

### 2.1 Essential elements in the law of contract

The principles of South African contract law stem from the common law. The common law functions alongside the Constitution as section 2 of the final Constitution requires that *all* law, including the common law, adapt and conform to the Constitution in order for it to remain valid.<sup>6</sup> Fundamental values that are entrenched in the law of contract include the freedom of contract, the sanctity of contract, good faith, and lastly, the privity of contract.<sup>7</sup>

In South Africa, a more modern concept of contract law has emerged. Excluding lease and purchase and sale agreements, agreements need not be in a particular format to meet the technical definition of a contract. This modern concept of contract law has developed because of the principle of the freedom of contract.<sup>8</sup> In layman's terms, the freedom of contract entails that contractual parties may agree on any terms and conditions which are lawful and

3 M Kruger 'The Role of Public Policy in the Law of Contract, Revisited' (2011) 128 *South African Law Journal* at 712.

4 Pillay (n 1) 2.

5 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 (*Mohamed's v Southern Sun*).

6 Constitution of the Republic of South Africa, 1996 (Constitution) sec 2.

7 Pillay (n 1) 5.

8 Hutchison & Pretorius *The Law of Contract in South Africa* (2017) at 21.

possible to perform. If the contracting parties have the required contractual capacity, they are free to choose the contents of the contract and are 'free from external control'.<sup>9</sup> It is thus evident that all valid contracts are based on the freedom to contract and consensus – where parties agree to the terms and conditions, and contracts are conducted in good faith.

Central to the freedom to contract is that people are free to choose when, with whom, and on what terms and/or conditions to enter a contract, thereby bestowing 'party autonomy'.<sup>10</sup> The creation of a contract is undertaken through one's will and intent exercisable outside of the state's imposition. In the *Barkhuizen*<sup>11</sup> case, the Court held that 'freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy'.<sup>12</sup> The consequences of the freedom of contract maximize the parties' liberty. If the parties freely and voluntarily entered into a contract, the courts will not be concerned about the substantive contents of the contract and will only analyse public policy, fairness, and public interest considerations should a need arise for the courts to enforce the contract.<sup>13</sup> The courts will also assume this role where legal uncertainties arise as this element is fundamental to the functioning of a free-market economy.<sup>14</sup>

Contracting parties cannot push for the courts to enforce provisions in contracts that are *contra bonos mores* and unfair.<sup>15</sup> Slightly eluding, the freedom of contract ensures that judges have enough flexibility to promote justice.<sup>16</sup> That being said, the quest for autonomy in freedom of contract or a pure form of certainty in contractual provisions can be achieved at the expense of justice.<sup>17</sup> It is thus, for this reason, that the principle of freedom of contract is considered alongside that of *pacta sunt servanda*.

## 2.2 Pacta sunt servanda

The law of contract is concerned with preserving the contents of the contract as well as ensuring fairness in contractual dealings. These fundamental values compete with one another and Hutchison states that finding the perfect balance between these values 'is one of the most intractable problems facing modern contract law'.<sup>18</sup>

9 Hutchison & Pretorius (n 8) 22.

10 Hutchison & Pretorius (n 8) 21.

11 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) (*Barkhuizen*).

12 *Barkhuizen* (n 11) para 150.

13 Pillay (n 1) 6.

14 As above.

15 Hutchison & Pretorius (n 8) 22.

16 As above.

17 Pillay (n 1) 13.

18 Hutchison & Pretorius (n 8) 22.

One of the main cornerstones of the law of contract is '*pacta sunt servanda*'. This principle translates from Latin to mean 'agreements must be kept'. The object of the sanctity of contract is to ensure that the obligations and the performance agreed to by contractual parties are adhered to, and that parties respect the agreement entered into voluntarily and with specified intentions.<sup>19</sup> This principle promotes the idea that contracts that are freely and voluntarily entered into must be honoured by the respective parties, and on this basis, these contracts may be enforced by the courts.<sup>20</sup> In *Wells v South African Aluminite Company*,<sup>21</sup> the Court held that public policy requires that people with the capacity to understand and appreciate the value of contracting have 'the utmost liberty' and that their contracts shall be 'held sacred' and enforced by the courts if entered into freely and voluntarily.<sup>22</sup> The difference between the freedom of contract and *pacta sunt servanda* is perfectly set out in *Mohamed's v Southern Sun*, where the parties enter into an agreement that gives effect to their right of freedom of contract with accompanying obligations which give effect to the common law principle of *pacta sunt servanda*.<sup>23</sup>

In support of *pacta sunt servanda*, Ngcobo J explained in a majority judgment that *pacta sunt servanda* is 'a profoundly moral principle, on which the coherence of any society relies'.<sup>24</sup> Ngcobo J iterated that *pacta sunt servanda* promotes values such as freedom and dignity, where self-autonomy lies central.<sup>25</sup> Ngcobo J emphasised that the general rule of enforcing agreements cannot be applied to those that are 'immoral or contrary to public policy', precluding unfair provisions.<sup>26</sup> Here, it is evident that where a contract is understood to be contrary to the moral convictions of society, the respective cornerstones of the freedom of contract and *pacta sunt servanda* become overruled by public policy.<sup>27</sup>

In restraint of trade agreements, *pacta sunt servanda* has been a highly valued principle and has even been considered above the freedom to trade as set forward in *Magna Alloys v Ellis*.<sup>28</sup> The Court iterated that it is in the public's interest for the respected parties to honour their agreements.<sup>29</sup> Further, even where an agreement can be

19 N Kubheka 'Pacta Sunt Servanda- which approach to follow?' (2019) 19(1) *Without Prejudice* at 37.

20 Hutchison & Pretorius (n 8) 21.

21 *Wells v South African Aluminite Company* 1927 AD 69.

22 Pillay (n 1) 7.

23 *Mohamed's v Southern Sun* (n 5) para 24.

24 *Barkhuizen* (n 11) para 87.

25 *Barkhuizen* (n 11) para 57.

26 *Barkhuizen* (n 11) para 87.

27 Van der Merwe et al *Contract General Principles* (2012) at 140.

28 *Magna Alloys v Ellis* 1984 4 SA 874 (A) (*Magna Alloys*).

29 K Calitz 'Restraint of trade agreements in employment contracts: Time for *pacta sunt servanda* to bow out?' (2011) 22 *Stellenbosch Law Review* at 51.

perceived as unfair to a respective party, this will normally not be a ground to challenge the validity of a contract.<sup>30</sup>

For a restraint of trade clause to be contrary to public interests, it must enforce an unreasonable restraint against the interest protected.<sup>31</sup> Therefore, the onus to prove that an agreement is unreasonable and contrary to public policy rests with the contracting party who wishes to escape the restraint of trade clause.<sup>32</sup> This reversed burden of proof is due to the primacy and value placed on *pacta sunt servanda*, thus preserving the contents and sanctity of contracts.<sup>33</sup>

In *Magna Alloys* the Appellate Division held that a restraint of trade agreement is proper and enforceable similar to any ordinary contract, provided that it is consistent with public policy.<sup>34</sup> This case revolutionised contract law in South Africa as restraint of trade agreements are now valid and enforceable unless the employee can prove that the provisions in the restraint of trade agreement are unfair, unreasonable, and contrary to public policy.<sup>35</sup> On the other hand, in *Den Braven v Pillay* Wallis J stated that '*pacta sunt servanda* is the economic life-blood of a civilised country', placing utmost importance on this principle in line with *Magna Alloys*.<sup>36</sup> As presented, it is unequivocal that Wallis J and Davis J did not see eye-to-eye regarding the observance of *pacta sunt servanda*. In layman's terms, Davis J viewed *pacta sunt servanda* as a rumination of a *laissez-faire* approach where individuals had the utmost freedom of contract whereas Wallis J held that restraint of trade agreements must be treated the same as any ordinary contract.<sup>37</sup>

It is unequivocal that there is uncertainty regarding restraint of trade principles. Ultimately, although a restraint of trade agreement can be perceived to be unfair to a party (employee), at the end of the day, both parties entered the contract freely, voluntarily, and with the required capacity to perform according to the provisions of the contract, rendering it enforceable in a court of law.

### 2.3 Public policy, good faith, and equity

The notion of good faith or *bona fides* played a large role in the development of our law of contract and has sustained equitable morale in civil law. The role of *bona fides* in modern contract law is

30 As above.

31 Calitz (n 29) 52.

32 As above.

33 Calitz (n 29) 52.

34 *Magna Alloys* (n ) 893.

35 Calitz (n 29) 52.

36 Calitz (n 29) 58.

37 As above.

debatable. Good faith is seen as a 'counterweight' principle to the freedom of contract and is applied as a mechanism to develop a system of fairness in contract law.<sup>38</sup>

The crux of the *bona fide* principle is that contractual dealings must take place in an honest fashion and in good faith. Judicial precedent has widened the meaning and scope of *bona fide* to include values such as reasonableness, fairness, justice, and equity.<sup>39</sup> Sijde explains that the principle of *bona fides* merged into an 'umbrella defence of public policy', meaning that public policy is acquainted with contractual relationships as well as *pacta sunt servanda*.<sup>40</sup> One may observe that good faith can be used as a scapegoat for a contracting party who wishes to abandon or escape the contract. The principle of *bona fide* supports that even though the freedom of contract enables parties to determine the terms of their contract, this freedom cannot assume that a court of law will enforce a contract *contras bonos mores*.<sup>41</sup>

In order to determine what is reasonable, the court will look at relevant social factors which will evolve over time.<sup>42</sup> The court will have to make a value-based judgment to establish what is fair.<sup>43</sup> Another imperative case in the law of contract is *Brisley v Drotzky*, where this Supreme Court of Appeal held that good faith was not the factor that helped courts set aside a valid agreement because 'it was not a "free floating" basis to interfere with an agreement reached voluntarily'.<sup>44</sup> Here, it is evident that the Court balanced the two principles of *bona fide* and *pacta sunt servanda* to reach common ground.<sup>45</sup>

Cameron JA acknowledged that public policy stems from the Constitution, and was said to be 'comfortable' with the majority decision since the cornerstone of the freedom of contract and contractual autonomy promotes the fundamental value of dignity.<sup>46</sup> Moreover, Cameron JA states that a balance between the freedom of contract and social justice must be grounded because 'this is the essence that the Constitution requires'.<sup>47</sup> The role of the *bona fide* principle in South African contract law is a basic principle upon which the law of contract informs its substantive rules. The Court was emphatic that the principle of good faith is not a stand-alone principle

38 Hutchison & Pretorius (n 8) 26.

39 Hutchison & Pretorius (n 8) 28.

40 E van der Sijde 'The role of good faith in the law of contract' LLM dissertation, University of Pretoria, 2012 at 1.

41 Sijde (n 40) 2.

42 Sijde (n 40) 19.

43 As above.

44 *Brisley v Drotzky* (432/2000) [2002] ZASCA 35 paras 14-15.

45 Sijde (n 40) 19.

46 Pillay (n 1) 8.

47 As above.

to advance or ‘attack’ contractual decorum. At most, the principle of good faith is merely an underlying value.<sup>48</sup>

Recently, the Constitutional Court in the *Beadica* case<sup>49</sup> pronounced on the debate between public policy and the enforcement of contractual terms which might yield unfairness. Theron J held that parties may not ‘escape’ obligations of a contract if the enforcement thereof would yield to be unfair since the values of the Constitution do not provide for interference by the courts in contractual relationships.<sup>50</sup> Instead, constitutional norms are considerations in the ‘balancing exercise’ for one to determine if the contractual clause is contrary to public policy.<sup>51</sup> Theron J was emphatic that abstract values of good faith, fairness, and ubuntu do not have autonomy and independent standing compared to contractual requirements. It is only where the enforcement of a contractual clause is unjust to the extent that it is contrary to public policy that a court may refuse the enforcement.<sup>52</sup>

## 2.4 Ubuntu

South Africa is a country with a unique and deep past that requires a teleological approach to the interpretation of the Constitution. At the foundation of our democracy lies values such as good faith, dignity, equality, and ubuntu.<sup>53</sup> Section 39(2) of the Constitution enables the courts to develop the common law and align it with the values set out in the Bill of Rights, with section 8(3)(a) outlining that a court must apply or, if necessary, develop the common law. In light of this, however, the following question arises – how does ubuntu relate to *pacta sunt servanda* and contract law in general?

Mokoro J outlined the concept of ubuntu as ‘*ubuntu ngumuntu ngabantu*’ which is translated to mean ‘a human being is a human being through other human beings’.<sup>54</sup> Prominence is placed on the principle of ubuntu because it provides for transformation, deconstruction, and change.<sup>55</sup>

48 D Hutchison ‘Non-variation clauses: Any escape from the Shifren straitjacket?’ (2001) 118 *South African Law Journal* at 744; D Hutchison ‘Good Faith in Contract: A Uniquely South African Perspective’ (2019) 1 *Journal of Commonwealth Law* at 237.

49 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) (*Beadica*).

50 *Beadica* (n 49) para 144.

51 *Beadica* (n 49) para 71.

52 *Beadica* (n 49) para 72.

53 Kubheka (n 19) 36.

54 Y. Mokgoro ‘Ubuntu and the Law in South Africa’ (1998) 4 *Buffalo Human Rights Law Review* at 15.

55 Hutchison (n 48) 242.

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*<sup>56</sup> (*Everfresh*) is the case that defined the African value of ubuntu in contract law. Ubuntu was designated the role of developing the law of contract to be consistent with fundamental constitutional values and morals. The Court noted that ubuntu.<sup>57</sup>

... emphasises the communal nature of society and carries in it the ideas of humanness, social justice and fairness, and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.

The notion of fairness, social justice, and equity are implicit in the African value of ubuntu. Although ubuntu is an umbrella principle that preserves social justice, it does not have a sense of legal certainty and the practical application of the principle of ubuntu may be ambiguous.<sup>58</sup> As mentioned above, courts have iterated that there is no precise remedy to solving a conundrum between good faith and *pacta sunt servanda*. Each conundrum must be presented and solved on a case-by-case basis using the tools of interpretation and sources such as legislation and case law. The law of contract is subject to constitutional scrutiny and courts have the duty to develop the common law to ensure its compliance with the underlying values of the Constitution. This was emphasised in *Barkhuizen v Napier* where it was held that courts are required to promote the spirit of the Bill of Rights when developing the law of contract.<sup>59</sup>

## 2.5 The role of the Constitution in contract law

The Constitution is the supreme law of the land and any law or conduct that is contrary to the Constitution is invalid to the extent of such contradiction.<sup>60</sup> The supremacy clause of the Constitution sets out that all law is subordinate to the Constitution. This section will delve into the application of the Constitution to contractual matters between private parties.

In terms of the direct application of the Bill of Rights to the law of contract, if a provision in a contract appears to violate a fundamental constitutional right, the respective party may 'attack' this provision on the ground that it possibly violates said right.<sup>61</sup> In this case, there is no need to reference a common law rule.<sup>62</sup> However, in terms of an indirect application of the Bill of Rights, if there is a probable violation of a fundamental constitutional right in

56 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC) (*Everfresh*).

57 *Everfresh* (n 56) para 71.

58 Sijde (n 40) 36.

59 *Barkhuizen* (n 11) para 35.

60 Constitution (n 6) sec 2.

61 *Hutchison & Pretorius* (n 8) 35.

62 As above.



a contract, one must look at its effect in the law of contract.<sup>63</sup> A party who, for example, challenges a provision in the contract may argue that the term violated a fundamental constitutional right, rendering that term against public policy and common law rules.<sup>64</sup>

According to *K v Minister of Safety and Security*,<sup>65</sup> the very purpose of section 39(2) is to ensure that common law values are consistent with fundamental constitutional values.<sup>66</sup> Values such as good faith, public policy, and reasonableness are rooted in the law of contract which stems from the common law.<sup>67</sup> These values are flexible in the sense that they may be interpreted to be in line with the fundamental values of the Constitution, such as ubuntu.<sup>68</sup>

Ubuntu is the golden thread that runs through our Constitution. In the *Barkhuizen* case, the majority judgment in the Constitutional Court preferred an indirect application of the Constitution with regards to contractual matters, specifically when applying section 39(2).<sup>69</sup> Ngcobo J explained that the correct approach to establishing whether a provision in the contract is against public policy is to consider the fundamental values of our Constitution (such as ubuntu).<sup>70</sup> Thus, a contract that is contrary to the values in the Constitution will be against public policy and will therefore be unenforceable.<sup>71</sup>

This approach allows for *pacta sunt servanda* to function simultaneously, thus giving the court the power to disallow the enforcement of contractual provisions that are inconsistent with fundamental constitutional values – even where the parties may have agreed to them.<sup>72</sup> In a similar judgment, *Den Braven v Pillay*, Wallis AJ held that in terms of a contractual relationship, the freedom to choose a trade, occupation, or profession applies indirectly.<sup>73</sup>

The fundamental values of the Constitution are dignity, ubuntu, and equality.<sup>74</sup> These values have a phenomenal impact on the law of contract. The Bill of Rights is directly applied with regards to the state's conduct and indirectly applied in the sphere of private law.<sup>75</sup> Accordingly, it is required that the law of contract be developed to promote the fundamental values of our Constitution.<sup>76</sup>

63 As above.

64 As above.

65 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

66 *K v Minister of Safety and Security* (n 56) para 17.

67 Hutchison & Pretorius (n 8) 35.

68 Hutchison & Pretorius (n 8) 36.

69 *Barkhuizen* (n 11) para 35.

70 *Barkhuizen* (n 11) paras 29-30.

71 *Barkhuizen* (n 11) para 29.

72 *Barkhuizen* (n 11) par 30.

73 *Den Braven v Pillay* 2008 (6) SA 229 (D) para 30.

74 Hutchison & Pretorius (n 8) 36.

75 As above.

76 Pillay (n 1) 10.

It is thus clear that in our constitutional democracy, the golden thread of ubuntu must counterbalance the common law of contract to bring about its consistency with the Constitution.

## 2.6 Freedom of contract and the impact of the Constitution

Cameron JA, in *Brisley v Drotsky*,<sup>77</sup> referred to section 39(2) of the Constitution to associate the law of contract with fundamental constitutional values such as freedom, equality, and justice, as well as the common law principle of the freedom of contract. Concurring with this judgment, the freedom of contract principle was held to be a constitutional value in *Afrox Healthcare v Strydom*.<sup>78</sup> The Supreme Court of Appeal recognised the golden thread of the Constitution in section 27(1)(a) (the right to health care services), which must be considered in regulating the legality of a specific clause that excluded the negligence of nurses.<sup>79</sup> The principle of public policy was used to examine whether an exclusionary clause of this nature was plausible. The Court held that public interest has primacy value and declared the exemption clause invalid and unenforceable.<sup>80</sup> Thus, exclusionary clauses that protect hospitals from liability due to the fault of their staff members may be pronounced invalid.<sup>81</sup>

Similarly, the enforcement of exclusionary clauses was limited in *Johannesburg Country Club v Stott*.<sup>82</sup> An exemption clause in the contract excluded the liability of negligence causing the death of a person.<sup>83</sup> The Supreme Court of Appeal held that this exemption clause offended the right to life protected in section 11, as well as considerations of public policy, and the common law rule of the 'sanctity of life'.<sup>84</sup> This decision is indicative of the application by our courts of the golden thread of ubuntu in the sphere of law. It establishes the importance of not recognising terms that are not aligned with public policy and good and fair moral values. In this instance, public policy rightfully prevailed over the common law contract principles. The respective judges delivered value-based judgments using policy considerations.<sup>85</sup> The Court did not allow the enforcement of the exemption clause even though the parties entered the contract freely and voluntarily, and accordingly, the *pacta sunt*

77 *Brisley v Drotsky* (n 44) paras 88-95.

78 *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) paras 17-24.

79 *Afrox Healthcare v Strydom* (n 79) para 17.

80 As above.

81 D McQuoid-Mason 'Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?' (2012) 5(2) South African Journal of Bioethics and Law at 65.

82 *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).

83 *Johannesburg Country Club v Stott* (n 84) para 12.

84 As above.

85 Pillay (n 1) 13.

*servanda* principle was trounced by what was held to offend public policy considerations.

It is safe to say that the freedom of contract and human dignity can be linked together as human dignity, by its nature, requires individuals to make responsible decisions over their lives.<sup>86</sup> In support of this, Ngcobo J iterated that 'self-autonomy' is the essence of freedom and is an imperative part of dignity.<sup>87</sup> The extent that a contract was freely and voluntarily concluded is an important factor because it plays a role in determining the weight given to values of freedom and dignity.<sup>88</sup> However, Cameron JA affirmed in *Brisley* that an 'obscene excess' of autonomy must be forsaken as it may impede the fundamental right of human dignity.<sup>89</sup> As mentioned above, a rigid application of the freedom of contract principle may result in unfair contractual provisions, which are unenforceable in a court of law.<sup>90</sup>

In the *Barkhuizen* case, the Court was presented with a 90-day time clause in an insurance contract which was declared an unreasonable limitation of section 34 of the Constitution, which is the right to access courts.<sup>91</sup> This case was ground-breaking because it was the first time that the Constitutional Court had 'direct engagement' with the common law of contract.<sup>92</sup> Ngcobo J referred to Cameron JA's remarks in *Brisley v Drotsky* where he acknowledged that the Constitution itself honours the common law principle of *pacta sunt servanda*, requiring contractual parties to honour their word according to the contract.<sup>93</sup> Pillay comments that in this case, the Constitutional Court reaffirmed that *pacta sunt servanda* which is linked to the freedom of contract, is a concrete principle.<sup>94</sup> Even though contractual principles are recognised by the Constitution, a 'court should decline the enforcement' should the enforcement of these clauses or the contract itself be contrary to public policy, unreasonable or, unfair.<sup>95</sup>

As presented in the *Barkhuizen* and *Brisley* cases, Cameron AJ and Ngcobo J have brought closure on the conundrum concerning common law principles in the law of contract and the Constitution. These principles can be clearly understood considering our constitutional democracy. *Pacta sunt servanda* and the freedom of contract are considered concrete principles, however, these principles must be

86 Pillay (n 1) 12; Constitution (n 6) sec 10.

87 *Barkhuizen* (n 11) para 57.

88 Pillay (n 1) 11.

89 *Brisley v Drotsky* (n 44) paras 94-95.

90 Pillay (n 1) 11.

91 *Barkhuizen* (n 11) para 57.

92 Pillay (n 1) 13.

93 As above.

94 As above.

95 *Barkhuizen* (n 11) para 70.

married with the underpinning values in our Constitution.<sup>96</sup> Should a contractual clause result in unfairness and unreasonableness to the extent that its enforcement will be against public policy, the courts will not give effect to that clause.

### 3 Conflicting values in the law of contract and the impact of *Mohamed's v Southern Sun*

#### 3.1 Conflicting values in the law of contract

It is important to shed light on the instances where the cornerstones in the law of contract conflict or are in competition with one another. The freedom of contract and the sanctity of contract are principles that must not be applied too stringently, rigorously, or in isolation.<sup>97</sup> Public policy and the underlying values of our Constitution must always be kept in mind in the law of contract to ensure that holistic judgments are made in the interest of justice. To ignore public policy considerations would be detrimental and may render challenges before our courts fatal.

The freedom of contract and *pacta sunt servanda* function together, and together with them follow the theory of economic liberalism.<sup>98</sup> Contracts that are freely and voluntarily entered into by respective contractual parties can be enforced by the courts provided that parties have the capacity to contract, thus promoting a free-market economy and ensuring legal certainty.<sup>99</sup> The underlying complications of fairness and good faith in a contract, however, suggest a matter of social control over private interests in contract law.<sup>100</sup> It is unequivocal that the 'pursuit of individual freedom of contract' or legal certainty might come at the expense of social justice, and vice versa.<sup>101</sup>

*Sasfin v Beukes*<sup>102</sup> declared that the power to establish when a clause or contract is contrary to public policy must be 'exercised sparingly' and only in cases where it is clear that there is uncertainty regarding the validity of the contract.<sup>103</sup> It is important to note that this case cleared up the ambiguity on the following: one cannot conclude that a contract or clause is contrary to public policy simply

96 Pillay (n 1) 13.

97 Pillay (n 1) 8.

98 Hutchison & Pretorius (n 8) 22.

99 Pillay (n 1) 6.

100 Hutchison & Pretorius (n 8) 22.

101 As above.

102 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD).

103 Hutchison & Pretorius (n 8) 22.

because it offends one's individual or personal 'sense of propriety and fairness'.<sup>104</sup>

When a court enforces an unreasonable and harsh contract or contractual provision, it is at the expense of an individual's sense of what justice should entail.<sup>105</sup> On the other hand, when a court allows parties to escape their obligations and liability to perform under what was expected to be a binding contract, this is at the expense of legal and commercial certainty.<sup>106</sup> The more one enforces strict rules (such as the strict application of the freedom of contract and *pacta sunt servanda*), the smaller the ambit is for 'judicial manoeuvring' in terms of justice.<sup>107</sup> If the standards are more flexible (such as ubuntu and good faith), legal certainty is, however, compromised.<sup>108</sup> In order to balance these values, there is a need for a *quid pro quo* or an equal exchange between 'two desirable goals'.<sup>109</sup> An equilibrium must be found using value-based judgment that might differ on a case-by-case basis with consideration to changing laws and ideas.<sup>110</sup>

### 3.2 *Mohamed's v Southern Sun*

Mohamed's Leisure Holdings (Pty) Ltd (Mohamed's), the appellant, sought an order for the eviction of Southern Sun Hotel Interests (Pty) Ltd (Southern Sun), the respondent, based on a breach of a clause in the lease agreement.<sup>111</sup> The respondent defaulted on rent which entitled the appellant to cancel the agreement and evict the respondent.<sup>112</sup> An important material term in the agreement was that should Southern Sun fail to pay the rent on the specified date, Mohamed's was entitled to cancel the agreement and take full possession of the property.<sup>113</sup> Notably, the respondent had been occupying the property and had worked in the hotel business for an uninterrupted period of 35 years.<sup>114</sup>

Throughout the lease period, Southern Sun was prompt with rent payments.<sup>115</sup> Nevertheless, on 07 June 2014, Southern Sun failed to

104 *Sasfin v Beukes* (n 103) para 5.

105 Pillay (n 1) 33.

106 As above.

107 *Hutchison & Pretorius* (n 8) 22; *Hutchison* (n 48) 236-244; *Brisley v Drotzky* (n 44). Here, the Court cited *Hutchison* with approval. See also FDJ Brand 'The role of good faith, equity and fairness in the South African law of contract: A further installment' (2016) 27 *Stellenbosch Law Review* at 238; and M Wallis 'Commercial Certainty and Constitutionalism: Are They Compatible' (2016) 133 *South African Law Journal* at 560.

108 As above.

109 As above.

110 As above.

111 *Mohamed's v Southern Sun* (n 5) para 5.

112 *Mohamed's v Southern Sun* (n 5) para 6.

113 *Mohamed's v Southern Sun* (n 5) para 5.

114 As above.

115 *Mohamed's v Southern Sun* (n 5) para 7.

pay its rent.<sup>116</sup> On 20 June 2014, Mohamed's sent a written letter to Southern Sun, where it was given five days to remedy the breach and warned that should Southern Sun default payment in the future, a notice to remedy the breach will not be sent, the agreement will be cancelled, and Southern Sun would have to vacate the property immediately.<sup>117</sup> Southern Sun's bank, Nedbank, disclosed that owing to an internal problem regarding its processors, the payment was only processed for 01 June 2014.<sup>118</sup> Three months following the error made by Nedbank, Southern Sun monitored its bank statements to ensure that payments were made accordingly.<sup>119</sup> On 6 October 2014, the rent was debited from Southern Sun's account, but at the fault of Nedbank, the rent was credited to a wrong account and not Mohamed's account.<sup>120</sup> As a result of the clause being breached, Mohamed's sent a notice of cancellation of the agreement on 20 October 2014, giving Southern Sun until 31 October 2014 to vacate the property.<sup>121</sup> Repeatedly, Nedbank accepted accountability for the deferment of payment 'due to a processing error' and finally made the payment on 21 October 2014.<sup>122</sup>

Southern Sun paid the amount with interest to Mohamed's indicating good faith.<sup>123</sup> In response to the notice of cancellation and eviction from Mohamed's, Southern Sun's attorney argued that the cancellation of the agreement was unreasonable because the breach was an error made by Nedbank and that this unreasonableness was clearly against public policy.<sup>124</sup> The appellant contended that the High Court was obliged to enforce the contract since it was established that the respondent committed 'a material breach'.<sup>125</sup> The appellant relied on the common law contract principle, *pacta sunt servanda*.

### 3.3 Findings of the Court

The Supreme Court of Appeal (SCA) noted that the High Court concluded that Mohamed's had the power to cancel the lease agreement using the ground of default or non-payment of the rent due in October.<sup>126</sup> The High Court found that this clause did not cause a strain on the respondent because the respondent had agreed to pay according to these terms and had complied with these terms for 35

116 As above.

117 As above.

118 As above.

119 *Mohamed's v Southern Sun* (n 5) para 8.

120 As above.

121 *Mohamed's v Southern Sun* (n 5) para 8.

122 As above.

123 *Mohamed's v Southern Sun* (n 5) para 8.

124 As above.

125 *Mohamed's v Southern Sun* (n 5) para 10.

126 *Mohamed's v Southern Sun* (n 5) para 9.

years. The issue, to be determined by the High Court, was whether (considering all the relevant circumstances of this case) enforcing the 'cancellation' clause would be unreasonable and against public policy.<sup>127</sup>

In order to address the above concern, one must consider the impact that the relevant factors have on the case. This calls for a weighing up of the two principles of *pacta sunt servanda* and the golden thread of the Constitution. The SCA declared that since the respondent breached the agreement (a material breach), the appellant is clearly entitled to cancel the lease agreement.<sup>128</sup> It must be mentioned that although the appellant was entitled to cancel the agreement after the initial breach in June, it chose not to.<sup>129</sup> Henceforth, the appellant warned the respondent that a breach in the future could result in a cancellation of the agreement and waited a further 12 days for remedial action before cancelling the lease agreement.<sup>130</sup> The appellant's counsel explained that:<sup>131</sup>

If the courts were to embark on the course of action, claimed by the respondent it would be imposing its own sense of fairness and make the contracts for the parties.

In response, the respondent disputed the appellant's power to cancel the lease agreement due to the defaulted rent payment in October.<sup>132</sup> It argued further that the cancellation clause should be interpreted to mean that parties 'ought to act in good faith'.<sup>133</sup> This resembles the common law principle of *bona* good faith, where contractual parties are expected to conduct themselves in an honest and fair fashion. As mentioned above, the respondent iterated that the principle of good faith allows this clause to be 'flexible' in order to acclimatise to unexpected instances beyond the control of the parties involved.<sup>134</sup>

It was argued that the enforcement of the cancellation clause manifests an unreasonable outcome that is contrary to public policy. Furthermore, the respondent claimed that the clause was unreasonable because it purported compliance regardless of the uncontrollable and unexpected circumstances that prevented compliance.<sup>135</sup> As mentioned above, public policy is based on good faith, fairness, ubuntu, and social justice between parties. The respondent held that according to these principles, the courts are bound to promote the spirit, purports, and the objects of the Bill of

127 *Mohamed's v Southern Sun* (n 5) para 8.

128 *Mohamed's v Southern Sun* (n 5) para 11.

129 As above.

130 As above.

131 As above.

132 *Mohamed's v Southern Sun* (n 5) para 12.

133 As above.

134 *Mohamed's v Southern Sun* (n 5) para 12.

135 As above.

Rights according to section 39(2).<sup>136</sup> The crux of the respondent's argument 'is that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations'.<sup>137</sup> Meaning, that *pacta sunt servanda* is not the only consideration regarding the law of contract and that the golden thread of the Constitution must prevail in these circumstances.

The main points of the respondent's argument were the overall lease period spanning over 35 years, the uncontrollable and unexpected circumstances that caused the breach, and the efforts by *Southern Sun* to 'purge the default'.<sup>138</sup> It was asserted by the respondent that the cancellation clause should rather be interpreted where the parties act in good faith and the clause is flexible enough to adapt to instances where parties are hindered from complying with the clause.<sup>139</sup> The respondent reasoned that to give effect to the cancellation clause would be unreasonable, unfair, and contrary to public policy.<sup>140</sup> Given the period of the lease, the bank's in-house system, and the attempts made by the respondent to enforce the cancellation clause, the respondent argued that the attitude of the appellant was contrary to the good faith principle.<sup>141</sup>

It is quite clear that at the heart of *Mohamed's v Southern Sun* is the battle between common law contract principles and the golden thread of the Constitution. One must remember that the Court has the power to declare whether contracts are contrary to public policy and will do so only in precise cases where one can see that the implementation of this contract would result in an 'indiscriminate use of power'.<sup>142</sup> Furthermore, when parties freely and voluntarily contract, the privity of contract and *pacta sunt servanda* hold that contractual obligations are to be honoured. These are intrinsic to the freedom of contract where parties may agree on any terms that are possible and lawful in a contract. The enforcement of a contract is underpinned by the 'weighty considerations of commercial reliance and social certainty'.<sup>143</sup>

The Constitutional Court judgment in the *Barkhuizen* case was essential to the respondent's argument. Ngcobo J mentioned the importance of considering the circumstances that caused the breach

136 *Mohamed's v Southern Sun* (n 5) para 12.

137 As above.

138 *Mohamed's v Southern Sun* (n 5) para 13.

139 As above.

140 *Mohamed's v Southern Sun* (n 5) para 13.

141 As above.

142 STBB 'Is a hard-hitting contractual term constitutionally unfair and hence unenforceable?' [https://www.stbb.co.za/wp-content/uploads/stbb\\_plu01-2018\\_s1.pdf](https://www.stbb.co.za/wp-content/uploads/stbb_plu01-2018_s1.pdf) (accessed 15 February 2020) at 3.

143 STBB (n 143) 3.



or prevented the compliance. The respondent referred to Ngcobo J's statement:<sup>144</sup>

Once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply.

The respondent also questioned the substantive fairness of the cancellation clause, which had to be tested against the doctrine of public policy test set out in *Barkhuizen*.<sup>145</sup> There is a subjective stage to the public policy test, where the contract or the clause must be objectively and subjectively reasonable for it to be valid and enforceable.<sup>146</sup>

In support of its argument, the respondent relied on the *Everfresh* case. The minority judgment of the *Everfresh* case was referred to by the respondent to shed light on the importance of good faith and the impact that good faith has on the Constitution.<sup>147</sup> It was determined in *Everfresh* that the values embraced by ubuntu are relevant in determining the objects of the Constitution. The developments in contract law were shaped by the colonial era and it was about time that our country places a 'higher value on negotiating in good faith'.<sup>148</sup>

Lastly, the respondent held that the prejudice suffered by Southern Sun was 'far greater' than that of Mohamed's.<sup>149</sup> The appellant was said to be 'ignoring' the fact that the respondent was the lessee for 35 years and employed 91 permanent and secondary staff.<sup>150</sup> Evicting the respondent would taint its reputation in the hospitality industry and cause job losses. The respondent concluded that *pacta sunt servanda* should be relaxed, considering the relevant circumstances.

To decide whether the cancellation clause manifests to be unfair or unreasonable, the court must look at the extent that it is against public policy.<sup>151</sup> The objective terms of the agreement must be viewed considering the circumstances faced by the parties involved. This calls for a 'balancing and weighing-up' of the two competing principles; *pacta sunt servanda* and the golden thread of the Constitution.<sup>152</sup> The Court referred to *Sasfin v Beukes* where it declared that the power to pronounce a contract contrary to public

144 *Barkhuizen* (n 11) para 58.

145 *Mohamed's v Southern Sun* (n 5) para 13.

146 STBB (n 143) 3.

147 *Mohamed's v Southern Sun* (n 5) para 17.

148 *Everfresh* (n 56) para 23.

149 *Mohamed's v Southern Sun* (n 5) para 19.

150 As above.

151 *Mohamed's v Southern Sun* (n 5) para 21.

152 As above.

policy must be used sparingly.<sup>153</sup> The privity and sanctity of contract entails that contents of the contract must be honoured and preserved if parties had freely and voluntarily entered the contract. *Wells v South African Alumenite Company* was referenced by the Court to evaluate the principle of *pacta sunt servanda*. The Court applied the judgment of *Barkhuizen* to decide if applying the principle of *pacta sunt servanda* would be against public policy and the golden thread of the Constitution and found the following:<sup>154</sup>

- (1) The provisions of the contract are prima facie NOT against public policy.
- (2) The bargaining position of the parties are equal.
- (3) The parties could have negotiated a provision into the contract, where the appellant could have warned the respondent to remedy the breach before the contract was cancelled.
- (4) The performance on time was not impossible. The respondent could have planned with precaution to keep up to date with paying on time or found an alternative way to pay the appellant.

Henceforth, after considering all the relevant factors and applying the Constitutional Court's decision in *Barkhuizen*, it was not contrary to public policy to enforce this contract and uphold the principle of *pacta sunt servanda*.

The Court iterated that the respondent was aware of the material terms and the cancellation clause of the contract.<sup>155</sup> Additionally, the Court noted that the facts of the matter clearly indicate that the appellant was patient with the respondent's multiple failures to abide by the provisions in the lease agreement.<sup>156</sup> As demonstrated above, the Court in *Magna Alloys v Ellis* established that even though a contract or a provision in a contract can be perceived to be contrary to public policy, it might not be a ground for invalidity.<sup>157</sup> The SCA mentioned that even if a term in a contract is unfair or may operate harshly, this does not require it to conclude that the contract is contrary to public policy. This was especially applicable in this case as there was no evidence to conclude that the respondent's constitutional rights were infringed.<sup>158</sup> The reason that the Court did not use section 39(2) to develop the common law of contract was that it was 'impermissible' for the court to develop the common law to invalidate a provision of the contract.<sup>159</sup> The golden thread of the Constitution that consists of ubuntu, good faith, and fairness *would* have been used as a tool to unjustly and unscrupulously render the contract void.

<sup>153</sup> As above.

<sup>154</sup> *Mohamed's v Southern Sun* (n 5) para 28.

<sup>155</sup> As above.

<sup>156</sup> *Mohamed's v Southern Sun* (n 5) para 29.

<sup>157</sup> Calitz (n 29) 58.

<sup>158</sup> *Mohamed's v Southern Sun* (n 5) para 30.

<sup>159</sup> As above.

In application of the values of good faith and ubuntu in the law of contract, the *Potgieter v Potgieter*<sup>160</sup> case is valuable. *In casu*, the importance of legal certainty was stressed by the Supreme Court of Appeal due to the abstract nature of the values of good faith and ubuntu. This means that should judges decide matters based on what they hold to be fair, the principle of legal certainty may be jeopardised.<sup>161</sup>

The SCA held that the outcome of this case can be said to be ‘unpalatable’ for the respondent, but that the respondent must face the consequences of its agent’s failure to perform in time.<sup>162</sup> In this case, the respondent and appellant agreed to renegotiate in *bona fide* and to conclude further agreements.<sup>163</sup> The SCA held that it would be ‘untenable’ to relax *pacta sunt servanda* because that would result in the Court making the agreement for the parties.<sup>164</sup> The Court included a notice period of three months for Southern Sun to leave the property by 31 March 2018.<sup>165</sup>

#### 4 The impact of *Mohamed’s v Southern Sun* on the law of contract

The Constitutional Court is willing to develop the common law by deviating from strictly applying the principle of *pacta sunt servanda* to improve our judicial precedent and law. The obstacles, however, appear with our legal practitioners who do not appropriately plead the question of public policy before the lower courts.<sup>166</sup> The central point of *Mohamed’s v Southern Sun* is that the enforcement of a contract may be unfair and contrary to the golden thread of the Constitution (ubuntu), but upon a thorough inspection of the relevant facts of the matter using guidance set by case law, this may prove otherwise. This renders the ‘defence’ of public policy considerations partially effective, thereby giving credence to fairness, justice, and equity to all in the circumstances of each matter.

A lesson learnt from this matter is that the courts aim to ensure a consistent application of the freedom to contract and are cognisant of the fact that injustice might prevail from the application of this doctrine. It may be perceived that constitutional muster might not prevail after all. This judgment supports party autonomy and notes that parties may freely and voluntarily enter into a contract. It can, however, be necessary to trump the improper exercise of the freedom

160 *Potgieter v Potgieter* (2011) JOL 27892 (SCA).

161 *Potgieter v Potgieter* (n 161) para 34.

162 *Mohamed’s v Southern Sun* (n 5) para 32.

163 As above.

164 *Mohamed’s v Southern Sun* (n 5) para 32.

165 As above.

166 *Kubheka* (n 19) 37.

to contract should it be contrary to public policy. Enforcing a contract that seems to be harmless may breach a constitutional value and should this value be unreasonably impacted; this clause will not be enforceable. Here, the clause was not contrary to public policy at face value.

The resolution of contractual disputes which relate to the balancing of *pacta sunt servanda* and ubuntu lies in our courts following the principles and judicial precedents set and adopted to date. These principles have been tailored and modified to handle the unfair enforcement of contractual terms.<sup>167</sup> This was perfectly illustrated in *Mohamed's v Southern Sun* where the Court considered *Barkhuizen* and *Brisley* when navigating towards a balanced and informed decision. Courts can refuse to enforce a contractual term based on unfairness if the term is found to be contrary to public policy. It is, however, the duty of the courts to be cautious in not hastily concluding that the enforcement of a term will result in an opposition to public policy simply because it offends considerations of fairness.<sup>168</sup>

The courts also have the duty to exercise their power and discretion to refuse the enforcement of contract terms carefully and only in circumstances where it manifests to being 'exceptionally unfair'.<sup>169</sup> The SCA decision mirrors the conservatism of the bench in *Brisley v Drotzky*.<sup>170</sup> This judgment binds lower courts until the Constitutional Court brings about certainty in this grey area of the law. The SCA in *Mohamed's v Southern Sun* used this approach to balance the common law of contract and the golden thread of the Constitution. The SCA considered the employees of Southern Sun and the functioning of the hospitality industry, thus a notice period of three months was given for them to vacate the property.

## 5 Conclusion

*Mohamed's v Southern Sun* has set the precedent that when determining whether the enforcement of a provision in a contract would result in unfairness, courts must investigate whether the parties were aware of the breach or could have prevented it in the main. It is paramount to investigate the possible prejudice that each party will suffer should the contractual clause be enforced.

167 R Sharrock 'Unfair enforcement of a contract and the constitutional norm of Ubuntu: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ)' (2018) 39(1) *Obiter* at 228.

168 As above.

169 Sharrock (n 168) 229.

170 Hutchison (n 48) 247. See also *Roazar CC v Falls Supermarket CC* (2018) 1 All SA 438 (SCA) where the Court gave a unanimous judgment with consideration of the contrasting principles of freedom of contract and fairness.

*Mohamed's v Southern Sun* confirms that the enforcement of a valid contract clause may not be against public policy if one can justify its enforcement in a commercial context. One must look at whether the creditor has a 'sound commercial reason' for enforcing the provision.<sup>171</sup>

*Mohamed's v Southern Sun* is an important case in the law of contract in South Africa because it perfectly encapsulates the underlying principles, cornerstones, and judicial precedent. *Mohamed's v Southern Sun* has established that having a degree of trust in a party is not sufficient to guarantee performance and this case has shown how the law of contract plays an important role for society to operate efficiently and to hold parties accountable. *Mohamed's v Southern Sun* demonstrates how parties to a contract can invoke the assistance of the law to enforce a contract, using *pacta sunt servanda*.

The supremacy of the Constitution has, without a doubt, impacted the common law of contract. The combined academic literature of Pillay, Calitz, and Sharrock, and the judicial precedent demonstrates a holistic understanding of the law of contract. The incorporation of ubuntu in the common law of contract serves as a mechanism of social justice, but on the other hand, must be used scathingly as evidenced by *Mohamed's v Southern Sun*. The crux of the moral conundrum, which is the competition between *pacta sunt servanda* and the golden thread of the Constitution, played out in *Mohamed's v Southern Sun* where the Court used the judicial precedent set in *Barkhuizen* to fairly balance the principles to conclude on the matter.

171 As above.