

ILLEGAL CONTRACTS AND THE BURDEN OF PROOF*

JACQUES DU PLESSIS[†]

Professor of Private Law, Stellenbosch University

*South African law, in line with a number of prominent jurisdictions, recognises the general rule that when the legality of a contractual term is in dispute, the party who alleges illegality bears the burden of proof. Possible justifications for the general rule are explored and it is concluded that the rule is supported by established principles of the law of evidence, as well as by the *pacta servanda sunt* principle, which requires that freely concluded agreements should be enforced. It further is concluded that in disputes over the legality of restraint of trade clauses there appears to be no compelling reason why the law should deviate from the general rule by exceptionally placing the burden of proof on the party seeking enforcement. The mere fact that parties sometimes agree to these terms in situations of inequality does not suffice. However, those who advocate greater sensitivity for the position that contracting parties find themselves in when they supposedly exercise their contractual autonomy express a legitimate concern. A solution supported here is that South African law should address this problem directly by extending the existing categories of cases of improperly obtained consent to include cases of exploitation of certain specific situations of weakness. Such a development would reinforce, rather than subvert, the *pacta servanda sunt* principle.*

I PROBLEM

This essay considers where South African law places the burden of proof in disputes over whether a contractual term is illegal — i.e. whether it is contrary to statute or contrary to public policy according to the common law.¹ While some standard works do not consider this question at all,² or only in the context of certain cases of illegality,³ other works provide varied answers. Thus, while Van der Merwe et al⁴ essentially suggest that the party who alleges the contract bears the burden of proof of legality, others, like Floyd, maintain that the party who wishes to rely on illegality has to plead it and

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[†] BCom LLB LLM (Stell) PhD (Aberdeen).

¹ See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7–8 on various terms that are at times referred to interchangeably in determining common-law illegality.

² See, for example, J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992).

³ See, for example, R H Christie & G B Bradfield *The Law of Contract in South Africa* 6 ed (2011) 357 and 380; AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 208, 211 and 225 on the onus in the context of restraint of trade clauses and statutory illegality.

⁴ S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 174.

bears the burden of proof of the illegality.⁵ Before proceeding to examine this question more closely, it may be valuable first to consider some concepts that are relevant when trying to understand these positions and their practical implications.

II KEY CONCEPTS: BURDEN OF PROOF, SPECIAL DEFENCE AND PRESUMPTIONS

The concepts ‘burden of proof’ or ‘onus of proof’ have not been used consistently, but the courts have tried to introduce a degree of order. It is said that the correct use is to denote ‘the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be’.⁶ This ‘overall onus’⁷ is imposed as a matter of substantive law. It can never shift.⁸

A further, incorrect usage of the concept is to denote ‘the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent’.⁹ In contrast to the overall onus, this is merely a (temporary) duty or burden to adduce evidence in rebuttal. It could be called an evidential or evidentiary onus or burden (in Afrikaans, a ‘weerleggingslas’, as opposed to the true ‘bewyslas’). In practical terms, determining who bears the true onus in civil matters is relevant when it is as probable that something which is averred is true as it is probable that it is not true. The probabilities are then balanced or are ‘50/50’. If this is the position at the end of the case, the party bearing the burden of proof has failed to discharge it.¹⁰

As stated above, a true burden of proof can exist in respect of a claim or a defence. Thus, while the plaintiff often bears the burden of proof, on the principle that the party who alleges must prove,¹¹ a defendant may at times

⁵ Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 179 (contributed by T B Floyd); Tomas Floyd ‘The current debate on the reversal of the onus of proof when enforcing restraint-of-trade agreements: much ado about nothing?’ (2012) 75 *THRHR* 404 at 408–9; Tomas Floyd ‘The constitutionality of the onus of proof when enforcing restraint-of-trade agreements: an appropriate evaluation of the common-law rules’ (2012) 75 *THRHR* 521. Also see L T C Harms *Amler’s Precedents of Pleadings* (Illegal Contracts) 7 ed (2009) 219.

⁶ See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548, following *Pillay v Krishna* 1946 AD 946 at 952–3.

⁷ See *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 715.

⁸ See *Tregea v Godart* 1939 AD 16 at 32; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 14.

⁹ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* supra note 6 at 548; *Mohunram v NDPP (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) para 75n99.

¹⁰ See D T Zeffertt & A P Paizes *The South African Law of Evidence* 2 ed (2010) 45. Total ‘mathematical’ 50/50 probability is rare, but not impossible — it could for example be indicated by a scientific study.

¹¹ See parts III(c) and (d) below.

bear the burden of proof if such a party raises a special defence.¹² If the probabilities are balanced after such defence is raised, the party who raised the defence will fail.

Finally, there is the concept of the presumption. Again, conceptual uncertainty abounds, especially about types of presumption and their impact on the burden of proof. The impact of the presumption could be to assist in discharging one party's onus, to place an evidentiary burden (ie a 'weerleggingslas') on the other party, and possibly even to place a full onus on such a party.¹³ In the present context, the rebuttable presumption is potentially the most relevant; it could also be regarded as the only true presumption, in the sense that it alone involves mandatory inferences or assumptions that require others to produce evidence to the contrary.¹⁴ For example, evidence of cohabitation and repute, combined with evidence of the marriage ceremony, give rise to a rebuttable presumption that the parties are validly married; the party alleging invalidity then has to adduce evidence rebutting this inference.¹⁵ Regulation 44 to the Consumer Protection Act¹⁶ in turn contains a host of terms with certain purposes or effects that are presumed to be unfair, and hence contravene s 48 of the Act; it is then up to the party seeking enforcement of these terms to produce evidence that the term is not unfair.

The implications of this brief conceptual overview are as follows. When Floyd suggests that the party who wishes to rely on illegality bears the burden of proof of the illegality, he is saying that such a party has to raise a special defence against a claim for enforcement.¹⁷ And when Van der Merwe et al maintain that the party who seeks to enforce a contract appears to bear the burden of proof of legality, they in turn regard legality as an essential element of the claim of enforcement. Inasmuch as it is possible for presumptions to affect the burden of proof, it can be said that on the Floyd approach, contracts are presumed to be lawfully concluded, and that the burden of proof rests on the party denying its validity,¹⁸ whereas Van der Merwe et al maintain the opposite position.

Ultimately, the practical result of these differences is the following. If the probabilities in regard to proof of the legality of the term are balanced, Van der Merwe et al will conclude that the party seeking enforcement must fail,

¹² See *Pillay v Krishna* supra note 6 at 952; *Intramed (Pty) Ltd v Standard Bank of SA Ltd* 2004 (6) SA 252 (W) at 259–60; *Louw v Golden Arrow Bus Service (Pty) Ltd* 2001 (1) SA 218 (LC) para 44; C W H Schmidt *Bewysreg* 3 ed (1989) 34.

¹³ D T Zeffertt & A P Paizes *Essential Evidence* (2010) 56; Zeffertt & Paizes op cit note 10 at 181.

¹⁴ See J du Plessis 'Presumptions in South African law: An historical perspective' in R H Helmholz & W David H Sellar (eds) *The Law of Presumptions: Essays in Comparative Legal History* (2009) 227 at 243.

¹⁵ See *W v W* 1976 (2) SA 308 (W) at 315; *Ex parte L (also known as A)* 1947 (3) SA 50 (C); *Ex parte Soobiah In re Estate Pillay* 1948 (1) SA 873 (N) at 881; *Mudyanduna v Mukombero* 2006 (6) SA 185 (ZS) at 190.

¹⁶ Act 68 of 2008.

¹⁷ See Floyd 2012 *THRHR* op cit note 5 at 542

¹⁸ See *W v W* supra note 15 at 315.

whereas to Floyd this lot would befall the party seeking to escape liability. It has been suggested that such an (exact) equilibrium would be rare,¹⁹ but this remains to be proven. It is at least clear that courts at times pay considerable attention to which party bears the onus, and that they do not always adopt a particularly strict approach in finding that such an equilibrium is present.²⁰ It must in any event be kept in mind that in motion proceedings for final relief the facts in dispute have to be resolved in favour of the respondent.²¹ Thus, in motion proceedings relating to restraint of trade clauses, the respondent is generally the party seeking to escape liability. If certain facts are in dispute, for example whether the respondent is acting contrary to the provisions of the restraint, or whether the applicant has trade secrets or a particular connection to its clients, these facts have to be resolved in favour of the respondent who is seeking to escape from the restraint.

One final introductory question remains. It is said that the parties bearing the burden of proof must finally satisfy the court that they are entitled to succeed on their claim or defence.²² This still leaves uncertain what the court must be satisfied about. The requirements for claims or defences are set out in legal rules. These legal rules may in turn require proof of facts to guarantee success. But sometimes the law sets out the requirements for a claim in terms that require a value judgement, and not merely proof of facts. Thus, the law of contract requires that a mistake has to be material and reasonable to render a contract void. These requirements cannot be met merely by proving facts. The finding that a mistake is reasonable may be aided by the proof of facts (for example that the mistake was caused by the other party's representation), but it ultimately remains a (judicial) value judgement. It may be said that the burden relates to 'issues' and not (only) facts. This distinction, which is of special relevance in debates about the burden of proof in disputes about the legality of a contract, will be returned to later on.²³

III THE GENERAL RULE REGARDING THE BURDEN OF PROOF IN CASES OF ALLEGED ILLEGALITY

(a) *The general rule as revealed by the case law*

Against the background of this brief overview of academic views and key concepts, the relevant case law on who bears the onus when the legality of a

¹⁹ See Floyd 2012 *THRHR* op cit note 5 at 539.

²⁰ See *Pratt v First Rand Bank Ltd* 2009 (2) SA 119 (SCA) para 13; *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) at 1102C–D; Brahm du Plessis & D M Davis 'Restraint of trade and public policy' (1984) 86 *SALJ* 86 at 98–9 (writing in the context of the onus in respect of restraint of trade clauses); Zeffertt & Paizes op cit note 10 at 55.

²¹ *Reddy v Siemens Telecommunications (Pty) Ltd* supra note 8 para 14.

²² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* supra note 6 at 548, following *Pillay v Krishna* supra note 6 at 952–3.

²³ See part IV(a) below. As to the general uncertainty on whether the onus relates to 'facts' or 'issues' or both, see Zeffertt & Paizes op cit note 10 at 60–74 (esp at 69).

contract is in dispute can now be investigated. In essence, support exists for the following two propositions.

First, a plaintiff seeking a declaration of invalidity or unenforceability due to illegality bears the burden of proof.²⁴ The divergence of views discussed above is not relevant in this case, since the person who seeks relief is also the person who alleges illegality.

Secondly, if a plaintiff seeks to enforce a contract, but the defendant wants to escape liability due to illegality, the dominant view in the case law, which also accords with the approach favoured by Floyd, is that the defendant bears the burden of proof.²⁵ Thus, in *Diners Club SA (Pty) Ltd v Singh*²⁶ Levinsohn J stated that

‘[t]he legal *onus* of establishing that a term in a contract (admittedly entered into by the defendants) is *contra bonos mores* rests on the defendants. This carries with it the duty finally to satisfy the Court that it ought to succeed on the issue and they have also the duty to adduce evidence in regard to the factual background relevant to the defence.’

Such a defendant then in effect raises a special defence.²⁷ Special procedural rules could then govern how the defence should be pleaded and what evidence should be adduced.²⁸

The two propositions above can be combined in the following rule, which, for want of a better expression, will be called the ‘general rule’: if the legality of an agreement is in issue, the party who relies on the illegality bears

²⁴ See e.g. *Pratt v First Rand Bank Ltd* supra note 20.

²⁵ See *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D) 645F–G; *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA); *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para 19; *Book v Davidson* 1989 (1) SA 638 (ZS) at 651; *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552 (O) at 556H–557A read with 563B. For a lone dissenting voice, see the judgment of King J in *Allied Electric (Pty) Ltd v Meyer* 1979 (4) SA 325 (W) at 330H, which suggests that the party seeking enforcement also bears the burden of proof of legality.

²⁶ *Diners Club* supra note 25 at 645F–G.

²⁷ See *Santam Bank Ltd v Voigt* 1990 (3) SA 274 (E) at 279F–H; *Book v Davidson* supra note 25 at 651. Where a contract may be performed lawfully or unlawfully, the party seeking avoidance will have to prove that it was intended to perform it unlawfully, and hence is illegal (see *Claasen v African Batignolles Construction (Pty) Ltd* supra note 25 at 556H–557A).

²⁸ See *Yamakou v Appollo Club* 1974 (1) SA 614 (A) at 623: ‘Rule 19(4) of the 1968 Magistrates’ Courts’ Rules (like Supreme Court Rule 22(2)) requires of a defendant that he shall in his plea “clearly and concisely state the nature of his defence and all the material facts on which it is based”. . . . [I]f his [i.e. the defendant’s] defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded. It is true that it is the duty of the Court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it.’ The dictum is confirmed in subsequent judgments, for example, *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) para 23.

the burden of proof.²⁹ One qualification must be added to this rule. In cases of alleged statutory illegality, the statute itself could indicate where the burden of proof as to whether a contract is legal should be placed.³⁰ Thus, as Christie explains, a plaintiff seeking enforcement of a type of contract which by statute is declared to be invalid unless certain requirements are met, bears the burden of proof that these requirements were met. And if the statute determines that a type of contract is valid, unless certain exceptional circumstances prevail, the party seeking to escape liability has to prove the existence of these circumstances.³¹

(b) *The general rule viewed from a comparative perspective*

Having established the general rule on who bears the onus of proof in disputes over the legality of contracts, we may turn briefly to the question whether this rule is a peculiarity of the South African law, or whether it also characterises some prominent jurisdictions that represent traditions which have been influential in shaping our law.

In the civil-law context, German law maintains that a party who alleges that the legal act necessary to conclude a contract is void under § 138 of the German Civil Code ('BGB') bears the burden of proof of the circumstances that indicate that such an act is contrary to public policy, and hence is illegal.³² The position in Dutch law is comparable. A party who raises the defence that a contractual term is unacceptable according to standards of reasonableness and fairness under art 6:248 lid 2 of the Dutch Civil Code must state this defence and must prove it.³³

However, it is recognised in civil law that special rules may at times govern the proof of certain cases of illegality. For example, § 138 of the German Civil Code does not only contain the general provision in subpara (1) that a legal transaction which is contrary to public policy is void, but further determines in subpara (2) that:

'In particular, voidness attaches to a legal transaction, whereby one person through exploitation of the situation of distress (*Zwangslage*), inexperience (*Unerfahrenheit*), lack of judgment (*Urteilsvermögen*) or grave weakness of will (*Willensschwäche*) of another, causes economic advantages to be promised or granted to himself or to a third party in exchange for a performance, and these

²⁹ See *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* supra note 25 para 19; *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* supra note 25 at 525–26, which by implication supports placing the onus on the party seeking to escape liability in cases of illegality, although that case concerned the application of the in duplum rule. Further see Harms op cit note 5 at 219.

³⁰ See *Tuckers Land & Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 266C–D; Christie op cit note 3 at 357.

³¹ See *Oosthuizen v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) at 905I.

³² *Münchener Kommentar zum BGB* 6 ed (2012) § 138 paras 155–56 (comment by Christian Armbrüster); Leo Rosenberg, Karl Heinz Schwab & Peter Gottwald *Zivilprozessrecht* 16 ed (2004) para 101n10.

³³ See W D H Asser *Bewijslastverdeling* (2004) para 246 (at 206–8).

advantages exceed the value of the performance to such an extent that, under the circumstances, there is a striking disproportion between them.’

Whereas the burden of proof of illegality generally lies on the plaintiff, the courts to some extent protect such a party when applying subpara (2). A party relying on this provision must prove that the defendant had a reprehensible motive in exploiting the other party’s weakness. In cases of a particularly gross discrepancy between the performances, German law then presumes that this ‘subjective’ requirement of a reprehensible motive was met.³⁴ Thus, through the operation of special presumptions the application of the general rule on proof of illegality is modified.

The approach of placing the onus on the party seeking to escape liability due to illegality is not limited to the civil law. For example, in the context of English law, *Chitty on Contracts* states that the party alleging illegality bears the burden of proving this fact.³⁵ Similar approaches are also followed in some American states, which maintain that illegality must be raised as an ‘affirmative defense’ and that the defendants have the burden of pleading and proof of the defence.³⁶

(c) *The justification for the general rule*

Given that such strong support exists for the general rule in local and foreign law, the question arises what considerations could underlie this position. This demands an investigation into principles or policies that generally influence or justify decisions to place the burden of proof in civil matters.³⁷

In *Pillay v Krishna*³⁸ and *Mobil Oil Southern Africa (Pty) Ltd v Mechin*³⁹ it was indicated that three ‘principles’ or ‘rules’ (the terms are used interchangeably) could be relevant in determining who bears the onus.⁴⁰

³⁴ *MüKoBGB/Armbrüster BGB* op cit note 32 § 138 Rn 116, 156. The positioning of § 138(2) BGB was not a considered choice. It was the result of a last-minute attempt in drafting the BGB to accommodate ‘usurious’ agreements concluded by exploiting weakness; the resulting para 138(2) BGB was then latched onto the general prohibition of transactions that offend good morals (§ 138(1) BGB) (see J E du Plessis ‘Threats and excessive benefits or unfair advantage’ in Hector L MacQueen & Reinhard Zimmermann (eds) *European Contract Law — Scots and South African Perspectives* (2006) at 160–1). An alternative approach, more in line with model international instruments aimed at developing the law of contract, could have been to draw a clearer distinction between illegality (§ 138(1) BGB) on the one hand, and exploiting weakness as a distinct form of improperly obtained consent, next to misrepresentation/fraud and duress, on the other (see part IV(c) below).

³⁵ H G Beale (general ed) *Chitty on Contracts* vol 1 General Principles 31 ed (2012) para 16–207 (at 1352), relying on *Hire-Purchase Furnishing Co v Richens* (1887) 20 QBD 387 at 389.

³⁶ Samuel Williston *A Treatise on the Law of Contracts* 4 ed by Richard A Lord (2009) § 12:5.

³⁷ See generally Floyd 2012 *THRHR* 521 op cit note 5.

³⁸ *Supra* note 6 at 951–2.

³⁹ 1965 (2) SA 706 (A) at 711.

⁴⁰ *Pillay v Krishna* *supra* note 6 at 951–2 and *Mobil Oil Southern Africa (Pty) Ltd v Mechin* *ibid*. For comparable principles in English law see Hodge M Malek (general

The first principle is that the party who seeks a remedy must bear the burden of proof.⁴¹ In essence, persons who rely on the courts to determine that they have a case are expected to prove that they have a case. However, it has been said that this principle does not imply that the party seeking the remedy has to adduce proof of circumstances that do not occur 'ordinarily'.⁴² Whether the first principle could be formulated in this qualified form is relevant in the context of disputes over contractual liability. According to the first principle formulated in its qualified form, the plaintiff seeking the remedy of enforcement of a contract should not have to bear the burden of proof in disputes of validity based on rarely occurring circumstances.

Secondly, there is the principle that a person who pleads a defence is considered to be the plaintiff for that purpose, and hence bears the burden of proof of the defence.⁴³ The underlying justification for this principle appears to be that raising a defence is more than a mere denial of a claim; the person pleading it is in effect making a separate case, which deserves prima facie substantiation.

The third principle is that the party who makes an allegation, and not the party who denies it, bears the burden of proof.⁴⁴ This means that a party is not normally required to prove a negative.⁴⁵ It is also regarded as preferable to place the burden on the party who is in a better position to adduce or obtain positive proof, or in whose 'domain' the facts lie. But this does not necessarily have to be the one who alleges these facts. Perhaps it is best regarded as a separate general principle, albeit that it is not expressly endorsed in the *Pillay* and *Mobil Oil* cases.⁴⁶

These broad principles or rules will at times be in conflict.⁴⁷ They cannot provide definitive answers on where the onus should be placed. It is therefore understandable that some judicial support has been expressed for Wigmore's view that the rules about adducing proof and allocating the burden of proof ultimately are based on 'broad and undefined reasons of experience and fairness'.⁴⁸ Nonetheless, this does not mean that the courts can apply or ignore these rules at will; in this regard it has been said that it is 'within these

ed) *Phipson on Evidence* 17 ed (2010) para 6–06 and for an evaluation see Zeffertt & Paizes op cit note 10 at 57–61.

⁴¹ See D 22.3.21 ('semper necessitas probandi incumbit illi qui agit').

⁴² See J E Goudsmit *Pandekten-Systeem* vol 1 (1866) § 104 (*The Pandects — A Treatise on the Roman Law* tr R de Tracy Gould (reproduced 2005) 316–17).

⁴³ See D 44.1.1 ('agere etiam is videtur, qui exceptione utitur: nam reus in exceptione actor est').

⁴⁴ See D 22.3.2 ('ei incumbit probatio qui dicit, non qui negat').

⁴⁵ Floyd 2012 *THRHR* op cit note 5 at 531.

⁴⁶ Although Davis AJA may have had this in mind in *Pillay* when he refers to the party who is in a better position to provide proof at 955–6 (see Zeffertt & Paizes op cit note 10 at 59).

⁴⁷ Zeffertt & Paizes ibid at 58, Floyd 2012 *THRHR* op cit note 5 at 529.

⁴⁸ *Pillay v Krishna* supra note 6 at 953–4; *Book v Davidson* supra note 25 at 651D–E.

principles that experience and fairness interplay in the course of doing justice to the parties'.⁴⁹

(d) Evaluating the rules on the burden of proof in disputes about validity

Against this brief background on principles that apply in establishing who should bear the onus of proof, the South African position on who bears the onus when there is a dispute about legality, and, for purposes of a broader perspective, on who bears the onus in disputes over other requirements for a valid contract, can now be evaluated.

We can start with justifications for the general rule formulated above, namely that the party who avers illegality must prove it. If this party happens to be a plaintiff seeking a declaration of invalidity based on illegality, it would be in accordance with both the first principle and third principle to place the burden of proof on the plaintiff. It would be a fairly straightforward matter to justify making such a party bear this burden.

However, if a plaintiff seeks enforcement of a contract against a party who denies liability on the ground that the contract is illegal, the 'unqualified' first principle and third principle are in conflict: the 'unqualified' first principle suggests that the party seeking the remedy of enforcement should prove legality as one of the requirements for validity; this is the plaintiff. The third principle in turn suggests that the party who positively asserts or alleges invalidity should prove illegality; this is the defendant. It is only if the first principle is 'qualified' in the way indicated above, ie so as not to cover proof of rarely occurring or extraordinary circumstances, that the tension between the first and third principles could be resolved: inasmuch as circumstances indicating illegality are out of the ordinary, the 'qualified' first principle would require that that defendant, and not the plaintiff, has to bear the burden of proof in disputes about the existence of these circumstances.

This conclusion that it may be preferable for the defendant to bear the burden of proof is also supported by the second principle: inasmuch as alleging illegality is more than just a denial, but amounts to a defence (a distinction which admittedly could be fine),⁵⁰ the defendant should bear the burden of proof of this defence. Ultimately, it would therefore appear that a process of weighing up the three principles tends to support the conclusion that the burden of proof must be on the party seeking to escape liability on the grounds of illegality.

One may be forgiven for feeling that this process of weighing up the three principles is rather technical and abstract. However, it does appear that there are underlying practical considerations that could justify the conclusion above that the defendant alleging illegality should bear the burden of proof. These practical considerations are linked most closely to the 'qualified' first principle, which states that a party seeking a remedy need not prove rarely

⁴⁹ *Book v Davidson* ibid at 651D–E. See also the relevance attached to these principles in *Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) at 822C.

⁵⁰ See Zeffertt & Paizes op cit note 10 at 58.

occurring circumstances. If one asks why this should be so, an important explanation could be that such a party may otherwise have to engage in costly and potentially wasteful fact-gathering exercises to provide prima facie proof of facts relating to requirements for validity that may not even be in dispute. More specifically it may not generally be expected in claims for enforcement of contracts that their legality would be in issue.

So far then as to the general principles, and arguments derived from the law of evidence on how they could impact on placing the burden of proof. We now turn to an argument more specific to the law of contract. This is an argument which the courts have relied on strongly in support of the general rule which places the onus on the defendant alleging illegality. The argument is essentially that if a contract has been entered into freely, the contract may be assumed or expected to be concluded lawfully or to be regarded as prima facie valid. The implication is that it is up to the party seeking to escape liability on the ground of illegality to indicate what entitles him or her to such relief.⁵¹ This point was made by Didcott J in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd*,⁵² and expressed as follows in *Govender v Naidoo*:⁵³

‘[W]hen a person of full age and competent understanding has entered into a contract, it should be enforced by Courts of justice, and . . . the benefit of any doubt as to its enforceability must be given against the person seeking to avoid liability for his solemnly undertaken debt (*Fender v St. John-Mildmay*, 1938 A.C. 1, as applied in *Kuhn v Karp*, supra . . . [1948 (4) SA 825 (T)]).’⁵⁴

In *Kuhn v Karp*,⁵⁵ quoted in *Govender* above, reference is not only made to the English *Fender* case, but also to the famous dictum of Sir George Jessel MR in *Printing Registering Co v Sampson*⁵⁶ that

‘if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice’.

Neither Didcott J in *Roffey* nor Milne J in *Govender* expressly stated that the party denying liability on grounds of illegality bears the burden of proof. However, this clearly follows from their indication that if the probabilities are even, the plaintiff seeking enforcement would succeed.

⁵¹ See *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) 503G–H, referring to *Govender v Naidoo* 1959 (2) SA 776 (N). Also see the reference in *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 313B–C to contracts that have been ‘seriously concluded’ and the argument of counsel for the appellant in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 879D.

⁵² *Ibid.*

⁵³ *Supra* note 51 at 782D–E.

⁵⁴ *Ibid.*

⁵⁵ *Kuhn v Karp* 1948 (4) SA 825 (T) at 840.

⁵⁶ LR 19 Eq 462.

It should be apparent that the cases referred to above ultimately are influenced by the familiar maxim of *pacta servanda sunt*. In this regard the Constitutional Court held in *Barkhuizen v Napier*⁵⁷ that

‘public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity . . . *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle.’⁵⁸

It is at this point that we may briefly, and for purposes of a broader perspective, shift the focus to the problem of where to place the burden of proof when other requirements for validity are in contention.⁵⁹ In this regard it has been held in the context of self-imposed formalities that ‘where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies on the party who alleges it’.⁶⁰ Again, the argument appears to be that once some form of consensus is proven, the party seeking to challenge it by alleging further requirements have not been complied with should bear the onus.⁶¹ Authority also exists to the effect that a party seeking to escape due to supervening impossibility of a validly concluded contract bears the burden of proof that performance has become impossible.⁶²

If we turn to disputes over consensus, the position on placing the burden of proof is slightly more complex. Here the party seeking enforcement has to prove that the agreement was aimed at creating binding obligations.⁶³

⁵⁷ 2007 (5) SA 323 (CC).

⁵⁸ *Ibid* paras 57 and 87.

⁵⁹ These are essentially that an agreement aimed at creating binding obligations was concluded by parties, that they had the necessary capacity, that the content of the contract was certain or capable of being rendered certain, that performance was possible, that applicable formalities were adhered to, and that the contract was legal. On typical expositions of the requirements for a valid contract in these terms see J E du Plessis ‘J C de Wet en die struktuur van die Suid-Afrikaanse kontraktereg’ in J E du Plessis & G F Lubbe (eds) *A Man of Principle — The Life and Legacy of J C de Wet* (2013) 137 at 166–7 and 171–88.

⁶⁰ See *Woods v Walters* 1921 AD 303 at 305–6; *Goldblatt v Freemantle* 1920 AD 123 at 128; *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at 995E.

⁶¹ This argument does not apply in cases governed by statutory formalities; there it must appear on the face of the pleadings that formalities were complied with (see Harms *op cit* note 5 at 113).

⁶² See *Frenkel v Ohlsson’s Cape Breweries Ltd* 1909 TS 957 at 965–6.

⁶³ Harms *op cit* note 5 at 110. The plaintiff relying on a written contract must attach a copy (see Uniform rule 18(6)). A tacit contract must be proved by ‘unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact, contract on the terms alleged’ (Harms *ibid* at 109–10). The burden of

However, in a number of situations the party who alleges that consent was absent or defective bears the burden of proof relating to establishing such a ground for escaping liability. For example, this burden is borne by the party who maintains that consent is absent due to incapacity,⁶⁴ or due to a iustus error (a material and reasonable mistake).⁶⁵ Judicial support exists for a similar approach to placing the onus if consent has been obtained in an improper manner. Here the burden of proof is on the party alleging defects such as fraud⁶⁶ or duress.⁶⁷

This general allocation of the burden of proof is also in accordance with positions adopted in some leading foreign jurisdictions. German law places the burden of proof of a variety of problems with consent on the party alleging their existence. These include problems with incapacity as well as cases where the declaration of will has been rescinded due to mistake (under § 119 BGB), fraud or duress (under § 123 BGB).⁶⁸ Again one finds, as Wigmore indicated, that considerations of fairness or reasonableness must underlie the allocation of the burden.⁶⁹ An influential general principle in German law is that the defendant bears the burden of proof of the elements that stand in the way of, destroy or inhibit the plaintiff's claim, such as the existence of defective consent.⁷⁰ Dutch law also does not require that a party who seeks enforcement of a contract has to bear the burden of proof of all the requirements for a valid contract. A party who alleges a defect in consent such

proof of the party seeking enforcement extends to the validity of all its terms. This includes proving a negative, namely the absence of terms which the other party alleges are part of the contract (see *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A)).

⁶⁴ *Serobe v Koppies Bantu Community School Board* 1958 (2) SA (O) 265 at 271 (in turn referring to J W Wessels *Contract* 2 ed vol 1 (1951) para 693 and Voet *Commentarius ad Pandectas* 4.4.12); *Di Giulio v First National Bank of SA Ltd* 2002 (6) SA 281 (C) para 28.

⁶⁵ See, for example, the judgment of Olivier AJ in *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 296, which in the context of an allegation of unilateral mistake, relies on *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G–H. Olivier AJ further suggested that a contrary position is followed in *Diedericks v Minister of Lands* 1964 (1) SA 49 (N) at 54F–55A and in *Saambou National Building Society v Friedman* 1977 (3) SA 268 (W) at 275F–H, but this is not apparent from the passage quoted from these two cases. On placing the burden of proof on a party alleging that an agreement is a simulation see *Niemand v Van Heerden* [1998] 3 All SA 616 (NC) at 619–21.

⁶⁶ *Di Giulio v First National Bank of SA Ltd* supra note 64 para 28; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) para 30.

⁶⁷ See *Savvides v Savvides* 1986 (2) SA 325 (T) at 330.

⁶⁸ Rosenberg et al op cit note 32 para 101 Rn 10–12; Hans-Joachim Musielak *Kommentar zur Zivilprozessordnung* 7 ed (2009) § 286 para 51.

⁶⁹ H Prütting *Münchener Kommentar zur ZPO* 4 ed (2013) § 285 para 108.

⁷⁰ Prütting *ibid* § 285 para 111; Musielak op cit note 68 § 286 para 36. Further see Schmidt op cit note 12 at 37.

as mistake or fraud bears the burden of proof of this defect, admittedly with rather detailed provisions on the extent of such a burden.⁷¹

A similar approach is adopted in English law, which maintains that the defendant bears the onus of facts pleaded in confession and avoidance, such as infancy, rescission and fraud.⁷² If the claimant shows that parties concluded an express agreement, the defendant seeking to escape liability on the basis that there was no intention to create legal relations bears the onus of proving the absence of such an intention.⁷³ However, English law does recognise certain specific rules that make it easier for a party who alleges that consent was obtained in an improper manner to succeed in proving this. Thus, in the case of undue influence certain presumptions facilitate the burden of proof. This point will be returned to later on.⁷⁴

What could justify this general approach, adopted in a number of prominent jurisdictions, of placing the burden of proof on the party seeking to escape liability due to problems with consent? We have seen that the *pacta servanda sunt* justification plays a prominent role in supporting the general rule that the party alleging illegality bears the burden of proof. But this justification runs into difficulties when we have to decide who bears the burden of proof in disputes about whether there was consent: the *pacta servanda sunt* justification assumes that consent has been given freely and voluntarily, whereas it is precisely the existence of consent which is in dispute. However, another, familiar justification could be more relevant. As we have seen, some of the principles of the law of evidence on who should bear the burden of proof essentially protect parties who seek enforcement from having to provide *prima facie* proof of proof of rarely occurring or extraordinary circumstances. It can then be argued that it is not normally expected that parties would place the existence of consent in dispute (just as it is also not expected that legality would be in contention). To require in each and every case where a plaintiff seeks enforcement that he or she must provide *prima facie* proof that none of the possible defects of consent are present could be costly and wasteful if the defendant never intended placing these requirements in dispute.⁷⁵

Let us recap. It has been shown that where a party alleges that a requirement for the validity of a contract, and more specifically the legality requirement, has not been met, such a party generally bears the burden of proof to establish invalidity. It has also been shown that this position could be justified with reference to a variety of principles. We now turn to consider the implications of these findings for one of the most contentious problem areas in the South African law of contract, and certainly the most contentious

⁷¹ See Asser *op cit* note 33 para 241.

⁷² See Malek *op cit* note 40 para 6-08.

⁷³ See Beale *op cit* note 35 para 2-162.

⁷⁴ See part IV(c) below.

⁷⁵ Also see Floyd 2012 *THRHR* *op cit* note 5 at 530.

in the context of the legality requirement. This is the problem of who should bear the burden of proof in disputes about the validity of a restraint of trade clause.

IV THE BURDEN OF PROOF AND RESTRAINT OF TRADE CLAUSES⁷⁶

(a) *Restraint of trade clauses and the general rule*

Under English influence, South African law has for many years acknowledged an exception to the general rule above that the party who alleges illegality must prove it.⁷⁷ The exception was that the plaintiff seeking enforcement of a restraint of trade clause bore the burden of proof of its legality.⁷⁸ However, three decades ago the Appellate Division changed this position in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis*.⁷⁹ Since this decision, the restraint of trade clause has to be treated in the same manner as any other clause whose legality is in dispute. This means that the general rule applies — the party alleging that the enforcement of the restraint would be contrary to public interest (and hence that it is illegal), bears the burden of proof.⁸⁰ Thus, if the plaintiff seeks a declaration of invalidity, the plaintiff bears the burden of proof that enforcing the restraint would be contrary to public interest.⁸¹ But if the plaintiff seeks enforcement of the restraint, he or she (merely) has to prove the agreement itself and breach; it is the defendant who bears the burden of proof that enforcement would be contrary to the public interest.⁸²

Since *Magna Alloys*, some academics and members of the judiciary have argued strongly in favour of reverting to the previous position by shifting the onus on the party seeking to enforce the restraint. In other words, they have argued that restraints of trade should be an exception to the general rule. In the next section it will be considered whether such a development could be justified, especially in the light of the preceding exposition of general

⁷⁶ For an in-depth recent analysis see Floyd 2012 *THRHR* op cit note 4 at 404 and 521.

⁷⁷ For the background to the reception of the English rule, see Philippus J Sutherland *The Restraint of Trade Doctrine in England, Scotland and South Africa* (PhD thesis, University of Edinburgh, 1997) 254–6; Floyd 2012 *THRHR* op cit note 5 at 405ff.

⁷⁸ See Sutherland *ibid* at 254–6 and for critical views compare *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* supra note 51 at 503G–H; *SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd* 1968 (2) SA 777 (D) at 787–8.

⁷⁹ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* supra note 51.

⁸⁰ *Reddy v Siemens Telecommunications (Pty) Ltd* supra note 8; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* supra note 51 at 892I–893A.

⁸¹ See *Bedford Square Properties (Pty) Ltd v Eif 179 Bedfordview (Pty) Ltd* 2011 (5) SA 306 (SCA) para 13.

⁸² *Basson v Chilwan* 1993 (3) SA 742 (A) at 777H–I; *Experian South Africa (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ) para 14; *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) at 82D; *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 (N) para 85; Harms op cit note 5 at 343.

principles. But before doing so, it must be pointed out that a number of commentators have remarked that the practical implications of placing the onus on the restrained party are in any event limited. Certain procedural and evidentiary considerations may render it distinctly unwise for the plaintiff seeking enforcement to adopt a relaxed approach to adducing proof as to legality merely because the restrained party bears the burden of proof.

The first consideration has already been encountered. In motion proceedings the facts in dispute have to be resolved in favour of the respondent, who usually is the restrained party. The second consideration deals with a question posed at the outset, but not yet considered, namely what exactly the burden of proof relates to. The Supreme Court of Appeal has now indicated that the burden of proof in restraint cases only relates to the *facts*. It does not extend to the *value judgement* whether, in the light of the facts, it would be reasonable to enforce the restraint. According to Malan AJA in *Reddy v Siemens Telecommunications (Pty) Ltd*:⁸³

‘If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.’⁸⁴

Similar views have also been expressed by South African authors,⁸⁵ and in foreign law. For example, Treitel has remarked in the context of English law that

‘the questions of reasonableness and public interest are questions of law so that it is strictly inaccurate to say that the party claiming enforcement has the *onus of proving* that the covenant is reasonable. What he must do is prove the circumstances from which the court may conclude that the ratio between restraint and interest is reasonable. The same principle applies to the question of public interest.’⁸⁶

This point was clearly conveyed by Lord Parker of Waddington in *Herbert Morris Ltd v Saxelby*:

⁸³ *Supra* note 8.

⁸⁴ *Ibid* para 14. But see the judgment of Botha JA in *Basson v Chilwan* *supra* note 82 at 776–7, where it is said that ‘the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced’. But this leaves open the question whether ‘the point’ is the underlying facts or the issue of reasonableness.

⁸⁵ See Zeffertt & Paizes *op cit* note 10 at 70n60.

⁸⁶ G H Treitel *The Law of Contract* 13 ed by Edwin Peel (2011) para 11-085 (at 516).

‘When once they [i.e. the circumstances] are proved it is a question of law for the decision of the judge whether they do or not justify the restraint. There is no question of onus one way or another.’⁸⁷

All in all, the party seeking enforcement therefore should not find too much comfort in the burden of proof being on the restrained party. The party seeking enforcement clearly has no choice but to argue why in the light of the proven facts the court must find that the restraint is reasonable. In this regard it would be especially important to place facts before the court which show that interests such as the need to protect confidential information or client connections outweigh any interest on the side of the restrained party in being economically active.⁸⁸

(b) Justifications for applying the general rule to restraint of trade clauses

It has been shown earlier that South African law generally maintains that once a party seeking enforcement of a contract or term proves actual consensus, or at least the appearance of consensus, it is up to the defendant seeking to escape liability to prove that a specific requirement for contractual validity has not been met. It was also shown that the courts have especially emphasised the *pacta servanda sunt* principle in adopting this position, and that it is supported by the practical consideration of preventing unnecessary costs if the person seeking enforcement were to be compelled to present evidence about requirements for liability that may not be in dispute.⁸⁹

The question now arises whether there are special considerations that justify treating the incidence of the onus differently in restraint of trade cases. The dominant view in the case law on this point is clear. It was said in *Magna Alloys* that it is ‘illogical and inappropriate’ to place the onus on the party seeking enforcement ‘when the point of departure is that agreements have to be enforced unless it is proved that their enforcement would harm the public interest’.⁹⁰ This justification was repeated by Botha JA in *Basson v Chilwan*:⁹¹ ‘The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings.’⁹² In deciding where to place the burden of proof in restraint of trade clauses, the courts therefore clearly attach great weight to the *pacta servanda sunt* principle.

As far as justifications are concerned for adopting the contrary position, i.e. that the burden of proof should be placed on the party seeking enforcement

⁸⁷ [1916] 1 AC 688 at 707; further see Albert Kiralfy *The Burden of Proof* (1987) 94.

⁸⁸ The third question in *Basson v Chilwan* supra note 82.

⁸⁹ See Floyd 2012 *THRHR* op cit note 5 at 530.

⁹⁰ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* supra note 51 at 893A–E. For a similar argument see Arthur Suzman QC ‘Book Review — O D Schreiner *The Contribution of English Law to South African Law*’ (1968) 85 *SALJ* 90 at 91; further see Floyd 2012 *THRHR* op cit note 5 at 407–8.

⁹¹ Supra note 82.

⁹² *Basson v Chilwan* ibid at 777A.

of the restraint,⁹³ the focus has especially been on s 22 of the Constitution.⁹⁴ This section protects a person's right to choose his or her trade, occupation or profession. The argument is essentially that a restraint of trade clause limits or infringes this right, and that the burden of proof of its enforceability must therefore rest on the party seeking enforcement.⁹⁵

Thus far this argument has not enjoyed significant judicial support. It indeed cannot be denied that a person's choice of trade, occupation or profession would be limited by enforcing a restraint of trade clause. But the mere limitation of such a right does not imply that the burden of proof of validity necessarily has to be placed on the party seeking enforcement.⁹⁶ To succeed, the argument requires proper engagement with the basic principles that generally govern allocating the burden of proof⁹⁷ and with the constitutional rights and values that could underpin these principles.⁹⁸ In this regard it is significant that the *pacta servanda sunt* principle, relied on in placing the onus of proving illegality on the party alleging it, (also) enjoys constitutional recognition. More specifically, if it appears that both parties have exercised their autonomy by agreeing to the clause, it can be said that they have given expression to their right of dignity, which is entrenched in

⁹³ The focus here is on who bears the onus when full enforcement is sought. If partial enforcement is sought, the justification for applying the general rule loses force, inasmuch as the party seeking partial enforcement is trying to hold the party to something other than that which was agreed upon. This may warrant placing the burden of proof on the party seeking partial enforcement to show why this 'scaled down' consensus should be enforced. For a discussion of approaches to the onus in cases of partial enforcement further see Floyd 2012 *THRHR* op cit note 5 at 540–2.

⁹⁴ Constitution of the Republic of South Africa, 1996.

⁹⁵ See, for example, *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N) at 209E–F: 'The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the Constitution to impose the onus to prove a constitutional protection on the first respondent.' For a fuller treatment see Floyd 2012 *THRHR* op cit note 5 at 413ff.

⁹⁶ This point is not for example argued in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* *ibid* at 209 or in *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2002 (2) SA 853 (SE) at 862 (it merely was stated *obiter* that 'it seems that the position in terms of the Constitution may now be that the onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution. For purposes of this judgment I do not find it necessary to determine this question . . .'). Also see C-J Pretorius 'Covenants in restraint of trade: An evaluation of the positive law' (1997) 60 *THRHR* 6 at 24; Floyd 2012 *THRHR* op cit note 5 at 413ff.

⁹⁷ See generally Floyd 2012 *THRHR* op cit note 5.

⁹⁸ For example, it might be argued that because the facts in dispute are generally within the domain of the party seeking enforcement, rather than of the party seeking to escape liability, the former should bear the onus. But the notion that a party must provide proof of factual material peculiarly within his or her knowledge is not without its difficulties (see Zeffertt & Paizes op cit note 10 at 91–2, especially note 152).

s 10 of the Constitution.⁹⁹ Furthermore, recognition is in any event already given to a party's s 22 rights through the rule that the interest of the restricted party not to be economically inactive or unproductive is an important consideration in determining the reasonableness of a restraint of trade clause, and hence in determining its enforceability.¹⁰⁰

The judgment of the Constitutional Court in *Barkhuizen v Napier*¹⁰¹ further presents a particularly formidable obstacle to the view that the onus must be on the party seeking to enforce the restraint. In that case the validity of a term which restricted a party's right to access to the courts (a right protected by s 34 of the Constitution) was in dispute. The Constitutional Court, in accordance with the general rule, placed the onus on the party seeking to avoid enforcement to prove that it was unreasonable and contrary to public policy.¹⁰² The mere fact that a potential infringement of a particular constitutional right was at stake was not sufficient to warrant any reversal of the onus. The court further recognised the rule that a party seeking to invoke the limitations clause of the Bill Rights (s 36(1)) bears the onus of proving that the limitation of a fundamental right is permissible in terms of this clause,¹⁰³ but it clearly stated that this rule only applies to laws of general application, and not to contractual terms.¹⁰⁴ The court in *Barkhuizen* therefore drew a clear line through those cases which relied on the allocation of the onus under s 36(1) as justification for placing the onus in restraints of trade on the party seeking to enforce a term that limits a constitutional right (e.g s 22).¹⁰⁵

⁹⁹ See *Reddy v Siemens Telecommunications (Pty) Ltd* supra note 8 para 15; Mark Tait 'Who should bear the onus in restraint of trade disputes?' (2004) 25 *Obiter* 488; Floyd 2012 *THRHR* op cit note 5 at 416. Reference has been made to the right to equality, protected by s 9(1) of the Constitution, in order to challenge the position that the party seeking enforcement must bear the burden of proof. According to Floyd, the right to equality implies that the onus of proof should be divided between the parties, unless there is a reason not to do so (2012 *THRHR* op cit note 5 at 419–20 and 525–6, referring to *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) and *Khumalo v Holomisa* 2002 (5) SA 401 (CC)). At 526 he suggests that there should be an 'equal' division of the burden of proof, unless there is a reason not to do so, and at 528 he states that the sharing of the burden of proof 'need not be entirely equal'. However, it is not apparent why the recognition of a right to equal treatment implies that as a point of departure the burden of proof must be (equally) shared by the parties. The *Prinsloo* and *Khumalo* cases only require a division of the onus that is justifiable or rational, and not arbitrary or discriminatory (see for example *Prinsloo* *ibid* paras 36 and 38).

¹⁰⁰ See *Basson v Chilwan* supra note 82 at 767G.

¹⁰¹ *Supra* note 57 para 23.

¹⁰² *Ibid* para 58.

¹⁰³ See, for example, *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) para 28; *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 92; *S v Makwanyane* 1995 (3) SA 391 (CC) para 102, Floyd 2012 *THRHR* op cit note 5 at 416.

¹⁰⁴ *Supra* note 57 para 23.

¹⁰⁵ See, for example, *Coetzee v Comitis* 2001 (1) SA 1254 (C) para 40.

It further does not appear that there are particularly promising routes to get around *Barkhuizen*. One route is perhaps to argue that the general rule itself is unconstitutional, but, as indicated earlier, this rule could be justified by a variety of considerations of principle and policy. Alternatively, it could be argued that the onus must exceptionally be placed on the party seeking enforcement of a term that could restrict s 22 rights, but not be placed on the party to escape enforcement of a term that could restrict s 34 rights. However, it is hardly apparent what the justification could be for such a differentiated and potentially discriminatory treatment of allocating the burden of proof. It would mean that a private individual who concluded a contract of insurance which limits the right of access to the courts should be in a significantly worse position as regards the allocation of the onus than a business executive who concluded an employment contract restricting his right to choose his trade or profession. In short, it cannot be concluded that the onus has to be on the party seeking enforcement merely by pointing out that the restrained party enjoys a specific constitutional right, without explaining why such an exceptional position is tenable.

A second justification for placing the onus on the party seeking to enforce the restraint has featured prominently in the context of the employment relationship. In essence, it is maintained that the onus should be on the employer seeking enforcement due to the inequality or bargaining power of employees.¹⁰⁶ However, here we face the problem of over-generalisation. Prospective employees may indeed at times be in a weaker bargaining position than prospective employers.¹⁰⁷ But restraint of trade clauses are also often signed by executives for whom this need not hold true. And if inequality could generally be assumed in employment contract restraints, why not do so in a host of consumer contracts where the inequality may have been even more readily apparent? The difficulty therefore arises as in pre-*Magna Alloys* English law: an inconsistent exception based on the notion that restraints of trade are to be viewed with particular suspicion due to an assumed inequality of bargaining power.¹⁰⁸

(c) *Alternative routes to contractual equity: Developing effective ways to combat improperly obtained consent*

It was argued above that no proper case has been made out for departing from the general rule through exceptionally placing the onus in restraint of trade cases on the party seeking to enforce the restraint, rather than on the party seeking to escape liability. Such a case cannot merely be based on an

¹⁰⁶ See Karin Calitz 'Restraint of trade agreements in employment contracts: time for *pacta servanda sunt* to bow out?' (2011) 22 *Stellenbosch LR* 50.

¹⁰⁷ See *Zero Model Management (Pty) Ltd v Barnard* 2010 JDR 0842 (WCC) at 29.

¹⁰⁸ See *Roffey v Catterall*, *Edwards & Goudré (Pty) Ltd* supra note 51 at 499–500; *Basson v Chilwan* supra note 82 at 777C (per Botha JA); *Stewart Wrightson (Pty) Ltd v Minniti* 1979 (3) SA 99 (C) at 402H–403A; Sutherland op cit note 77 at 259.

assumption that parties concluding an employment contract are necessarily in such an unequal situation that the onus must be placed on the employer.

However, arguments regarding the onus should not deflect our attention from a more serious underlying problem in our law of contract. We have seen that the *pacta servanda sunt* principle requires that freely concluded agreements should generally be enforced, and that this principle is resorted to in order to justify placing the onus on the party seeking to escape liability due to illegality.¹⁰⁹ But for this principle to have persuasive force, it is crucial that our law on when consent itself is freely given has to function properly. Or, to put the point differently, if there are cases where consent has not been given freely, but the existing law fails to provide the necessary relief, then it calls into question applying the principle of *pacta servanda sunt*. As Davis J pointed out in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn*,¹¹⁰ there is a need for sensitivity to the position contracting parties find themselves in when (supposedly) exercising their freedom of contract or contractual autonomy. It is now necessary to turn to the question whether there are such cases, and if so, what our law could do about them.

In this regard a matter of particular concern is the way in which the South African common law currently treats cases where there is not only weakness on the side of one party, but this weakness is exploited by the other party to obtain 'assent' to an onerous contract. The conventional approach is that the only improper ways of obtaining consent that warrant relief are misrepresentation, duress, undue influence and exceptional cases like commercial bribery. However, developments in contract law globally indicate that such an approach does not go far enough. The mere fact that the parties are in a position of relative weakness or an unequal bargaining position can indeed not be sufficient in itself to influence the validity of the contract.¹¹¹ As indicated earlier, it can at best be a factor that could be taken into account with others (such as the lack of a protectable interest in the context of the restraint of trade clause) in determining whether a contract or term is

¹⁰⁹ See *Barkhuizen v Napier* supra note 57, discussed in part III(d) above.

¹¹⁰ 2008 (2) SA 375 (C) para 30; *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* supra note 82 at 85. Also see the judgment of Sachs J in *Barkhuizen v Napier* supra note 57 para 168, quoting the statement of the Hong Kong Law Commission that 'The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining'. The judgment of Wallis AJ (as he then was) in *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) does not appear to reject this general position; however, he clearly is more guarded about the mechanism that could be used to counteract problems arising from what he calls 'the disparate power relationships of the parties' (para 33).

¹¹¹ See Robert Sharrock 'Relative bargaining strength and illegality: *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 (5) SA 205 (WCC)' (2014) 35 *Obiter* 136 at 141–4; Jaco Barnard-Naudé 'Of Dorothy's dog, "poststructural" fairy tales . . . and the real: Power, poverty and the general principles of the South African law of contract' (2013) 29 *SAJHR* 467 at 479. In *Uniting Reformed Church, De Doorns* the court emphasised inequality, rather than the need to prove that advantage was taken in an improper manner.

contrary to public policy, and hence illegal.¹¹² But the possibility has not been properly explored whether the *exploitation* or *abuse* of situations of weakness such as inequality of bargaining power could be an independent ground for relief, or a further improper way of obtaining consent, apart from established grounds like misrepresentation, duress and undue influence.

In this regard some notable developments have already taken place in statutory consumer law. More specifically, s 40 of the Consumer Protection Act 68 of 2008 broadened the ambit of cases where weak consumers will be protected.¹¹³ This provision does not only prohibit the conventional improper means of obtaining consent referred to above, but also includes the situation where a supplier knowingly takes advantage of the fact that a consumer was substantially unable to protect his or her own interest because of various forms of weakness. These include disability, ignorance, and an inability to understand the language of the agreement. While this provision is restricted to consumer contracts in our law, the general trend in international instruments aimed at harmonising contract law has been to extend this type of protection to a variety of contracts. According to these instruments, the types of weakness which may not be exploited to obtain an unfair advantage typically include dependence, economic distress, urgent needs, improvidence, ignorance, inexperience and lack of bargaining skill. It is at times further required that the party taking advantage either had to know or should have known of the weakness.¹¹⁴

¹¹² See *Basson v Chilwan* supra note 82 at 777C; *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 766 (SCA) at 776E–F and *Barkhuizen v Napier* supra note 57, which recognises more generally that inequality can also be taken into account when determining whether contractual terms or their enforcement would be unreasonable, and hence contrary to public policy.

¹¹³ Section 40(1) provides that ‘A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with [inter alia] the conclusion or enforcement of an agreement to supply any goods or services to a consumer.’ Section 40(2) then proceeds to state: ‘In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.’ For comment see Graham Glover ‘Section 40 of the Consumer Protection Act in comparative perspective’ 2013 *TSAR* 689; Jacques du Plessis ‘Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008’ (2012) 75 *THRHR* 26. Further see s 52(2)(b), which requires of courts, when dealing with alleged contraventions of ss 40, 41 or 48, to consider the relationship between the parties and their relative capacity, education, experience, sophistication and bargaining position.

¹¹⁴ See art 3.2.7 of the *UNIDROIT Principles of International Commercial Contracts* (for comment on its predecessor, art 3.10, see J E du Plessis & P Huber ‘Chapter 3: Validity’ in Stefan Vogenauer & Jan Kleinheisterkamp *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009) 449–56); Art 4:109 of the *Principles of European Contract Law* (for comment see Du Plessis in MacQueen & Zimmermann (eds) op cit note 34 at 158–71); Art II.-2:207 of the *Draft Common*

Ultimately, we are therefore presented with a range of principles that could assist us in determining when consent truly has been obtained properly or has been provided freely.¹¹⁵ The challenge facing South African common law, if there is a serious conviction that only freely agreed-upon contracts should be enforced, is to consider extending the traditional categories of improperly obtained consent to meet modern demands.¹¹⁶ A failure to do so would subvert the *pacta servanda sunt* principle itself, for its whole foundation is the notion that the contract has to be a true expression of the parties' free will.¹¹⁷

Crucially, it is not necessary to invent entirely new legal concepts to achieve this goal.¹¹⁸ We already have the conceptual apparatus to do so. To facilitate the recognition of undue influence as a further ground for invalidating a contract, the Appellate Division in *Preller v Jordaan*¹¹⁹ creatively made use of the earlier civil law on *dolus*, which could cover a variety of improper ways of obtaining consent to conclude detrimental contracts. This type of approach could also be adopted to recognise a further specific ground for relief, covering cases that do not fall under the traditional grounds like misrepresentation, duress, and undue influence.¹²⁰ While its precise ambit remains to be 'hammered out on the anvil of concrete cases',¹²¹ this new

Frame of Reference (DCFR) and Art 51 of the *Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) 2011/0284OM* (for comment see L Hawthorne 'Concretising the open norm of public policy: Inequality of bargaining power and exploitation' (2014) 77 *THRHR* 407 at 418–24). Further see the observations of F D J Brand 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution' (2009) 126 *SALJ* 71 at 88–9, reflecting a willingness to provide relief where the bargaining position of the parties was so unequal that the victim in effect had no say at all.

¹¹⁵ See, for example, the judgments of Sachs J in *Barkhuizen v Napier* supra note 57 at para 173 and Moseneke J at para 108, as well as Van der Merwe et al op cit note 4 at 114–15.

¹¹⁶ See, for example, the American decision of *Williams v Walker-Thomas Furniture Company* 350 F 2d 445 (CAD 1965).

¹¹⁷ See *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) para 24.

¹¹⁸ On the potential role of the judiciary in promoting contractual equity by developing the existing conceptual apparatus, see the 2014 Mortimer Malherbe Memorial Lecture by D M Davis ('Where is the map to guide common-law development?' (2014) 25 *Stellenbosch LR* 3).

¹¹⁹ 1956 (1) SA 483 (A) at 489–93.

¹²⁰ This incremental development might be preferable to subsuming all existing and new specific grounds under 'improperly obtained consent' as a general ground for rescission. This rather vague notion has not gained notable support. In *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C), Brand J (as he then was) was not prepared to endorse such a development (para 65); see further Graham Glover 'Contract, good faith, the Constitution and duress: Contextualising the doctrine' in G B Glover (ed) *Essays in Honour of AJ Kerr* (2006) 101 at 118–19.

¹²¹ To use the phrase coined by Lord Nicholls of Birkenhead in another context in *Her Majesty's Attorney General v Blake* [2001] 1 AC 268. On recognising new cases see further D J Joubert *General Principles of the Law of Contract* (1987) 118; Van der Merwe

specific ground could cover a variety of situations where weakness is present, combined with unacceptable advantage-taking by a party who knew or should have known about it.

To facilitate this development our courts could further resort to the principle of good faith or *bona fides* — not as a ‘free-floating’ principle to refuse to enforce contracts at will — but as an underlying value of our law of contract, which historically has played the important ‘midwife’ function of facilitating the birth of specific constructs and rules which promote the mutual regard that parties to a contract have to display to each other.¹²² Finally, any development of the common law aimed at ensuring that consent must be provided freely could potentially be justified on the basis that greater effect would thereby be given to a party’s autonomy; this in turn could give expression to and reinforce the constitutional right and values of freedom and dignity.¹²³

We have to some extent departed from the main question of burden of proof. But the point had to be made that it may be preferable to strike at the heart of problems relating to the exploitation of weakness rather than (merely) to refer to these problems in order to justify exceptionally placing the onus of proof of validity on the employer when an employee agrees to a restraint of trade clause. We can now, in conclusion, return to the issue of the burden of proof, and ask how it is to be allocated if, as argued above, the existing categories of improperly obtained consent were to be extended to cover new cases of exploitation of weakness.

et al op cit note 4 at 110–15; Hutchison & Pretorius op cit note 5 at 144; L Hawthorne ‘Public policy and micro lending — has the unruly horse died?’ (2003) 66 *THRHR* 116 at 122; L Hawthorne op cit note 114. Hawthorne favours the development taking place within the ambit of the requirement that contracts must not be contrary to public policy. However, even though inequality may be *relevant* when applying this requirement (as indicated in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para [12]; *Barkhuizen v Napier* supra note 57 paras 59 and 66), the development argued for here is the express recognition of a separate ground of improperly obtained consent, next to others such as undue influence. For criticism of a conflation of the requirement that contracts may not be contrary to public policy and the procedural requirement that certain means should not be used to obtain consent further see Gerhard Lubbe ‘Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg’ (1990) 1 *Stellenbosch LR* 7 at 22–3.

¹²² See *Barkhuizen v Napier* supra note 57 para 82; Brand op cit note 114 at 83; Dale Hutchison ‘Good faith in the South African law of contract’ in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213 at 229–42; Reinhard Zimmermann ‘Good Faith and equity’ in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross — Civil Law and Common Law in South Africa* (1996) 217; Glover op cit note 120 at 114–15.

¹²³ See *Barkhuizen v Napier* supra note 57 para 57; Gerhard Lubbe ‘Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law’ (2004) 121 *SALJ* 395 at 420–23; Brand supra note 114 at 86–9 (especially the text to note 77, reflecting a reconsideration of earlier positions, and endorsing Lubbe’s views on the varied roles that values like freedom and dignity could play); Glover op cit note 120 at 119–27; Sharrock op cit note 111 at 143.

In this regard it has been indicated that the general approach of South African law is that if the party seeking enforcement has proven actual or apparent consent, the party seeking to escape liability bears the onus of proof that a requirement for liability has not been met. This also includes requirements relating to whether consent has been freely given.¹²⁴ However, it may be difficult to prove that consent was not given freely where parties are in an unequal relationship. This problem has long been recognised in English law. Like South African law, it places the burden of proof of undue influence on the person seeking to escape liability. This position is also in line with the general rule. But English law further recognises that at times it may be difficult to discharge a burden of proof of such a defect of consent. In this regard English law maintains that the burden is normally discharged if the person seeking to escape liability can prove two things: first, that he or she placed trust and confidence in the other party; and secondly, that the transaction calls for explanation.¹²⁵ When such proof is provided, it is up to the party seeking enforcement to prove that the transaction was nonetheless freely concluded. Resorting to presumptions could be a subtle instrument to protect such parties, compared to the somewhat unsophisticated tool of an anomalous exception, whereby the onus is simply shifted to the party seeking enforcement of a particular type of contract, namely that of employment.

The practice of using presumptions to protect weak parties is not without precedent in the civil-law tradition, of which South African law forms a part. As in later English law, the earlier civil law at times eased the burden of proof of a defect of consent by making use of presumptions. For example, where a contract was challenged on the ground of duress (*metus*), the victim had to prove that he or she acted under fear. But because proof of fear was difficult, proof could be facilitated by a presumption that fear arose in certain typical situations of intimidation.¹²⁶ The potential exists in our modern law to draw on this early practice, and use devices like presumptions to facilitate proof of improperly obtained consent. This practice would also be in line with the approach of modern German law, which, as we have seen earlier, uses presumptions to prove the state of mind of the victim in applying § 138(2) BGB.¹²⁷

Again, the courts will have to proceed incrementally to make proper use of this conceptual tool. The mere fact that parties concluded an employment contract cannot be the basis for a presumption that advantage has been taken

¹²⁴ See part III(d) above.

¹²⁵ See e.g. *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 para 14.

¹²⁶ See J du Plessis & R Zimmermann 'The relevance of reverence: Undue influence civilian style' (2003) 10 *Maastricht Journal of European and Comparative Law* 345 at 354–7, discussing the views of earlier civil-law authors such as Joseph Mascardus and Jacobus Menochius (for reference to their works in modern South African law see e.g. *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) para 35 and *Radley v Stopforth* 1977 (2) SA 516 (A) at 528).

¹²⁷ See part III(b) above; *MüKoBGB/Armbrüster BGB op cit* note 32 § 138 para 116.

of weakness. However, a presumption that consent was not properly obtained, and more specifically that advantage was taken of weakness, would be more tenable if there is an indication that a party was in a situation of economic distress, with no alternative avenue of employment, and the other party insisted on onerous terms when it knew about this state of affairs. Developing presumptions like these will undoubtedly require a certain degree of boldness from the courts. But if our common law is to remain resilient and responsive to the constantly adapting needs of society, and especially to the need for a more equitable law of contract that promotes and balances the interests of both parties, there may be no real alternative.

V CONCLUSIONS

South African law adheres to a general rule that if the legality of an agreement is in issue, the party who relies on the illegality bears the burden of proof. Our system is not alone in this regard; such a general rule is standard practice in a number of prominent jurisdictions. A similar approach is also followed in challenges to validity based on a variety of grounds, such as non-compliance with self-imposed formalities, impossibility, lack of capacity and defective consent.

The general rule is supported by well-established principles that influence the placement of the burden of proof. Underlying some of these principles is the sound practical consideration of limiting the costs of deciding disputes. The rule also draws strength from a justification specific to the law of contract, namely the *pacta servanda sunt* principle. The argument is that if the party seeking enforcement proves that the other party freely consented to a contract, and the other party now appears to go against his or her own word by alleging illegality, then the other party must bear the burden of proof of illegality. In this regard the mere fact that parties sometimes conclude contracts in situations of weakness or inequality (for example when some prospective employees conclude employment contracts containing restraint of trade clauses) does not justify exceptionally placing the burden of proof of legality on the party seeking enforcement.

However, this should not deflect our attention from a more fundamental issue. A real need exists to reconsider the state of the current substantive common-law rules on typical cases of improperly obtained consent. The opportunity exists to extend these cases to accommodate situations where advantage is taken of weak parties who conclude onerous contracts. In this regard our courts are able to build on the foundations and conceptual apparatus provided by earlier authorities. Guided further by principles laid down in local and international statutory and model instruments, the courts could creatively fashion new rules aimed at preventing these forms of exploitation. While the overall burden of proof should remain on the party seeking to escape liability under a contract they apparently agreed to, some scope exists to protect these parties by alleviating this burden through the creative use of presumptions.