ENSURING CONTRACTUAL FAIRNESS IN CONSUMER CONTRACTS AFTER BARKHUIZEN V NAPIER 2007 5 SA 323 (CC) – PART 2

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5 The importance of sanctity or freedom of contract[194]

Although courts have acknowledged that they have a duty to impugn contractual provisions that are against public policy in order to promote "simple justice between man and man",[195] they have also remained cautious of public policy:

> "Public policy in the interpretation of contracts has, for some reason, inspired a shower of equine analogies. It has been variously described as a very unruly horse, a high horse to mount and difficult to ride, one which stampedes in opposite directions at the same time and one whose reins must be tightly held".[196]

They have confirmed that "public policy generally favours the utmost freedom of contract"[197] and that:

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness".[198]

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194 The judges in this matter seem to use the terms sanctity of contract and freedom of contract interchangeably It is doubtful whether this is correct But nothing more will be made of it in this contribution

195 *Jajbhay v Cassim* 1939 AD 537 544

196 See *Interland Durban (Pty) Ltd v Walters NO* 1993 1 SA 223 (A) 224-225 and the analysis of the criticism of *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A)

197 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9

198 8-9 See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 8; *Barnard v Barnard* 2000 3 SA 741 (C) para 40; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) 782-783; *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 31; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 2 SA 389 (SCA) 403; *Citibank NA South African Branch v Paul* 2003 4 SA 180 (T) 195; *De Beer v Keyser* 2002 1 SA 827 (SCA) para 22; *De Jager v Absa Bank Bpk* 2001 3 SA 537 (SCA) para 14; *De Klerk v Old Mutual Insurance Ltd* 1990 3 SA 34 (E) 43-44; *Diners Club SA (Pty) Ltd v Singh* 2004 3 SA 630 (D) 657-658; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) 324; *First National Bank of SA Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG) 870-871; *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 3 SA 373 (C) 385-386; *Mufamadi v Dorbyl Finance (Pty) Ltd* 1996 1 SA 799 (A) 803-804; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 23; *Society of Lloyd's v Romakin* 2006 4 SA 23 (C) paras 99, 109; *Standard Bank of SA Ltd v Essop* 1997 4 SA 569 (D) 575-576; *Traco Marketing (Pty) Ltd v Commissioner South African Revenue Services: In re Commissioner South African Revenue Services v Traco Marketing (Pty) Ltd* 1998 4 SA 1002 (SE) 1012; *Venter v Credit Guarantee Insurance Corporation of Africa Ltd* 1996 3 SA 966 (A) 976-977; *Warrenton Munisipaliteit v Coetzee* 1998 3 SA 1103 (NC) 1112

In the Supreme Court of Appeal counsel for the insured relied on the constitutional values of "dignity, equality and the advancements of human rights and freedoms" as described in section 1 of the Constitution, to have the time limitation struck down for being inconsistent with public policy.[199] However, Cameron JA allowed a narrow field of application for such a review of contractual provisions. He stated that these values do not provide a "general all-embracing touchstone for invalidating a contract".[200] He stressed the importance of freedom of contract as a constitutional counter-value and observed that this principle was itself rooted in freedom and dignity.[201] Judges have to take care not to impose their conceptions of fairness and justice on arrangements that were apparently concluded voluntarily. Constitutional values had to be employed only to strike down the "unacceptable excesses of freedom of contract".[202]

Cameron JA mentioned that it is "easy to see how the Constitution's foundational values of non-racialism and non-sexism could lead to the invalidation of a contractual term".[203] He then continued that a far more complicated balancing act was necessary for determining whether a clause could be impugned on the basis of dignity, equality and the advancement of human rights and freedoms, as dignity and autonomy also formed the justification for the principle of freedom of contract.[204] Cameron JA's argument seems to have been that non-racialism and non-sexism, unlike autonomy and dignity, do not fulfil the dual role of also forming the foundation for freedom of contract. But his argument paints the picture with rather broad strokes. The judge followed a classic liberal interpretation of the concepts freedom and dignity. It is doubtful whether it is historically, politically and therefore legally acceptable to endorse such a construction. Equality should serve as a more important "vehicle to facilitate transformation" in an unequal society such as South Africa.[205] Dignity also should be a "constraint-based" rather than an "empowerment-based" liberal concept in this society that still struggles to deal with the legacies of apartheid.[206] Cameron JA's narrow reliance on the foundational principles of the Constitution in order to give content to public policy further skews public policy in favour of sanctity of contract.[207] A more sophisticated textual treatment of the specific provisions of the Bill of Rights was called for. It is doubted whether the special role which Cameron JA ascribed to freedom

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[199] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 11 See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 94, Lubbe 2004 *SALJ* 414-415; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 44

[200] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 11

[201] Paras 11-14 See also Bhana 2007 *SALJ* 271-272; Naude & Lubbe 2005 *SALJ* 443

[202] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 13 See also para 7 and the rejection of the striking down of contractual provisions on imprecise notions such as good faith

[203] Para 14 See generally text next to n 240 below See also Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 182 and his analysis of profiling and stereotyping, discussed in the text next to n 268 below

[204] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 11-16

[205] Bhana 2007 *SALJ* 274

[206] 273-275 (it is doubted whether Bhana is correct in concluding that this is more conservative than the pre-Constitutional approach to contracts against public policy) See further Bhana & Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" 2005 *SALJ* 865 879-881; Lubbe 2004 *SALJ* 420-422; Naude & Lubbe 2005 *SALJ* 452

[207] See text next to n 102 above

of contract can be justified in the light of the absence of any explicit reference to it in the detailed provisions of the Bill of Rights.

Nominally Ngcobo J in the Constitutional Court agreed with the Supreme Court of Appeal on the significance of sanctity of contract.[208] He again made several references to the importance of freedom of contract or *pacta sunt servanda*.[209] He observed that this principle gives effect to the 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".[210]

It was further recognised that *pacta sunt servanda* is a "profoundly moral principle, on which the coherence of any society relies",[211] and that reliance should be placed on the concept, although this reliance should not be "blind".[212]

Nevertheless, it is clear from his more specific description of public policy, that Ngcobo J subtly changed tack in favour of a more restricted perspective of the principle of sanctity of contract. The differences should not be exaggerated. Ngcobo J correctly observed that the Supreme Court of Appeal in this case did not regard *pacta sunt servanda* as a holy cow that could never be slaughtered in order to give effect to the Constitution.[213] However, Ngcobo J also accorded greater priority than the Supreme Court of Appeal to other values, and especially fairness, as significant checks on freedom of contract.[214]

The dissenting judges went even further. Moseneke DCJ explicitly envisaged a narrower scope for sanctity of contract. He stated that it is trite that "constitutional values allow individuals the dignity and freedom to regulate their affairs"[215] but that bargains, even if freely struck, could not be inimical to equity and fairness as sourced from the Constitution. He criticized the extolling of the virtues of *laissez faire* freedom of contract at the expense of public notions of reasonableness and fairness.[216]

For Sachs J this case raised the question whether the need to protect consumers required that received concepts of sanctity of contract should be revisited[217] or whether received notions of contract law as encapsulated in the principle of sanctity of contract are inviolate and unchanging.[218] He did more than any other judge who sat on this matter to explain the purpose and function of the principle of sanctity of contract.[219] He quoted from the judg-

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[208] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 57, 70
[209] Paras 55, 57, 70, 73
[210] Para 57
[211] Para 87
[212] Para 55
[213] Para 15
[214] See especially paras 72-73 See also the judgment of Moseneke DCJ para 104 See further 4 above on the role of reasonableness and 6 2 1 below
[215] Para 104
[216] Para 104
[217] Para 123
[218] Para 150
[219] See Christie *The Law of Contract* (2006) 12, 14-15 and Van der Merwe et al *Contract* 11-12, 20-21 on freedom of contract and the reasons for its existence

ment of Davis J in *Mort v Henry Shields-Chiat*[220] where that judge stated that the constitutional principle of freedom, to some extent, supported contractual autonomy: failure to do so would cause contractual litigation to mushroom and it would defeat the expectations of the parties.[221] Yet, equality and dignity direct attention in another direction. Parties to a contract in the constitutional era have to adhere to a minimum threshold of mutual respect. One-sided promotion of personal interests would therefore constitute a breach of the duty to act in good faith.[222] The law of contract had to be developed to ensure that it reflected these constitutional values.[223] Sachs J noted that sanctity of contract and the maxim *pacta sunt servanda* had become "axiomatic, indeed mesmeric" through judicial and textbook repetition. Freedom of contract is defined in terms of a separation of the market and state, private and public law. At its fullest reach it is the doctrine of *laissez faire*.[224] However, the importance of these principles is not self-evident and they have become severely restricted in open and democratic societies. Sanctity of contract has been removed from the "pedestal on which it once imperiously stood".[225] The state now has a greater interest in the regulation of private relationships and in ensuring fairness and equity.[226] This development took place through consumer protection struggles, scholarly critiques, legislative intervention and creative judicial reasoning. The new constitutional order also attenuates sanctity of contract's once implacable position.[227]

It is perhaps an exaggeration to state that sanctity of contract has ever been regarded as absolute. It is not surprising that Sachs J made this statement without referring to any examples from local textbooks or case law.[228] However, his broad conclusion is correct: the importance of sanctity of contract has often been overstated in South Africa. The time is ripe to reconsider this principle against the backdrop of the Constitution, the importance of the state in the regulation of the economy and the need for consumer protection.[229]

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[220] 2001 1 SA 464 (C) 474-475, also cited by Olivier JA in *Brisley v Drotsky* 2002 4 SA 1 (SCA)

[221] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 168, 171-172 See also the reference to the Law Reform Commission of Hong Kong *Report on Sale of Goods and Supply of Services* Topic 21 (1990) where the role played by sanctity of contract in creating certainty and the limits of this argument was discussed and the analysis and evaluation of the same argument by the South African Law Commission

[222] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 165, 167, 335-336 On the role of good faith see the text next to n 179 above and text next to n 365 below

[223] Para 140

[224] Para 145

[225] Para 141, 162-163

[226] Para 154 See also para 170 where it was mentioned that a balance has to be struck between freedom of contract and the control of private volition in the interest of public policy, but see the more accurate approach in para 174 where individual volition is contrasted with a reconciliation of the interests of the parties Christie *The Law of Contract* 15 (2006) calls this a "paternalistic" attitude

[227] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 141

[228] See paras 151-154 especially n 26 where reliance was placed on Collins *The Law of Contract* 3 ed (1997) v-vi although his views are generally considered to be quite extreme See also paras 158-160 where it was accepted that courts have placed some limitations on the operation of sanctity of contract

[229] This approach has already garnered strong academic support See for example, the sources mentioned in 5 above and the academic outcry after *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) mentioned in *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 8 n 4

6 The determination of fairness of a time-limitation

It now remains to look more closely at the manner in which the different courts in *Napier* determined whether the time-limitation was fair and what this means for time-limitations and other unfair provisions.

6 1 Fairness before the High Court and Supreme Court of Appeal

The court of first instance directly tested the time-limitation against the constitutional right set out in section 34 of the Constitution. It could therefore apply the reasoning of the *Mohlomi* case,[230] where a statutory time-limitation was found to conflict with the Constitution, in its pure form. De Villiers J concluded that the time limitation was unfair.[231]

In the Supreme Court of Appeal, Cameron JA decided that the *Mohlomi* test was not applicable in this contractual context. However, in answering his first broad question, regarding the extent to which the Constitution generally applied between contracting parties, he considered whether the time limitation was contrary to public policy by reference to a further two-stage test.

First he asked whether the provision was unfair or unreasonable. He concluded that the unfairness of the time limitation was not self-evident and that there was no warrant for such a conclusion on the evidence before court.[232] The statement of facts did not generate sufficient evidence that could persuade the court that the time limitation was unfair. The time limitation meant that the insured lost his claim within a much shorter time than the ordinary periods of prescription, but in insurance cases details of the claim and the incident that caused it are usually uniquely within the claimant's knowledge. This would justify a shorter limitation period for an insurance claim. The reasonableness of the period would amongst others depend on the number of claims the insurer has to deal with, how its claim procedures work, what resources the insurer has to investigate and process claims, and what premiums it charges.[233]

Secondly, Cameron JA referred to *Brisley v Drotsky*[234] as support for the view that the mere unfairness or harshness of a provision did not mean that it offended against constitutional principles.[235] Although he acknowledged that the judgment was controversial, he relied on *Afrox Healthcare Bpk v Strydom*[236] where it was decided that equality of bargaining power could prove decisive in these situations. To determine relative bargaining power, evidence is required regarding a number of issues, such as the market for short-term insurance products; the variety of these products that is available; the concentration levels in the market for these products; whether all or most insurers impose these restrictions; the variety of time limitations that is available to

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230 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) See text next to nn 176-178 above and 6 2 below

231 *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 10-13; *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 10; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 9

232 *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 9-10

233 Bhana 2007 *SALJ* 277-278 rightly asks why the court did not equally take note of factors favouring the insured

234 *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 95

235 *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 12

236 2002 6 SA 21 (SCA)

insured parties and the range over which they fall; and whether short-term insurance was an essential or optional convenience for an apparently affluent middle-class person such as the insured or was an optional convenience. But, as there was no evidence of inequality of bargaining power before the court, this constitutional challenge could not "even get off the ground".[237]

The Supreme Court of Appeal stressed the importance of relative bargaining power in determining the significance of the Constitutional principles of dignity, equality and the promotion of human rights and freedoms for contractual outcomes.[238] Generally, both the court's understanding of the concept of bargaining power[239] and the role that was ascribed to it are problematic. In particular, the relative bargaining position of the parties was not envisaged to carry the same significance in cases that concern contractual provisions that offend against the principles of non-sexism and non-racism. The conclusion that a racist provision in a contract concluded between parties of equal bargaining should be struck down without reference to bargaining power, while one that is economically unfair to one of the parties should not, is justifiable. Yet, a more sophisticated basis for distinguishing these situations is called for.[240]

6 2 Fairness in the Constitutional Court

Ngcobo J determined whether the contractual time limitation had to be struck down with reference to the two reasons given in the *Mohlomi* case for striking down a statutory time limitation.[241] First, it had to be established whether the clause itself was reasonable. Thereafter, even if it was reasonable, it had to be established whether the clause should be enforced in particular circumstances which prevented compliance with the time-limitation clause.[242] Moseneke DCJ also applied the reasoning of the *Mohlomi* case, but he followed the formulation in that case more closely. His second enquiry was addressed to the question whether the clause was unfair because it was inflexible or required strict compliance in all circumstances.[243]

6 2 1 Ngcobo J's first enquiry: fairness of the clause

Ngcobo J bifurcated his first enquiry. First, it had to be determined whether the objective terms of the contract, on their face, were inconsistent with public policy. Some time-limitation clauses are so unreasonable that their unfairness is "manifest". As an example the judge mentioned a provision determining that a claim had to be instituted within 24 hours of the occurrence of a risk. No further information would be required to show that such a clause is

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[237] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 8, 14-16 See the cogent criticism of Bhana 2007 *SALJ* 276

[238] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 14 See Bhana 2007 *SALJ* 271-272

[239] See the analysis of standard-form contracts in 6 2 3 below

[240] See text next to nn 203-207 above where this distinction is explained

[241] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 50-52, with reference to *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) paras 13-14 See also text next to nn 163-164, 215 above

[242] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-58

[243] Para 109 Moseneke DCJ called it the *Mohlomi* test although it was not formulated as a test in that case

unreasonable.[244] There could also be other cases where a restriction would be tantamount to denial of access to court.[245] But he then decided that in this case, the 90 days limitation was not manifestly unreasonable. It only started to run once a claim had been repudiated. At this stage the insured would already have sufficient information about the claim to allow him or his attorney to issue summons within the restricted time.[246]

According to the second part of the first enquiry, it then had to be determined whether the term was contrary to public policy in the light of the relative situation of the contracting parties. In addressing this second question, Ngcobo J stressed the importance of the relative bargaining power of the contracting parties:

> "Indeed, many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness."[247]

However, there was no admissible evidence that the contract was not freely concluded, that the parties were in an unequal bargaining position, or that the clause was not drawn to the attention of the insured.[248]

The first enquiry as put forward by Ngcobo J constitutes a considerable shift in this area of the law. The Supreme Court of Appeal indicated that proof of inequality of bargaining power is a core requirement for striking a contract down on the basis of fairness. In the Constitutional Court it was merely viewed as an additional requirement once it was found that the objective terms were not on their face unreasonable:[249]

> "if a court finds that a time-limitation clause does not afford a contracting party a reasonable and fair opportunity to approach a court it will declare it to be contrary to public policy and therefore invalid. To the extent that the Supreme Court of Appeal appears to have held otherwise, that dictum cannot be supported".[250]

In this respect the judgment of the majority in the Constitutional Court is a vast improvement on the outdated approach of the Supreme Court of Appeal. However, the judgment of Ngcobo J also raises some uncomfortable questions.

First, this part of the judgment is badly organized and difficult to follow. It is not always clear when the court is dealing with the first part of the first enquiry, the second part of the first enquiry discussed in this section, or the second enquiry analyzed in the next section.[251]

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[244] Paras 59-62

[245] Para 60

[246] Para 63

[247] Para 65

[248] Paras 59, 64-66 The courts have followed a similar approach in other cases See Lubbe 2004 *SALJ* 416

[249] Para 59

[250] Para 72 Although this statement is made in the context of the second enquiry (which is discussed in 6 2 5 below), it does not appear to be restricted to it See also Woolman 2007 *SALJ* 772 who over-simplifies these issues

[251] It is not clear why the considerations mentioned in para 57 of *Barkhuizen v Napier* 2007 5 SA 323 (CC) were referred to only in the context of the first enquiry It is also not clear whether para 60 was intended to apply to one or both parts of the first enquiry Para 62 seems out of place in so far as it refers to the second enquiry The heading before para 62 and para 67 creates the impression that this section applies only to the first part of the first enquiry, but it actually concerns both parts See also the comments about para 72 in n 235 above

Secondly, the judge initially merely required that the time-limitation be unreasonable before it would be impugned. Later on he added that the unreasonableness had to be "manifest".[252] Moreover, it is not clear whether this was merely required in terms of the first part of the first enquiry, or whether the yardstick will always be "manifest" unreasonableness or unfairness.[253] There are good grounds for arguing that it generally should not be enough to show that a contractual provision is unreasonable but that manifest unreasonableness has to be proved.[254] The striking down of a contractual provision, after all, should be the exception rather than the rule.[255] There may be reasons for applying a more lenient test where other facts indicate that this should be the case, for instance where a standard-form provision is the subject of a dispute, but this can be accommodated under the second leg of the first enquiry.[256]

Thirdly, it seems that the test requires that the fairness of a provision on the first leg has to be evaluated without any reference to evidence. The court stated that the contract had to be evaluated "on its face" and it did not refer to evidence in concluding that the clause did not comply with this test.[257] Evidence is considered only in order to answer the second question. However, it is not clear why this should be so. The judgment should rather be read to allow for a wider consideration of evidence.

Fourthly, the court stated that the "relative situation of the parties" must be evaluated.[258] It is not quite clear what this means. The court only considered inequality of bargaining power under this rubric but perhaps other aspects can also be considered here.

Finally, Ngcobo J's evaluation of relative bargaining power is superficial.[259]

Perhaps a differently formulated test is called for. First, it should be asked whether the clause is manifestly unreasonable on the face of it. Second, it should be determined whether there is evidence that shows either that it is manifestly unreasonable or that it should not be upheld on the basis of unfairness for other reasons such as inequality of bargaining power.

6 2 2 The purported objective approach of the minority and role of bargaining power

Sachs J accepted that it was not necessary for the insured to show that the restriction operated unfairly against him (although he did not clearly distin-

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[252] In para 60 it is implied that the reasonableness test will be very strictly applied

[253] The term "manifest" is used only in the context of the first part of the enquiry, but it is mentioned in the heading of the part of the judgment where both are analyzed, and it is used in para 67 with reference to both The term was possibly introduced by counsel (see para 49)

[254] But *cf* paras 70-71 where the court merely spoke of unreasonableness

[255] Christie *The Law of Contract* (2006) 14-15 with reference to the proposals of the Law Commission See 6 2 3 below, especially text next to nn 316-317 Thus far courts have only been prepared to strike down contracts on the basis of public policy in cases of clear and manifest unfairness (see text next to n 180 above)

[256] See the last part of this section

[257] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59

[258] Para 59

[259] Discussed in 6 2 2 below See also Hawthorne 2004 *THRHR* 299-300 and the criticism of a similar strategy in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) by Naude & Lubbe 2005 *SALJ* 461

guish the issues that had to be investigated in determining the reasonableness of the time-limitation). The question was whether, objectively speaking, the time-limitation was consistent with public policy.[260] Contractual fairness in the light of the Constitution required a special investigation of the provenance of the time bar. It had to be determined whether the fairness which public policy demanded at all permitted the enforcement of the time-limitation.[261]

This perspective formed the core of Moseneke DCJ's disagreement with the majority. He criticized the majority judgment for determining "the consistency of a contractual term with public policy … by reference to the circumstances and conduct of the parties to the contract".[262] Public policy should ordinarily not be determined with reference to the personal attributes of the party seeking to escape the results of the time bar but by means of an "objective assessment of the terms of the bargain".[263] It is the "likely impact"[264] or "tendency"[265] of an impugned provision that should be determinative of public policy notions of fairness. The "subjective approach" of the majority meant that the same provision could be good or bad depending on the parties to the contract. This would render the reasonableness standard of public policy whimsical.[266] If a complaint that a contractual provision is inconsistent with public policy could be defeated on the basis that it was not unfair to a particular contracting party, it would elevate *laissez faire* freedom of contract at the expense of public policy:[267]

> "While there is often merit in contextual analysis, it is clear that contractual terms should not be tested for their consistency to public norms by *merely* observing the peculiar situation of the contracting parties. The enquiry must rather focus on the arrangement that the stipulation contemplates, on its impact on the parties, whoever they may be, on its tendency or likely outcome and ultimately, on its fairness between the parties as measured against public notions of fairness."[268]

Moseneke DCJ exaggerated the extent to which the majority found support in so-called subjective factors.[269] The Deputy Chief Justice relied on the statement in the majority judgment that fairness has to be "assessed by reference to circumstances of the applicant".[270] This statement is widely formulated, but the majority probably only intended this phrase to refer to the relative bargaining positions of the parties to the contract. Moseneke DCJ continued:

> "This preferred subjective yardstick has prompted a fulsome enquiry into: (a) whether the applicant is poor or illiterate; (b) whether he was unaware of his rights; (c) whether he had access to professional advice; and (d) whether he was impeded by financial, educational or geographical reasons from

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260 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 122 and see paras 161, 183
261 Para 124
262 Para 94
263 Para 96
264 Para 97
265 Para 98 See also paras 99-103 with reference to *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA); *Donelly v Barclays National Bank Ltd* 1995 2 SA 1 (A); *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1995 3 SA 1 (A); *Standard Bank of SA Ltd v Wilkinson* 1993 2 SA 822 (C)
266 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 98 But see para 148 n 18 per Sachs J who apparently did not regard this as a problem (discussed in the text after nn 292, 295, and especially n 313 below)
267 Para 104
268 Para 104 (own emphasis)
269 Para 94
270 Para 64

> meeting the deadline set by the time bar. In the same vein, much has been made of the fact that he is a software developer and drives a new BMW 328i, which in the words of the Supreme Court of Appeal is 'a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle'. The majority judgment also notes that the applicant lodged his claim with the insurance company promptly after the motor collision that saw his motor vehicle damaged beyond repair, thereby implying that he could have issued summons well within the 90-day prescriptive period. In effect, the applicant's personal attributes and station in life played a decisive role in the determination of the majority judgment that the time bar clause is fair and just and thus accords with public policy."[271]

This misstates the extent to which the majority relied on the personal circumstances of the insured. The fact that the insured was a software developer who drove a BMW and that the claim was notified to the insurer well within another time limit was mentioned in the majority's summary of facts.[272] The employment of the insured and nature of the vehicle driven by him then played no further role in the judgment. The point regarding the speed with which written notice was given, was later repeated.[273] However, the majority did not thereby imply that the insured "could have issued summons well within the 90-day prescriptive period".[274] It referred to this fact as an "indication" that the insured was informed and not in an unequal bargaining position.[275]

Furthermore, Moseneke DCJ seems to have overlooked the first part of the first enquiry proposed by the majority, when he concluded that the majority had merely looked at subjective factors.[276] The Supreme Court of Appeal certainly followed a very subjective approach, but the majority judgment in the Constitutional Court is more sophisticated. Relative bargaining position is regarded as relevant, and not conclusive. It is only considered once it is concluded that the objective terms of the contract are not unreasonable on their face.[277] The broader "circumstances that prevented compliance" in the specific case was perceived to be relevant only as part of the second enquiry.[278]

The judgments of the majority and minority therefore are not far apart on this point. Moseneke DCJ, in terms that echo the first part of the first enquiry proposed by the majority, finally concluded that the time limitation was "on its face unreasonable or unjust".[279] He only emphasized that the relative position of the parties would not "ordinarily" be relevant and later mentioned that there is often merit in contextual analysis.[280] Sachs J simply stated that fairness could not *just* be determined with reference to the position of the particular insured.[281]

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[271] Para 95 with reference to *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 15

[272] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 2 See also the comment about the Supreme Court of Appeal judgment in para 14

[273] Para 66

[274] Para 95

[275] Para 66

[276] Para 104 It appears that a similar point is made by Sachs J in para 124

[277] Para 59

[278] Paras 58, 69 However, the broader "circumstances of the parties" was also used in the analysis of relative bargaining power (para 64) but see the discussion in the text just before n 259 above

[279] Para 119

[280] Paras 96, 97, 104

[281] Para 124

In the first instance, inequality of bargaining power is relevant to the question whether a particular contract was properly concluded.[282] Nevertheless, relative bargaining power also ought to be an indicator of the fairness or unfairness of a contractual term. It is unlikely that a party who is truly in an equal bargaining situation will accept terms that are unfair. Evidence that a party in an equal bargaining position accepted a particular term should therefore be relevant whether the parties to the case before court were in such a position or not. This, at least in part, is what Sachs J meant with the "provenance" of the time-limitation clause.

However, the elements of equal bargaining power should be carefully established. It will appear from the analysis of standard-form contracts[283] that various requirements have to be met before it can be concluded that parties truly are in an equal bargaining position and that it will not be necessary to establish whether there is equality of bargaining power on the facts of every case. Moseneke DCJ's warnings that bargaining power should be relevant only in determining whether a provision will tend to be unreasonable and that bargaining power should be approached with considerable caution is therefore apposite.

The focus on objective facts allowed the minority to evaluate the time-limitation within the context of the entire insurance contract and other ancillary documents "that provide valuable clues on the likely manner in which the insurance agreement was concluded",[284] and to regard this, together with the sparsely stated facts, as sufficient for the purpose of drawing firm conclusions about the acceptability of the time-limitation provision.[285] It allowed the contractual documents to "speak for themselves".[286] This is a major point of distinction between the majority and minority, and in this respect the minority judgments are more credible.

6 2 3 The minority judgments and short-term insurance policies as standard-form contracts

For the minority, a full evaluation of the contractual setting served as a springboard to label the time-limitation a provision in a standard-form document or contract of adhesion that was attached to, but did not form part of, the negotiated terms of the contract.[287] Ngcobo J acquiesced in many of the comments made by Sachs J concerning standard-form contracts, but he did not apply them to this matter on the basis that the tersely stated facts did not allow for it. This is the most disappointing aspect of his judgment. Both minority judgments show convincingly that a reference to the contractual documents provided sufficient fuel for such an evaluation. This failure of the majority has

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[282] Christie *The Law of Contract* (2006) 14 accepts that the Constitution could help to develop this area of law

[283] See 6 2 3 below

[284] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 105

[285] Paras 97, 105, 106, 110 per Moseneke DCJ (who found support in the judgment of Sachs J) and para 122ff per Sachs J

[286] Para 124

[287] Para 122 per Sachs J The only discussion of this issue in the judgment of Moseneke DCJ is in paras 107-108 with reference to Sachs J

important consequences both in the particular case and for the law of contract and insurance law in general.

The issue of standard form contracts was the focal point around which Sachs J shaped his judgment.[288] He drew a distinction between the major terms of a contract that are mostly negotiated and determined by market forces and the ancillary terms in standard form, or those terms that, like Mount Everest, are just there.[289] A standard-form contract is drafted in advance by the supplier of goods or services and is presented to the consumer on a take-it-or-leave-it basis. It contains the common stock of terms that will be heavily weighted in favour of the supplier. Consumers are often ignorant of these terms or at least unable to appreciate their import. They are drafted by lawyers in obscure language and are set out in fine print.[290] It is impracticable for consumers to shop around or take legal advice on these terms. The cost in time and legal fees would simply not justify the effort. The cost to an insured of taking legal advice frequently will exceed the premium that has to be paid on the policy. Even those who read and understand the standard-form provisions will find it difficult to resist them.[291] The difficulties regarding standard-term contracts therefore strike both the rich and sophisticated and the poor and uneducated consumer.[292]

Few could disagree with these observations about the nature of standard contracts. Perhaps the reasonable man of the nineteenth century would have thought it sensible to read and make sense of all terms of the contracts that he concluded. Yet, the lifestyle of the reasonable person of the 21st century is far too complex and full for that. As almost nobody would go to the effort of investigating the fine-print terms of a contract, no market for such terms exist, even for those who are so fastidious that they read and make sure that they understand their consumer contracts.[293]

Sachs J's conclusion that the part of the insurance policy which contained the time limitation, called the certificate of insurance, was a standard form contract is also indisputable. Insurance companies compete on the level of cover, no-claim bonuses, and premiums but not on the small print.[294] The terms on which the parties actually agreed, the negotiated part, which concerned the type of vehicle insured, the major circumstances under which cover was granted and the premium paid, were set out in a schedule separate from the certificate of insurance.[295] This part of the insurance policy was on a

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[288] See also the way in which this issue was analyzed by the Bophuthatswana court in *National Bank of SA Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG) 871-872 The argument was adumbrated by Bhana 2007 *SALJ* 275

[289] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 144, 156 See the discussion of this issue in paras 164-165 with reference to UK law, and its application in para 180

[290] The reasons for the use of small print are discussed in paras 147, 156, 182-183 See the attempt to address this in the Policyholder Protection Rules (Long-term Insurance) 2004 issued in terms of s 62 of the Long-term Insurance Act 52 of 1998 r 6 1

[291] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 135-136

[292] Para 149 See the comments in paras 148 (especially n 18), 156 and 173 about businesspeople, although they may also conclude standard contracts as consumers See also n 266 above and n 313 below

[293] The evidence which Cameron JA required about the insurance market would therefore be irrelevant *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 15

[294] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 144 See Bhana 2007 *SALJ* 275-276

[295] See the distinction drawn by Sachs J in para 148 n 18 See also nn 266, 292 above

different footing.[296] The document was provided to the insured at a time when he was still considering cover.[297] There was nothing intrinsically unreasonable in the determination of the premium on the basis of facts which the insurer thought was statistically or actuarially significant and no question of offensive stereotyping or profiling arose here.[298] (The judge warned that these provisions will not be allowed if they constitute "offensive stereotyping or demeaning profiling" even if they are in a negotiated part of a contract and are themselves negotiated.[299] Insurers should think seriously whether the practice of charging different premiums to males and females for specific types of insurance or for persons who live in traditionally white and black areas ought to be continued.)[300] But the certificate of insurance contained voluminous terms in fine print to which the insurer claimed copyright.[301] It was not signed by the insured or drawn to his attention. Neither the schedule nor the correspondence between the parties referred to the certificate. The certificate merely determined that the insured, after receiving it, had to return it immediately if it was not in accordance with the application for insurance.[302]

Sachs J asked whether courts in the constitutional era were compelled to impugn onerous provisions in standard-form contracts.[303] He answered this question by observing that consumers seldom consent to the terms of these contracts in any real sense,[304] but that consumers such as insured parties merely expect to receive reliable products and services on reasonable terms.[305] The principle of sanctity of contract had to be put in its rightful place,[306] especially in the context of these standard-form contracts[307] where provisions often allowed product and service providers to exert unilateral power over consumers.[308] If contractual terms are enforced in these situations despite the lack of true subjective consent, it undermines true volition and the

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[296] Traditionally, policies were provided to insured parties only after conclusion of their insurance agreements, but the General Code of Conduct for Authorized Financial Services Providers and Representatives 2003 issued in terms of s 15 of the Financial Advisory and Intermediary Services Act 37 of 2002, especially r 7 1 now makes this practically impossible See 7 below With regard to other problems regarding the traditional contracting methods in insurance law, see *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) discussed by Sutherland & Cupido "Insurance Law" in 2005 *Annual Survey of South African Law* 507, 508

[297] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 127-129, 147, 182

[298] Para 182

[299] Para 182

[300] Havenga "Equality in Insurance Law – the Impact of the Bill of Rights" 1997 *SA Merc LJ* 275

[301] Although the judge, for somewhat different purposes, was at pains to show that smallness of print is not in itself significant (*Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 182, 183)

[302] Paras 130-134, 147, 180, 182-183 In fact, both the schedule and certificate were only signed by the insurer (paras 128, 138) On the distinction between the schedule and certificate, see para 107 per Moseneke DCJ See also on the protection of shareholders against the signing of blank documents: the General Code of Conduct for Authorized Financial Services Providers and Representatives 2003 issued in terms of s 15 of the Financial Advisory and Intermediary Services Act 37 of 2002, r 7 2 and the Policyholder Protection Rules (Long-term Insurance) 2004 issued in terms of s 62 of the Long-term Insurance Act 52 of 1998, r 17 and Policyholder Protection Rules (Short-term Insurance) 2004 issued in terms of s 55 of the Short-term Insurance Act 53 of 1998 r 7 6 See also 7 below for a discussion of statutory disclosures

[303] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 123, 150

[304] Paras 137-138

[305] Para 136

[306] See text next to nn 217-229 above

[307] Para 145

[308] Paras 145, 163

concomitant values of dignity and autonomy.[309] If judges refer to autonomy in this context it merely illustrates that their vision has "become so clouded by anachronistic doctrine as to prevent them from seeing objective reality".[310] It treats mass-produced script as sanctified legal Scripture.[311] The judge also added that such an approach would not promote the spirit of openness.[312] It is difficult to see what standard-term contracts have to do with openness, but all other aspects of the argument are eloquent and persuasive. Although the judge did not say so expressly, the conclusion that a case involves a clause in a standard-form contract would negate a further need for determining the relative bargaining power of the parties. It would address what Ngcobo J saw as the second leg of his first enquiry.[313]

Conversely, all standard-form provisions cannot be struck down. They serve an important economic purpose. They reduce transaction costs and allow management of supplying firms to confine their risks and control the activities of subordinate sales staff.[314] What is required is neither a blanket rejection nor an acceptance of all standard-form terms. But the terms of these contracts have to be scrutinized carefully.

Sachs J proposed that a principled approach, using objective criteria for weighing standard terms, must be followed. So what are those criteria? He purported to answer this question with reference to local and international academic responses,[315] international practice[316] and proposals for law reform

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309 Paras 150-157

310 Para 155

311 Para 156

312 Para 156

313 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 148 n 18 Commercial contracts would have to be treated differently although the description of the types of contracts that are included may be too wide Commercial entities of course also conclude standard contracts See nn 266, 292, 295 above See further the discussion of the position in the UK in para 165 n 41 See also Naude & Lubbe 2005 *SALJ* 460-461 who argue in favour of a strict dispensation, at least where it concerns the bodily integrity of the consumer

314 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 139

315 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979); Atiyah *The Rise and Fall of Freedom of Contract* (1979) 731-732 (although Sachs J referred to a 1985 edition, this is merely a reprint); Bhana & Pieterse 2005 *SALJ* 865; Collins *The Law of Contract*; Fridman *The Law of Contract in Canada* 4 ed (1999) v (with reference to the very liberal comment of Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861) 140); Lewis "Fairness in South African Contract Law" 2003 *SALJ* 330; McQuoid-Mason "Consumer Law: the Need for Reform" 1989 *THRHR* 32; Nassar *Sanctity of Contracts Revisited: a Study in the Theory and Practice of Long-term International Commercial Transactions* (1995) 167-168; Rakoff "Contracts of Adhesion: an Essay in Reconstruction" 1983 *Harvard L R* 1173; Woolfrey "Consumer Protection — A New Jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109 at 119-20

316 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 164-168 The judge referred to the European Council Directive on Unfair Contract Terms 93/13/EEC OJ L 95/29 (5 April 1993); the Report of the English and Scottish Law Commissions *Unfair Terms in Contracts* LC 298 and SLC 199 (2005) (the summary of this report can be found in para 165 n 41); the Resolution Adopted by the General Assembly, UN Department of International Economic and Social Affairs, A/RES/39/248 (1985); and the UK Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulation 1999 He also discussed the position in South American countries, especially the Mexican Consumer Protection Law of 1975 and the Brazilian Consumer Protection Code 1990 He concluded his discussion with reference to the Law Reform Commission of Hong Kong *Report on Sale of Goods and Supply of Services* 37-38 quoted by the South African Law Commission *Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 Report* (1998) para 2 2 2 8 In a quote from the South African Law Commission Report reference was made also to several Continental European Countries and Australia (see para 163)

in South Africa.[317] However, the judge went beyond his professed aims and also did a comparative analysis of the previous question, which is whether oppressive standard-form clauses should be enforced and the more general question whether oppressive clauses can be impugned on the basis of public policy. Many of the sources surveyed, the academic work in particular, appear to be somewhat dated, while the judge placed too much emphasis on a single source, namely the South African Law Commission (now South African Law Reform Commission) Report, especially as this report has been gathering dust and has not been implemented by the legislator.[318] However, the judgment hopefully will become an important and valuable resource in this area of law. The foreign authorities illustrate that the problems which confronted the court are universal,[319] and that the traditional responses of South African courts to these difficulties are outmoded.[320]

Sachs J noted that the South African cases in which contractual provisions were impugned on the basis of public policy did not themselves indicate to what extent standard-form contracts raised public policy concerns.[321] He mentioned several factors that were relevant to the evaluation of the time-limitation provision in this case: the insured did not consent to the provision in any real sense, the insured's attention was not drawn to the provision, the onerous time-limitation was imposed without any reciprocal benefit for the insured, and a reasonable person in the position of the insured could not have been expected to have been aware of the provision.[322]

It is implicit in the conclusion that a contractual provision is in standard-form that the parties have not really agreed to its terms. It follows that there would be few further reason for evaluating whether the consumer has consented to standard-form terms, unless the aim is either to determine the degree of ignorance about a contractual term or there are special facts that show that the parties actually consented the provision in the particular circumstances of the case.

Considerable weight was attached to the lack of disclosure. Sachs J ultimately concluded that the time limitation "lies buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent on to the insured after negotiations had been completed".[323] The clause was not "highlighted in the text so as visually, and in keeping with internationally accepted standards of consumer protection, to bring the consequences of non-compliance to the attention of the insured".[324] The policy did not oblige the insurer to inform the insured of the time-limitation at repudiation.[325]

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317 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 169 in which reference was made to the South African Law Commission *Unreasonable Stipulations in Contracts*

318 See n 317 above See also Naude & Lubbe 2005 *SALJ* 441 on the effect of the report

319 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 162

320 See for example *Diners Club SA (Pty) Ltd v Singh* 2004 3 SA 630 (D)

321 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 161

322 Paras 147-148

323 Para 183

324 Para 183

325 Para 183 On the format of insurance policies, see text next to nn 294-302 above

Yet, disclosures should be approached carefully. Perhaps evidence that a particular term was pertinently drawn to the attention of the insured could be relevant in determining whether it is not onerous.[326] But the difficulty with disclosures should be borne in mind. Vast complicated disclosures, often a feature of insurance contracting, swamp insured parties with dense, incomprehensible information and do very little to protect them.[327] Again, even those consumers who understand disclosures may have no choice but to accept the disclosed provisions for lack of a market in such terms.

The two most important issues in determining the fairness of a clause in a standard form contract then remain: reciprocity and reasonable expectation.[328] It will have to be demonstrated that the insured has received some benefit in exchange for the time-limitation although it may be difficult to determine whether there was reciprocity with regard to provisions such as time-limitations in insurance contracts. Sachs J merely held that the insured in this case received no corresponding benefits in exchange for the time-limitation clause[329] and that the certificate of insurance wholly favoured the insurer without any reciprocal benefit for the insured. When invoked, the time limitation would wipe out a claim and not just limit or qualify it, thereby enabling the insurer to keep the premium. It impacted on the relationship between the insurer and insured in a manner that is not generally permitted in an open and democratic society.[330] Moseneke DCJ found that there was a lack of reciprocity in this case, because there was no time-bar on claims by the insurer.[331] But it is unlikely that the insurer will ever claim against the insured. Such a reciprocal restriction would therefore be of little practical importance. It should not be necessary or sufficient to show that an insurer is also subject to a time limitation. Moseneke DCJ noted also that the contract was not reciprocal because the power of the insurer to repudiate a claim was not subject to a time limitation.[332] Perhaps it would help to show reciprocity where such a limitation is placed on the time within which an insurer's repudiation has to take place.

When it comes to reasonable expectation, Sachs J observed that a reasonable person would not have been aware that the time limitation in this form was in the particular contract.[333] Perhaps it would have been better to ask

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[326] See the question raised in para 150

[327] See all the disclosures which will have to be made in terms of the General Code of Conduct for Authorized Financial Services Providers and Representatives 2003 issued in terms of s 15 of the Financial Advisory and Intermediary Services Act 37 of 2002, especially rr 3 1, 4, 5 and 7 1; the Policyholder Protection Rules (Long-term Insurance) 2004 issued in terms of s 62 of the Long-term Insurance Act 52 of 1998, particularly r 4 3; and the Policyholder Protection Rules (Short-term Insurance) 2004 issued in terms of s 55 of the Short-term Insurance Act 53 of 1998 r 4 3

[328] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 165, 183

[329] Para 147

[330] Para 183 See the discussion of the judgement of Moseneke DCJ in the text next to n 346 below

[331] Para 114, although his argument was not clearly related to the issue of standard-form contracts

[332] Para 114

[333] Para 148 See generally on the role of expectation, paras 136, 150, 165 This of course brings the public policy issue close to the question as to when a contract will be validly concluded See *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) and the way in which Naude & Lubbe 2005 *SALJ* 454 relate the issue of standard-form contracts to the requirements for the conclusion of a valid contract

whether the reasonable person would have been surprised if the existence and import of the time-limitation had been explained to him.[334] When it comes to a standard term, even a reasonable person often will not actually be aware or expect that a particular term is in a standard-form contract. Nevertheless, the answer to the question, if so phrased, would have remained the same in this case.

Normally standard-form contracts will not be set in stone. They will be adapted to changing circumstances. But how will the law allow flexibility where only terms that could be expected by a reasonable person will be allowed? Reasonable expectation should not necessarily depend on past experience. Hence a term would be reasonable as long as a reasonable consumer would not be surprised by it given the circumstances. Moreover, it should contribute to the enforceability of a new term if the consumer is specifically and properly informed of it and if reciprocal benefits are provided. In this sense reciprocity, disclosure and reasonable expectation ought to be related.

So Sachs J thought that the time-limitation in this case was oppressive. Yet, he ultimately did not find that all unreasonable or oppressive terms in standard-form contracts were inconsistent with public policy, but merely that a strong argument could be made out for such a conclusion.[335] His appraisal of standard-form contracts served as a backdrop to the evaluation of this contract.[336]

6 2 4 The minority's conclusion on the fairness of the time-limitation clause

Sachs J stressed that the time-limitation was a standard term but that the insurance policy also displayed two important further features: it involved the section 34 right that was specifically guaranteed in the Constitution[337] and the contract concerned insurance which is a virtual necessity,[338] has a public service character[339] and involves relatively vulnerable individuals dealing with large specialist organizations that are well organized and play a major role in public life.[340]

The importance of the first feature has already been highlighted.[341] On the second, Sachs J observed that the period of the time-limitation was considerably shorter than the periods allowed in favour of public organs dealing with public funds. It therefore required scrutiny where such clauses were imposed

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[334] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 150
[335] Para 140 See also the qualifications expressed in para 185
[336] Para 142 See 6 2 4 below
[337] Paras 143, 150, 181, 183
[338] Bhana 2007 *SALJ* 276-277
[339] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 144 The court referred to the importance of self-regulation and the Ombud for Short-term Insurance; there is also an Ombud for Long-term Insurance
[340] Paras 144, 183
[341] See 3 above

by large private firms that dominate the short-term insurance industry and unilaterally imposed these terms.[342] Furthermore, it also should be highlighted that insured parties require further consumer protection as insurance assists insured parties in their hour of need and short-term insurance is also subject to complex and comprehensive statutory regulation.[343] These points about relative vulnerability of insured parties are not entirely new, but are closely related to the standard-term analysis. Sachs J acknowledged this. He supported his observations about vulnerability with comments about the nature of standard-form terms.[344]

Moseneke DCJ agreed with Sachs J that the time limitation was unreasonably short and he stated that he would merely proffer further reasons for this conclusion.[345] He then added some noteworthy arguments. He found that it would have been very difficult for the insured to comply with the time-bar, that he would have suffered great prejudice where the insurer relied on the provision, but that the only benefit for the insurer of the short time-limitation would have been that it would have become easier to escape liability. He correctly looked at the time-limitation from a different point of departure: what legitimate purpose was achieved with this unseemly haste? Once the insured gave notice of the claim to the insurer, the insurer could start collecting evidence. The aim of the provision could not have been the preservation of evidence. The interest which the insurer had in the provision was disproportionate to that of the insured.[346] The weighing of the benefits for the insurer and detriments to the insured should be central to the evaluation of a time limitation. In this respect Moseneke DCJ makes a significant contribution. The preservation of evidence by the insurer probably should become relevant only where time-limitations allow for a considerably longer period within which summons has to be issued.[347]

6 2 5 The second enquiry: flexibility and reasonableness of enforcement

The second enquiry as phrased by the insured and derived from the *Mohlomi* case[348] concerned the question whether the time-clause was void because it inflexibly required compliance irrespective of the circumstances confronting the insured. Ngcobo J noted that:

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[342] Paras 176, 183 See also the comprehensive analysis of Moseneke DCJ in paras 115-117

[343] See especially the General Code of Conduct for Authorized Financial Services Providers and Representatives 2003 issued in terms of s 15 of the Financial Advisory and Intermediary Services Act 37 of 2002; the Short-term Insurance Act 53 of 1998; and the Policyholder Protection Rules (Short-term Insurance) 2004 issued in terms of s 55 of the Short-term Insurance Act See also 7 below

[344] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 144-146 An accurate analysis of this issue is provided in Bhana 2007 *SALJ* 276-277 See also 6 2 3 above for a discussion of bargaining power

[345] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 108

[346] Paras 112-113 See also the discussion of the judgement of Sachs J in the text next to n 330 above

[347] Perhaps it should be asked whether these arguments do not suggest a return to the traditional rules regarding onus in restraint of trade cases Cf the current position set out in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) and see the cases discussed in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA)

[348] *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC)

> "The inquiry is not whether the clause is inflexible. The inquiry is whether in all the circumstances of the case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause".[349]

These questions are related. If the law or the contract itself provides adequate mechanisms for dealing with circumstances where enforcement of the time-clause would be oppressive, then the clause naturally cannot be oppressive because of its inflexibility. It would then become necessary to determine whether the enforcement of the time-limitation in the particular circumstances is oppressive in terms of those contractual provisions or laws. In all other situations the inflexibility argument would remain important and it would be possible to hold that a time-limitation is illegal because it did not provide mechanisms for dealing with circumstances where enforcement would be oppressive, even if enforcement would not operate unfairly in the actual circumstances of the case.

Hence, the narrow question posed by the majority could only have arisen once it was accepted that the law (or the contract) contained adequate mechanisms to prevent oppressive enforcement of the clause. The contract manifestly did not provide for these situations, and it is at least controversial whether the law before *Napier* did so adequately.[350]

Ngcobo J accepted that the arguments of the parties on whether the clause was inflexible or "enforceable regardless of how unfair or unjust this might be in a given case" raised difficult issues.[351] He referred to two grounds for refusing enforcement of the time limitation in unfair circumstances. The first was the common law principle that a person should not be required to do something which is impossible: *lex non cogit ad impossibilia*.[352] The second, apparently relied upon by the respondent,[353] was that "the requirement of good faith … should be implied in this case".[354] The judge considered the statement of the Supreme Court of Appeal in *Brisley v Drotsky*[355] that good faith is not "a self-standing rule, but an underlying value that is given expression through existing rules of law".[356] He then proposed that good faith could be utilized to develop the doctrine of impossibility[357] while he asked whether the doctrine of impossibility would not alone be a sufficient ground for refusing

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[349] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 69

[350] Christie *The Law of Contract* (2006) 15 states that "the common law cannot yet claim to have this situation under control"

[351] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 74

[352] Paras 75-78 with reference to *Gassner v Minister of Law and Order* 1995 1 SA 322 (C) 332B-H; *Mati v Minister of Justice, Police and Prisons, Ciskei* 1988 3 SA 750 (Ck) 755-756; *Minister of Law and Order v Maserumule* 1993 4 SA 688 (T) 691G-692B; *Montsisi v Minister van Polisie* 1984 1 SA 619 (A) 638G-H; *Pizani v Minister of Defence* 1987 4 SA 592 (A) 602G-I

[353] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 68, 79

[354] Paras 79-82 with reference to *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651C

[355] 2002 4 SA 1 (SCA)

[356] Para 32 Referred to in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82 See Christie *The Law of Contract* (2006) 16 and the reference to *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A) See also the text next to nn 179, 222 above

[357] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82 with reference to Hutchinson "Non-Variation Clauses in Contract: any Escape from the Shifren Straitjacket?" 2001 *SALJ* 720 743-744 (quoted with approval in *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22)

to enforce a contract and whether "under the Constitution, this limited role [the one set out in *Brisley*] for good faith is appropriate".[358] He even noted that there is a "compelling argument" for applying both the impossibility doctrine and the principle of good faith to time-limitation clauses.[359] Yet, he concluded that it was not necessary to determine whether these arguments could have prevented enforcement of the time-limitation clause as there was no evidence that the insured had been treated unfairly.[360]

In contract law an obligation is normally invalidated for impossibility on the basis of the maxim *impossibilium nulla obligatio est*.[361] The requirements for invalidating an obligation because performance is impossible, are strict.[362] In the type of situation where an insured has not complied with a time-limitation clause, performance mostly will be subjectively impossible but the law traditionally requires objective impossibility for striking down an obligation.[363] It will not be easy to show that performance is impossible.[364] Moreover, it is doubtful whether good faith, as the concept has evolved in South Africa, could have been utilized to transform the doctrine of impossibility to address the difficulties caused by subjective impossibility. The suggestion that it may be necessary to give wider scope to good faith in the light of the Constitution is more tantalizing. It is a pity that a firmer view was not expressed on the matter. Hopefully the debate on the role of good faith in contract law will now be re-opened and addressed more adequately. Perhaps it could become an important engine for developing public policy.[365]

Most importantly the question remains: if the court did not take a firm view on these issues, would it not have been necessary to determine whether the clause itself was inflexible? The judgment provides an answer, albeit obliquely. Ngcobo J commenced this part of his judgment by apparently accepting that unfair circumstances would have precluded enforcement on the basis of public policy but that there was no factual basis for refusing enforcement on this ground.[366] He did not clearly relate the test applied here to the one that he formulated for purposes of addressing the first enquiry.[367] He also did not

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[358] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82

[359] Para 83

[360] Paras 83-86

[361] *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427, 434-435 with reference to D 50 17 185 and D 45 1 140 2 See the analysis of the maxims *lex non cogit ad impossibilia* and *impossibilium nulla obligatio est* by Van Zyl J in *Gassner NO v Minister of Law and Order* 1995 1 SA 322 (C) 325ff The latter maxim is more apposite to contract law The court in *Barkhuizen v Napier* 2007 5 SA 323 (CC) only mentioned the latter maxim in para 77 in a quote from *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A)

[362] The cases on the doctrine of impossibility to which the majority referred in the *Napier* case do not come from contract law and should be approached with considerable care

[363] *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 2 SA 421 (A) 425; *Yodaiken v Angehrn and Piel* 1914 TPD 254, See also Van der Merwe et al *Contract* 542

[364] See for example *K & S Dry Cleaning Equipment (Pty) Ltd v SA Eagle Insurance Co Ltd* 2001 3 SA 652 (W)

[365] See the emphasis on this issue in the judgment of Sachs J who regarded good faith as a mechanism that can be used to ensure fairness in contracts (*Barkhuizen v Napier* 2007 5 SA 323 (CC) para 167)

[366] Paras 72-73, 83-86 See the cautious argument in *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 69-73

[367] The majority's evaluation of public policy is also open to some criticism *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73, and see 4 above In para 57, Ngcobo J created the impression that sanctity of contract only had to be considered as part of the first enquiry, but in para 73 he made it clear that it was also relevant under the second enquiry

explain the link between this ground for not enforcing a contract in unfair circumstances and the other two grounds for doing so, that he analyzed thereafter.[368] But it is suggested that this is the only interpretation that would make sense of this part of the judgment.[369]

That the majority judgment leaves room for confusion is illustrated by the judgment of O'Regan J. She concurred in the order granted by and the reasoning of Ngcobo J, subject to one reservation.[370] She apparently believed that half of the argument concerning public policy as well as all the arguments concerning the application of the impossibility doctrine[371] and the concept of good faith were redundant to the resolution of the case because there were no facts to show that the time-limitation clause was unreasonable. If her reservation was intended to include the conclusion reached with regard to public policy, then her interpretation of the majority judgment renders it illogical.

Moseneke DCJ emphasized that the impugned time-bar provision did not provide for extension on good cause shown. It could have been enforced whatever the reason for the failure to comply with it. Conceivably the restraint could have been enforced in circumstances where it would have operated unfairly or unreasonably. The judge addressed the argument of the insured that there are remedies at common law that would ameliorate the harsh consequences of the clause: that the insured could have relied on the doctrine of good faith or the maxim that the law does not require persons to do the impossible. He correctly accepted that the majority did not finally decide whether any of these grounds applied in the circumstances. But he then concluded that

> "the majority judgment does not decide whether the clause is inflexible because there are no facts to show why the applicant did not comply with the time limitation".[372]

This summary of the majority's view confuses the question whether the time-limitation was inflexible and whether it would have been unfair to allow enforcement. Moseneke DCJ, like O'Regan J seems to overlook the majority's argument regarding the role of public policy in these situations.

Moseneke DCJ's response to the majority's arguments is similarly unintelligible and unpersuasive.[373] Again the reasons for the difficulty are twofold. First, the judge was reluctant to determine whether the common law could create the necessary flexibility for a provision, even if the provision itself did not. Secondly, he failed to distinguish between the question whether the clause could be unfairly enforced and whether it would be unfair to enforce it in the circumstances of the case. Oddly, the approach conflicts with his stated aim to determine public policy objectively.[374] He observed that:

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[368] But see text next to nn 352-354 above *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 84-85 in particular could be read to mean that the court did not take a firm view on whether there was any ground upon which enforcement could be refused

[369] If the judgment of the majority could not be so interpreted, then the criticism put forward by the minority that it is overly subjective would apply to the second enquiry

[370] Para 120

[371] Paras 73-83

[372] Para 118

[373] Paras 118-119

[374] See 6 2 2 above

> "It seems clear that the respondent's contention that there are common law defences which could render the time bar clause flexible is, at best, of no practical value in this case. This argument is an after-thought. It was never pleaded or argued in the High Court or the Supreme Court of Appeal. It amounts to a belated invitation to this Court to develop the common law. In any event, the common law qualification that the respondent seeks to have read into the stipulation flies in the face of the respondent's actual conduct, which is that the special plea is sufficient to destroy the applicant's claim. In my view, the clause means what it says. If the summons is not served within 90 days of repudiation of the claim, the insurer is released from liability". [375]

Perhaps the judge could get away with the contention that this issue was not properly pleaded and argued. This is perhaps what the first part of the quotation implies. But this aspect is not properly and explicitly reasoned. Moreover, the further point that the respondent's conduct showed that there was no such limitation in this case, is unpersuasive. The insurer could have relied on the special plea on the assumption that enforcement would have been fair in the special circumstances of the case.[376]

Sachs J did not clearly distinguish the first and second enquiries. But in his final evaluation of the case, he stated that the time limitation was

> "not subject to express qualifications in case of impossibility or difficulty of compliance, nor apparently permissive of condonation where considerations of justice would require that its harshness be tempered by prolongation of the time".[377]

Again this statement does not adequately address the question whether the law does not in any event provide adequate relief for enforcement in situations where it would be oppressive towards the insured to do so. The mere fact that the contract does not provide for these situations will not lead inexorably to unfairness if the law accommodates them.

Perhaps the difficulty with the second enquiry arose because the *Mohlomi* test was designed for dealing with legislative time limitations. In contract law the first enquiry should concern the question whether a time-limitation provision is against public policy because it is likely to be oppressive in ordinary circumstances.[378] When it comes to the second question the law ideally should provide for adequate mechanisms to deal with extraordinary circumstances. If this were so, the second enquiry as formulated by Ngcobo J would be appropriate. Would enforcement in the particular circumstances be so oppressive that it would preclude enforcement even though the clause itself is not oppressive? Questions regarding the flexibility of the clause would never arise.[379]

7 Conclusion

While the majority judgments in the Constitutional Court decision in *Napier* disappoint as they did not assist an insured who was confronted by a

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[375] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 119

[376] Although Sachs J did not discuss this as a separate issue, he considered it in para 183 See also the distinction between different stages of a contract that he referred to in para 170

[377] Para 183

[378] See 6 2 1 and 6 2 2 above

[379] For situations where time-limitations have been harshly enforced, see especially *K & S Dry Cleaning Equipment (Pty) Ltd v SA Eagle Insurance Co Ltd* 2001 3 SA 652 (W) and also *Union National South British Insurance Co Ltd v Padayachee* 1985 1 SA 551 (A) It is suggested that these cases would now be decided differently

short and oppressive time limitation in a standard-form contract, the majority and minority judgments bristle with suggestions for reforming traditional contract law in the light of the Constitution.[380] The proposals for developing the common law of contract and insurance law should be taken seriously.

The Constitution can serve as an important engine for reform of general contract law and insurance law. In this process the protection of vulnerable consumers should loom large. This perhaps is not as alluring as most of the other constitutional projects, but it remains of enormous practical importance:

> "Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world. Yet just as the best should not be the enemy of the good, so the worst should not be the friend of the bad. As our society normalises itself, issues that were once relatively submerged now surface to claim full attention. In this way achievement of the larger constitutional freedoms enables us to attend to and develop the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society."[381]

Since the *Napier* dispute arose, the policyholder protection rules have come into being in order to promote protection of consumers in the insurance industry.[382] These rules prohibit time-limitation provisions of shorter than 90 days. If a similar case were to come before court today the main question would be whether the rules accord with the Constitution. The role of the common law in the dispute would be much reduced. Furthermore, a wide-ranging Consumer Protection Bill will soon become law. This statute will address many of the concerns about the weak protection which the law currently affords consumers (although it will not apply to insurance transactions). After *Napier* it is impossible to argue that there is not a need for such legislation. It accordingly may be suggested that the *Napier* case will soon be of little practical relevance. However, it is proposed that the opposite is true. It is necessary that these legislative reforms should be accommodated within a general contract law and insurance law that are in harmony with it. These fundamental statutory reforms cannot be treated as exceptions to general and traditional contract law or insurance law. The Constitution is central to the creation of such a harmony.

SUMMARY

Barkhuizen v Napier 2007 5 SA 323 (CC) has important implications for insurance law, contract law in general, and an understanding of the interface between private common law and the Bill of Rights. In this matter an insurance policy determined that a claim against the insurer would lapse if the insured failed to serve summons on the insurer within 90 days of being notified of the insurer's repudiation of the claim. The insured argued that this provision conflicted with the constitutional right of access to the courts set out in section 34 of the Bill of Rights

The majority of the Constitutional Court, per Ngcobo J, considered the application of the Constitution of the Republic of South Africa, 1996 in private relationships. He eschewed direct application of the Bill of Rights to the contractual provision but preferred to apply it indirectly via

[380] Although even Sachs J remained conscious of the status of the Supreme Court of Appeal as developer of the common law See *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 178-179

[381] Para 184

[382] See n 74 above

the contract law concept of public policy. He considered the meaning of this form of public policy in the light of the Constitution, determined the manner in which the section 34 right as an expression of public policy applied to this contract and related this to broader contractual fairness. Part I of this article, which appeared in 2008 (3) *Stellenbosch Law Review*, focused on these aspects.

The majority further considered the significance of the sanctity of contract under the Constitution and decided that it could only uphold the time-limitation clause if it was fair. Its test for determining fairness was derived from cases that determined whether statutory provisions were inconsistent with section 34. They upheld the clause on the basis that there was insufficient evidence to show that the provision was unreasonable or that it would be unreasonable to enforce it in the circumstances. Part II is dedicated to an analysis of these issues.

The majority judgment is analyzed with reference to the trenchant criticism in the minority judgments of Sachs J and Moseneke DCJ, delivered in the same court, as well as the earlier judgments of the Transvaal Provincial Decision and Supreme Court of Appeal. Ultimately the majority judgment in the Constitutional Court is criticized for being too timid and in some respect unsystematic. However, the final conclusion is positive. These judgments can serve as a springboard for the development of a progressive contract law, built on the values and rights set out in the Constitution.