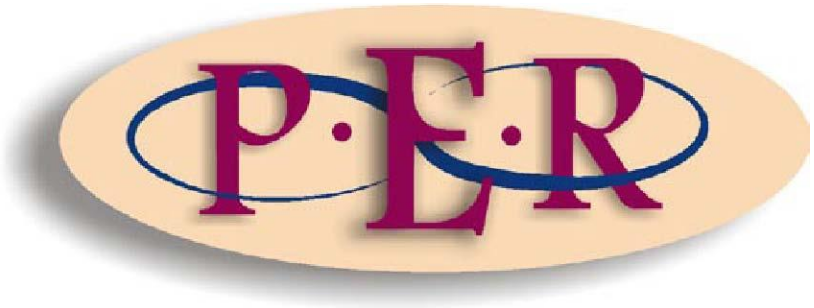
Author: L Hawthorne

FRONTIERS OF CHANGE AND GOVERNANCE IN CONTRACTUAL AGREEMENTS: THE POSSIBLE ROLE OF EXPLOITATION - *UNITING REFORMED CHURCH DE DOORNS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA* 2013 5 SA 205 (WCC)

ISSN 1727-3781



2014 VOLUME 17 No 6

http://dx.doi.org/10.4314/pelj.v17i6.17

FRONTIERS OF CHANGE AND GOVERNANCE IN CONTRACTUAL AGREEMENTS: THE POSSIBLE ROLE OF EXPLOITATION - *UNITING REFORMED CHURCH DE DOORNS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA* 2013 5 SA 205 (WCC)

L Hawthorne[*]

1 Introduction

Sasfin (Pty) Ltd v Beukes[1] placed the spotlight on the principle of legality as the doctrine which plays an important role in ameliorating harsh contracts concluded within the ambit of a contract law regime governed by freedom and sanctity of contract. This role was extended after the demise of the *exceptio doli* in the *Bank of Lisbon & South Africa Ltd v De Ornelas* [2] and elevated to a "general clause"[3] or open norm in *Barkhuizen v Napier.*[4] Recognition of public policy as the South African general clause is on its own not sufficient to launch attacks on unfair terms and/or contracts. Public policy requires concretisation, which in itself will be a slow process. In 2002 Cameron JA directed in *Brisley v Drotsky*[5] that:

> All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid. That includes the common law of contract which is subject to the supreme law of the Constitution. The Bill of Rights applies to all law and binds the Judiciary … In addition the Constitution requires the courts, when developing the common law of contract, to promote the spirit, purport and objects of the Bill of Rights.[6]

[*] Luanda Hawthorne. BA LLB LLD (UP). Professor of Private Law, University of South Africa. Email: hawthl@unisa.ac.za.

1 *Sasfin v Beukes* 1989 1 SA 1 (A).

2 *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 606D-E.

3 Grundmann "General Standards and Principles" 2, 3 states that: "This refers to the rules which are not formulated by the legislature in a way which lends itself readily and directly to application, rules which need not even be written, i.e. rules which encapsulate the situation in vague terms and which may cover a large range of cases: abuse of rights or also unfairness (*abus de droit*, *Rechtsmissbrauch*) as in the Unfair Contract Terms Directive, good faith (*bonne foi*, *gutter Glaube*), as in the Commercial Agents Directive, fairness or duty of loyalty or honesty (*honnêté*, *Treu- oder Interessenwahrungspflicht*) as in the Investment Services Directive, now Markets in Financial Instruments Directive, but also the duty of care (*professionalité*, *Sorgfaltspflicht),* stated in this same Directive, just to give a few examples."

4 *Barkhuizen v Napier* 2007 5 SA 323 (CC).

5 *Brisley v Drotsky* 2002 4 SA 1 (SCA).

6 *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 88.

Thus the open norm of public policy requires infusion with the values of human dignity, freedom and equality. Theoretically this could make for discretionary adjudication, which raises the concerns voiced by Harms DP in *Bredenkamp v Standard Bank of South Africa Ltd*,[7] where he held that: "the discretionary role of legality more than any other principle has the power to undermine the rule of law".[8] This caveat in regard to open norms was reiterated in *Potgieter v Potgieter*,[9] where Brand JA voiced a similar opinion regarding the norms of reasonableness and fairness.[10] These reservations are all justified because, as Brand JA explains, "… our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair … it will give rise to intolerable legal uncertainty". He continues to point out that:

> Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.[11]

7 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA).

8 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 39.

9 *Potgieter v Potgieter* 2011 ZASCA 181 (30 September 2011) para 32.

10 *Potgieter v Potgieter* 2011 ZASCA 181 (30 September 2011) para 32 Brand JA says that: "Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right". That much was pertinently held in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 53. As to the role of these abstract values in our law of contract this court expressed itself as follows in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27: "[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty." Brand JA relies on *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 21-24, 93-95; *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) paras 22-25.

11 *Potgieter v Potgieter* 2011 ZASCA 181 (30 September 2011) para 34. Brand JA refers to *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 24; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 38; Nienaber 2000 *TSAR* 193; Hefer 2000 *TSAR* 143.

The concerns voiced by Brand JA and Harms DP become even more complex when considering the impact of the *Constitution*, which is expressly value-based and demands that the judiciary take cognisance of substantive values.[12]

Consequently, the use of public policy as a general clause within the ambit of the rule of law necessitates providing content to this open norm. Such concretisation is currently in the process of being developed. Justice Brand paved the way for the *Barkhuizen* decision in *Afrox Healthcare Bpk v Strydom* when he held that "Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel 'n faktor is wat, tesame met ander faktore, by oorweging van die openbare belang 'n rol kan speel."[13] The Court recognised inequality of bargaining power as one element of public policy but required an additional factor or factors before it can be said that the term or contract is in conflict with public policy.

In order to address the reservations concerning the lack of certainty in regard to open norms it is necessary to ascertain which other factor(s) could qualify as a requirement together with inequality of bargaining power in order to give meaning to public policy. The recent decision of *Uniting Reformed Church, De Doorns v President of the Republic of South Africa*[14] provides a useful insight into the nature of this other elusive element. It is argued that a comparison with civil codifications of European countries, national consumer legislation and theories promoted by legal philosophers validates this insight.

Apart from providing insight into concretising public policy the case also presents an excellent application of the *Barkhuizen* formula regarding constitutional challenges of contractual terms.

12 See ss 1, 7, 39(1) and (2).
13 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.
14 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC).

2 Facts

The issue in this case concerns the validity and enforceability of three notarial lease agreements concluded between the applicant and the respondent. The applicant church owns three immovable properties on which were situated three public schools under the control and administration of the state (the Western Cape Provincial Minister of Transport and Public Works).[15] As a result of Apartheid policies many communities suffered a severe lack of educational facilities. The applicant being a religious order felt compelled to assume responsibility for providing educational facilities to the communities it served. This responsibility included developing new and improving existing school buildings on its properties. In order to finance these projects the applicant had to raise funds. During 1987 the church and the state had concluded three notarial lease agreements relating to the properties and the school buildings. In terms of these leases the House of Representatives in terms of section 5 of the *Coloured Education Act*[16] took over the running of the three schools from the applicant. At that stage the schools were in a bad state of neglect because the applicant was unable to effect maintenance because of a lack of funds. The House of Representatives assisted the applicant and arranged a loan for R1 671 290 from Sanlam against security of building mortgage bonds which were to be registered over the leased properties. In return the House of Representatives required a twenty-year notarial lease to be concluded in respect of the school buildings and to be registered against the title deeds of the relevant properties.[17] The notarial leases were drafted by the lessee and signed by the parties. The leases ran from 1 April 1987 for a period of twenty years, which expired on 31 March 2007. The notarial leases together with the mortgage bonds in favour of Sanlam were registered against the properties' title deeds.

15 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) paras 1, 29.

16 *Coloured Education Act* 47 of 1963.

17 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 15.

The House of Representatives leased from the applicant the three properties together with the school buildings and undertook to pay monthly rental to the applicant, lessor, in the amount of R 3 633 plus an amount of R26 188,84 directly to Sanlam as the monthly instalment in respect of the mortgage bond.[18] The applicant was responsible for the maintenance of the school buildings and the insurance for the properties as well as for paying the municipal rates and taxes and any other levies in respect of the properties.[19]

The question which brought the issue to court was clause 16 of the notarial leases in terms of which the applicant undertook after expiration of the lease period to transfer to the State all existing and new buildings together with the ground on which the buildings were situated, without any remuneration.[20] The applicant averred that this provision was contrary to public policy and inconsistent with the provisions and values enshrined in the *Constitution* and the Bill of Rights.[21] The lessor launched its attack against the enforcement of this term by alleging first that at the conclusion of the agreement it was in an unequal bargaining position and secondly that the term violated section 25 of the *Constitution*.

The applicant's approach follows the test for declaring contractual terms unconstitutional as laid down in *Barkhuizen v Napier.*

18 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 17.

19 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 18 and 29.

20 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 19.

21 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 24.

3 Illegality and unenforceability: indirect horizontal application of fundamental rights

The traditional role of fundamental rights limits the State in its relationship with individuals subject to its authority.[22] Fundamental rights are primarily aimed at protecting citizens in their dealings with the state. Emphasis on the vertical relationship between private individuals and the State is also typical of international human rights instruments.[23] The original limitation of fundamental rights to the vertical relationship between the individual and the state runs parallel with the distinction between public and private law. Strict adherence to this position no longer pertains and private law is no longer inflexible in the way in which it reacts to the existence of fundamental rights.[24] Thus the question today is not whether fundamental rights affect private law but rather how fundamental rights and private law relate to each other.

In *Barkhuizen v Napier*[25] the Constitutional Court opted for an indirect application of the *Constitution* to the case before them. Ngcobo J held for the majority that the proper approach to constitutional challenges to contractual terms is to determine whether the challenged term is contrary to public policy; and what constitutes public policy must today be discerned with reference to the fundamental values embodied in the *Constitution* and particularly in the Bill of Rights.[26] Consequently, within the context of contract law the effect of constitutional rights in private law is indirect. Although private law must comply with the public law of the *Constitution*, it is private law which is interpreted and applied to the relationships private individuals have with one another.[27] The theory of indirect effect[28] involves bringing constitutional values

22 Woolman "Application" 31.4(iv). Justice Hugo Black expresses the opinion that a Bill of Rights is: "… any document setting forth the liberties of the people" in Smith and Weisstub *Western Idea of Law* 455.

23 *European Convention on Human Rights and Fundamental Freedoms* (1950); *Constitution for Europe* (2004) art II-51.

24 Woolman "Application" 31.6(c).

25 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 23-30.

26 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 29-30; Hutchison and Pretorius *Law of Contract* 35ff.

27 See also Cherednychenko *Fundamental Rights* 73.

into private law "through open doors … and not through the window and every gap in the walls".[29] The "open doors" metaphor refers to general clauses such as public policy.[30]

Public policy was defined in *Barkhuizen* as representing the legal convictions or general sense of justice of the community, the *boni mores* and the values held most dear by our society; it takes into account the necessity to do simple justice between individuals; and it is informed by the concept of *ubuntu*.[31] "Public policy imports the notions of fairness, justice and reasonableness."[32] Thus it is submitted that public policy is the general clause which provides the vehicle to import constitutional values into the law of contract.

4 Constitutional challenges to contractual terms: the *Barkuizen* formula

In the *Uniting Reformed Church* case Zondi J[33] relies on the Constitutional Court judgement in *Barkhuizen*,[34] in which that Court laid down the test to determine whether a particular contractual term or the enforcement thereof was contrary to public policy. The Court held that in general the enforcement of an unreasonable or unfair term will be contrary to public policy.[35] Thus the court reduced the matter to determining fairness.[36] In order to determine what qualifies as fair two questions need to be posed: first, if the term itself is unreasonable and secondly, if the term is found to be reasonable, whether it should be enforced taking into account the

28 The indirect application of fundamental rights has the result that the autonomy of private law is retained as well as the distinction between public and private law. See Cherednychenko *Fundamental Rights* 75.
29 Cherednychenko *Fundamental Rights* 75.
30 Cherednychenko *Fundamental Rights* 74.
31 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 28, 51, 73; Hutchison and Pretorius *Law of Contract* 30.
32 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73.
33 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) paras 28-29.
34 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 28-30.
35 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.
36 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56.

circumstances of the particular case.[37] In consequence the fairness test is two-fold. The first part relates to the question concerning the objective terms of the contract,[38] ie if the particular clause in the contract passes the considerations of reasonableness and fairness, since public policy would preclude the enforcement of a contractual term if this would be unjust or unfair.[39] If it is found that the objective terms pass the muster of public policy the second part of the test is activated *viz* whether these terms are "contrary to public policy in the light of the relative situation of the contracting parties",[40] or "whether the clause should be enforced in the light of the circumstances which prevented compliance".[41] Thus the relative situation of the contracting parties is a relevant consideration in determining if a contractual term is contrary to public policy.[42] Consequently, the second part of the test is clearly subjective in nature since it involves the contextualisation of the parties' position.[43]

The Constitutional Court determined that the first question of the test (the objective test) involves balancing the constitutional values of freedom and dignity which inform the maxim *pacta sunt servanda* with a specific constitutional right or value.[44] Thus, this Court laid down the requirement that the contract or contractual term at issue must infringe a constitutional right.[45] This objective test imposes the unenviable duty on a court to achieve a balance between freedom, in *casu* freedom of contract, and other constitutional values, thus placing the rule of law and freedom of contract in potential conflict with substantive equality and human rights propounding transformation.

37 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56.
38 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.
39 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 48, 73.
40 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.
41 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56, 58.
42 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.
43 Hutchison and Pretorius *Law of Contract* 188; see Sutherland 2009 *Stell LR* 55, who interprets the first question differently. He is of the opinion that the first question involves an objective enquiry into whether the terms of the contract are contrary to public policy as well as whether the terms were subjectively contrary to public policy because of the parties relative bargaining position.
44 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57, in which case it entailed the right to access to justice.
45 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 30, 36; Brand 2009 *SALJ* 84.

In the case under discussion Zondi J addressed the first (objective) question, whether the offending term was fair, by balancing the principle of *pacta servanda sunt* against the constitutional right to seek judicial redress.[46] The honourable judge pointed out that access to justice is twofold. On the one hand it provides a forum to seek enforcement of a contract or term but on the other hand it also provides the stage to ask for non-enforcement because the contract or term is contrary to public policy because it is unfair.[47] The honourable justice emphasised that the courts must ensure a minimum degree of fairness.[48] In regard to this aspect of citizens' rights to access to justice, Zondi J moved to the second part of the *Barkhuizen* test, which was subjective in nature. Zondi J raised the issue of the parties' relative bargaining positions at the time of the conclusion of the agreement.[49] Thus, the circumstances of the case and the relevant situation of the parties were examined, which examination involved contextualizing the contract.

The subjective part of the *Barkhuizen* test is complex when read in the context of *Afrox Healthcare Bpk v Strydom*,[50] where Brand JA held that it is obvious that inequality of bargaining power in itself does not justify the conclusion that a term which favours the "stronger" party will necessarily be contrary to public policy. He also added that at the same time it must be accepted that inequality of bargaining power is a factor which together with other factors can play a role in the consideration of public policy. Thus, the South African judiciary has indicated that the foundational source for unfairness is an unequal bargaining position of the contracting parties together with other factors.[51] From the aforegoing, the conclusion appears justified that with the introduction of the subjective test the Constitutional

46 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 34.

47 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) paras 34, 35.

48 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 34.

49 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 34.

50 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.

51 *Barkhuizen v Napier* 2007 5 SA 323 para 59. Ngcobo J states that "In Afrox the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor that together with other factors plays a role in the consideration of public policy" (footnote excluded).

Court has recognised substantive equality in the law of contract, since the contextualisation of the parties' position requires consideration ie that the circumstances of the case and the parties relevant situation be taken into account.

The development of the principle of public policy was continued in *Barkhuizen* by Ngcobo J,[52] which raises the question whether "tesame met"[53] / "together with"[54] should be interpreted as "among" / "alongside" or "in conjunction with" / "in cooperation with" / "plus". It is submitted that according to Brand J inequality of bargaining power is not sufficient on its own to sustain a finding that a particular term of a contract is contrary to public policy and thus unenforceable. Consequently, to define "public policy" another element is required to supplement the inequality of bargaining power.

Until *Uniting Reformed Church* no opportunity has presented itself to specify which other factor(s) may be taken into account when assessing the validity or enforceability of a clause on the basis of its being contrary to public policy. It should be noted that the recognition of an unequal bargaining position as a co-determinant of public policy should be acknowledged as being extremely valuable in the development of rules pertaining to standard contracts. This closely follows the international practice of considering this to be a factor in the determination of the reasonableness or unreasonableness of a term.[55]

4.1 The subjective test to determine if a contract or term is contrary to public policy – inequality of bargaining position

In *Uniting Reformed Church* the court addressed the fairness of clause 16 by first questioning if it was contrary to public policy.[56] The applicant averred that clause 16, as contained in all three notarial leases, offended public policy because first, at the time of the conclusion of the agreement the parties were in an unequal bargaining

52 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.
53 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.
54 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.
55 Ramsay *Consumer Law and Policy* 127-213.
56 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 24.

position. In this regard the court found for the applicant Church that they had been in an unequal bargaining position in relation to the state.[57] The respondent did not dispute the fact that the parties had been in an unequal bargaining position, since "the terms of the notarial lease agreements were necessitated by the realities that faced both the applicant and the (State) Department of Education of the Administration: House of Representatives, namely financial resources".[58]

It is submitted that it seems trite that unconscionable terms more often than not arise from an inequality of bargaining power.[59] In the English case of *Lloyds Bank v Bundy*[60] the court held that "[W]hen the one is so strong in bargaining power and the other so weak … it is not right that the strong should be allowed to push the weak to the wall".[61] This opinion was followed in *Macaulay*[62] where it was held that it was necessary to protect "those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".

It is suggested that such cases of inequality may also be described as exploitative. In many cases[63] exploitation appears to arise organically from an inequality of bargaining power. It is the latter phenomenon which leads to the recognition of exploitation as the elusive "other factor" as a co-determinant, together with inequality, of public policy.

---

57 In *United Uniting Reformed, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 35 Zondi J quotes from the applicant's founding affidavits that: "… the Department, which represented so-called coloured own affairs in terms of the apartheid tricameral system, dictated the terms of the agreement, which the applicant had little option but to accept" (para 16 of the affidavit). And that: "… the impugned provision in the lease agreement was inserted at the instance of the state and the applicant was left with no choice in the matter. It simply had to comply in order to fulfil the demands of the state for assuming responsibility of the schools" (para 28 of the affidavit).

58 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 36.

59 Wertheimer *Exploitation* 64.

60 *Lloyd's Bank v Bundy* 3 WLR 501 (1974).

61 *Lloyd's Bank v Bundy* 3 WLR 501 (1974) 506.

62 *Macaulay v Schroeder Music Publishing Co* 1 WLR 1308 (1974) 1315

63 However, in a case where a soccer player is sold by his club to another club, he is in an unequal bargaining position *vis a vis* the club, but it is doubtful that he is ever exploited.

4.2 Exploitation: section 25 of the Constitution*, the proscription of the arbitrary deprivation of property*

After acknowledging the inequality of the parties Zondi J moves on to the applicants' contention that undertaking to transfer the properties free of charge after the expiration of the leases was inimical to the values enshrined in the *Constitution*, and in particular section 25.[64] Section 25,[65] which is known as the property clause, determines that "No one may be deprived of property except in terms of law of general application"[66] and "Property may be expropriated only in terms of law of general application and subject to compensation".[67]

Expropriation is the acquisition of ownership by the State through a legal process, against compensation.[68] Expropriation in the form of the acquisition of property involves compensation and the participation of the owner to a certain extent, as he or she may make representations regarding factors to be considered in the determination of the amount of compensation.[69] It also constitutes an administrative action, since only the State may expropriate. This administrative action must be in line with sections 25 and 33 of the *Constitution*, the *Promotion of Administrative Justice Act*[70] and the *Expropriation Act*.[71] The authors Mostert and Pope hold that

64 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 37.

65 The relevant parts of s 25 are the following:

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (c) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (d) the current use of the property; (e) the history of the acquisition and use of the property; (f) the market value of the property; (g) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (h) the purpose of the expropriation.

66 Section 25(1) of the *Constitution of the Republic of South Africa*, 1996.

67 Section 25(2)(b) of the *Constitution*.

68 Mostert and Pope *Principles of the Law of Property* 188; Wille, Du Bois and Bradfield *Wille's Principles* 517; Badenhorst, Pienaar and Moster *Silberberg and Schoeman's Law of Property* 172-173.

69 Mostert and Pope *Principles of the Law of Property* 188.

70 *Promotion of Administrative Justice Act* 3 of 2000.

expropriation takes place only when it is in the public interest or for a public purpose.[72]

It is necessary to point out that the so-called expropriation in the *Uniting Reformed Church* case does not constitute an expropriation in terms of the above legislation. It involves an expropriation by way of a contract, which is limited by the rules of contract law. The limiting rule applicable in this case is the doctrine of legality. If a contract is found to be contrary to public policy it is unenforceable. The question is consequently if clause 16 of the notarial deed may be considered contrary to public policy. It was argued for the applicant that clause 16 was contrary to section 25,[73] which implies direct horizontal application. However, as was pointed out earlier, Zondi J followed the precedent set by the Constitutional Court in *Barkhuizen* and applied the Bill of Rights indirectly through the open norm of public policy, coming to the conclusion that clause 16 in the notarial leases was unenforceable.[74]

Raising section 25 of the *Constitution* in support of the argument that an expropriation without compensation is contrary to public policy has both a literal and a philosophical impact on interpreting public policy. In the *Uniting Reformed Church* case it has a literal impact because clause 16 is in direct conflict with the law as set out in section 25 of the *Constitution*. Clause 16 authorises the "arbitrary deprivation of property" and is consequently unenforceable.[75] The court found no reasons which could justify the deprivation of the property,[76] and considered clause 16 "a disguised form of expropriation".[77]

---

71 *Expropriation Act* 63 of 1975.
72 Mostert and Pope *Principles of the Law of Property* 188.
73 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 37.
74 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 40.
75 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) paras 39, 40.
76 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 40.
77 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 41.

Essentially section 25, the property clause, provides protection against exploitation. In this case it is clear that the enforcement of the agreement would have resulted in the exploitation of the applicant. Nevertheless, what is important here is the fact that the element of exploitation might be thought to play a role complementary to the inequality of bargaining power, as the obscure "other" factor to be taken into account when determining public policy. It is submitted that from this case it is possible to deduce that the element of exploitation may be recognised as the other factor to be taken account of, together with an inequality between the parties, when deciding whether an unfair contract or term is unenforceable because it is contrary to public policy. Furthermore, coupling inequality to exploitation should harness the discretionary role of public policy and as such address the honourable Brand JA and Harm DP's concerns regarding the width of application of this open norm.

The conclusion that exploitation together with inequality can be used to define public policy may also be drawn from comparative and extra judicial research. Some of the European codifications, national consumer legislation and the philosopher Wertheimer emphasise the link between inequality and exploitation.

5 Exploitation: Wertheimer's hypothesis of the element of exploitation, the European Civil Codes and national and international consumer legislation

The seminal work by Alan Wertheimer[78] on the subject of "exploitation" provides certainty that exploitation constitutes a fitting additional factor as required by our judiciary. Wertheimer has identified that an inequality of bargaining power spawns exploitation and that the latter has its roots in inequality of bargaining power.[79] From his thesis it is submitted that inequality of bargaining power and exploitation constitute the two sides of the public policy coin and consequently constitute the requirements for supporting a claim that an unfair term or agreement is in contravention of public policy. Wertheimer defines exploitation simply as where A

78 Wertheimer *Exploitation*.
79 Werthiemer *Exploitation* 264.

exploits B when A takes unfair advantage of B.[80] The author Goodin sets out four conditions that have to be present in order for weakness to be exploitable. He requires first that the parties must be in an asymmetrical relationship; secondly that the subordinate party must need the resource that the superordinate supplies; thirdly that the subordinate party must depend upon some particular superordinate for the supply of the resources needed; and finally that the superordinate enjoys a discretionary control over the resources that the subordinate needs.[81] If these requirements are applied to the facts of the *Uniting Reformed Church* case, all of them are met. There is no doubt that the Church was in an unequal bargaining position *vis-a-vis* the State, that the Church needed the State's intervention to assist in raising funds, that the Church required the State's educational resources and that the State had discretionary control in aiding the Church to obtain the assistance needed. Consequently, it is possible to draw the conclusion that the undertaking to transfer the properties to the State free of charge upon expiration of the lease was clearly exploitative on a literal level.

Identification of exploitation as a suitable co-determinant with the inequality of bargaining power in order to establish what is meant by "public policy" is also supported by international codifications and directives. In Germany article 138(2) of the *Bürgerliches Gesetzbuch* provides:

> Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.[82]

The *Swiss Civil Code of Obligations*[83] states in article 21(1):

---

80 Wertheimer *Exploitation* 10. See also Goodin "Reasons for Welfare" 37.

81 Goodin "Reasons for Welfare" 37.

82 Article 138(2) of the *Bürgerliches Gesetzbuch*: "A transaction wherein someone exploits the necessity, lack of experience, lack of discernment or lack of willpower of another, obtains monetary advantage or a promise to be granted monetary advantage out of proportion to his own performance is void." Translation sourced from www.fd.ul.pt.

83 Part 5 of the *Swiss Civil Code of Obligations*. Translation sourced from www.admin.ch/ch/e/rs/2/220.en.pdf.

> Wird ein offenbares Misverhältnis zwischen der Leistung und der Gegenleistung durch einen Vertrag begründet, dessen Abschluss von dem einem Teil durch Ausbeutung der Notlage, der Unerfahrenheit oder des Leichtsinns des andern herbeigefürht worden ist, so kann der Verletzte innerhalb Jahresfrist erklären, dass er den Vertrag nicht halte, und das schon Geleistete zuruckverlangen.[84]

Both of these articles provide robust protection to an individual who is unfairly taken advantage of.

Globally the most recent document on consumer law is the *Regulation on the Common European Sales Law* (hereafter referred to as the CESL),[85] which is also explicit in its dealing with exploitation, since the proposed Regulation uses the words "unfair exploitation" in the heading to Article 51. The question of whether "fair exploitation" is possible and allowed will be left open.[86] CESL provides in Article 51(b) that exploitation of the other party's dependency, trust, economic distress, urgent need, improvidence, ignorance or inexperience, by taking an excessive benefit or unfair advantage constitutes a ground for voiding a contract on account of a defect in consent. Another important addition is that the CESL declares agreements dealing with terms in consumer contracts not individually negotiated to be unfair if they cause a significant imbalance in rights and duties to the detriment of the consumer, contrary to good faith and fair dealing.[87]

In a national context the *Consumer Protection Act* 68 of 2008 (CPA) also provides support for the notion that exploitation could be recognised as a factor complementary to inequality. The CPA provides that an agreement "is unfair, unreasonable or unjust"[88] if the terms "... are so adverse to the consumer as to be

---

84 Article 21(1) of the *Swiss Civil Code of Obligations*: "Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one part's exploitation of the other's thoughtlessness, the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made." A 21(2) states: "The one year period commences on conclusion of the contract". Translation sourced from www.admin.ch/ch/e/rs/2/220.en.pdf

85 *Proposal for a Regulation of the European Parliament and the Council of the European Union on a Common European Sales Law* (2011).

86 Wertheimer *Exploitation* 13ff.

87 Article 83 of the *Proposal for a Regulation of the European Parliament and the Council of the European Union on a Common European Sales Law* (2011).

88 Section 48(1)(ii) of the *Consumer Protection Act* 68 of 2008.

inequitable".[89] It is not difficult to come to the conclusion that exploitation would qualify as an example of a term which is excessively adverse.

These articles in the German and Swiss *Civil Codes*, the CESL and the *Consumer Protection Act*, together with Wertheimer's thesis, have been instrumental in identifying the element of exploitation as complementing that of inequality as a co-determinant of public policy.

6 Conclusion

This case is interesting on two levels. First, the court gave cognisance to the Constitutional Court's decision not to apply constitutional rights directly but to follow the indirect horizontal route using the open norm of public policy as the vehicle to introduce constitutional rights into the law of contract. If the court had decided to apply constitutional rights directly, the first step in the *Barkhuizen* formula which entails balancing the freedom of contract against a constitutional right, which in this case would have been section 25 of the *Constitution*, would have resulted in the agreement being found unenforceable since it was contrary to the *Constitution*. Indirect horizontal application necessitated using an open norm to test for enforceability, which once again brought public policy into the spotlight. There can no longer be any doubt that public policy is contract law's open norm of choice.

Secondly, the court reiterated the requirement of determining public policy with reference to the inequality of bargaining power together with another factor which was first mooted in *Afrox* in 2003. *Uniting Reformed Church* identified the factors of the inequality of bargaining power and drew attention to exploitation, the latter because it literally involved a case of expropriation without compensation, which qualifies as exploitation. Thus, because exploitation plays a convincing role in defining public policy in the South African *Consumer Protection Act*, European

89 Section 48(2)(b) of the *Consumer Protection Act* 68 of 2008. The fact that the Act defines "unfair" with reference to "inequitable and unfair", creating a circular argument, will not be dealt with in this paper. What is important for the proposition that exploitation be recognised as the co-determinant with inequality to define public policy is the fact that the CPA included the provision "a term is unfair if it is excessively one-sided".

Codifications, Directives and the work of Wertheimer, it is suggested that where exploitation results from an unequal bargaining relationship it provides the "further factor" that, together with inequality, is sufficient to establish that the contractual term or contract is in conflict with public policy. Exploitation together with inequality facilitates giving meaning to public policy.

Identifying two factors to contextualise public policy will also limit its interpretation variants and thus honour the rule of law while still giving cognisance to the transformative imperative of the *Constitution*. The hurdle which the two elements form could put in place clear checks and balances, preventing uncertainty when a claim of contrary to public policy because of unfairness is raised.

BIBLIOGRAPHY

Literature

Brand 2009 *SALJ*

Brand FDJ "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 *SALJ* 71-90

Cherednychenko *Fundamental Rights*

Cherednychenko OO *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (European Law Publishers München 2007)

Goodin "Reasons for Welfare"

Goodin RE "Reasons for Welfare: Economic, Sociological, and Political – But Ultimately Moral" in Moon JD (ed) *Responsibility, Rights and Welfare: The Theory of the Welfare State* (Westview Press Boulder 1988) 31-52

Grundmann "General Standards and Principles"

Grundmann S "General Standards and Principles, *Clauses Generales* and *Generalklauseln* in European Contract Law: A Survey" in Grundmann S and Mazeaud D (eds) *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification* (Kluwer Law The Hague 2006) 1-20

Hefer 2000 *TSAR*

Hefer JJF "Billikheid in die Kontraktereg Volgens die Suid-Afrikaanse egskommissie" 2000 *TSAR* 143-154

Hutchison and Pretorius *Law of Contract*

Hutchison D and Pretorius C-J (eds) *The Law of Contract in South Africa* (Oxford University Press Cape Town 2012)

Mostert and Pope *Principles of the Law of Property*

Mostert H and Pope A *The Principles of the Law of Property in South Africa* (Oxford University Press Cape Town 2010)

Nienaber 2000 *TSAR*

Nienaber PM "Regters en Juriste" 2000 *TSAR* 190-204

Ramsay *Consumer Law and Policy*

Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* 3rd ed (Hart Oxford 2012)

Badenhorst, Pienaar and Moster *Silberberg and Schoeman's Law of Property*

Badenhorst PJ, Pienaar JM and Moster H *Silberberg and Schoeman's The Law of Property* 5th ed (LexisNexis Butterworths Durban 2006)

Smith and Weisstub *Western Idea of Law*

Smith JC and Weisstub DN *The Western Idea of Law* (Butterworths London 1983)

Sutherland 2007 *Stell LR*

Sutherland P "Ensuring Contractual Fairness in Consumer Contracts After Barkhuizen v Napier 2007 5 SA 323 (CC) (Part II)" 2009 *Stell LR* 50-73

Wertheimer *Exploitation*

Wertheimer A *Exploitation* (Princeton University Press Princeton 1999)

Wille, Du Bois and Bradfield *Wille's Principles*

Wille G, Du Bois F and Bradfield G *Wille's Principles of South African Law* 9th ed (Cape Town Juta 2007)

Woolman "Application"

Woolman S "Application" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2002) ch 31

Case law

Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA)

Bank of Lisbon & South Africa Ltd v De Ornelas 1988 3 SA 580 (A)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Bredenkamp v Standard Bank of South Africa Ltd 2010 4 SA 468 (SCA)

Brisley v Drotsky 2002 4 SA 1 (SCA)

Lloyd's Bank v Bundy 3 WLR 501 (1974)

Macaulay v Schroeder Music Publishing Co 1 WLR 1308 (1974)

Maphango v Aengus Lifestyle Properties 2011 5 SA 19 (SCA)

Potgieter v Potgieter 2011 ZASCA 181 (30 September 2011)

Sasfin v Beukes 1989 1 SA 1 (A)

South African Forestry Co Ltd v York Timbers Ltd 2005 3 SA 323 (SCA)

Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 5 SA 205 (WCC)

Legislation

Coloured Education Act 47 of 1963

Constitution of the Republic of South Africa, 1996

Consumer Protection Act 68 of 2008

Expropriation Act 63 of 1975

Promotion of Administrative Justice Act 3 of 2000

International instruments

Bürgerliches Gesetzbuch

Constitution for Europe (2004)

European Convention on Human Rights and Fundamental Freedoms (1950)

Proposal for a Regulation of the European Parliament and the Council of the European Union on a Common European Sales Law (2011)

Swiss Civil Code of Obligations

LIST OF ABBREVIATIONS

CESL	Regulation on the Common European Sales Law
CPA	Consumer Protection Act
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir Suid Afrikaansereg

FRONTIERS OF CHANGE AND GOVERNANCE IN CONTRACTUAL AGREEMENTS: THE POSSIBLE ROLE OF EXPLOITATION - *UNITING REFORMED CHURCH DE DOORNS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA* 2013 5 SA 205 (WCC)

L Hawthorne[*]

SUMMARY

In the South African common law of contract there appears to be support for the open norm of public policy as a general clause to ameliorate the effects of unfair contracts and terms which are contrary to public policy. The courts have on several occasions held that contracts or terms would be regarded as contrary to public policy had they come about where the parties were in an unequal bargaining relationship and this inequality was linked with another factor(s). In this case note it is argued that the element of unequal bargaining position may be contrary to public policy if it is linked with exploitation as the other factor. The element of exploitation was highlighted in the recent court decision of *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC). In this case the applicant church owned three properties on which were three schools under the control of the State. The church and the State had concluded 20-year notarial leases in respect of each of the properties. A term in the contract provided that after the expiration of the lease period the church would transfer the properties to the State free of charge. After the expiration of the leases the State demanded the transfer of the properties. The church disputed the claim, averring that the term was unenforceable because the parties had been in an unequal bargaining position and that the enforcement of the term constituted expropriation in contravention of the property clause of the *Constitution*. It is submitted that expropriation without compensation is not only contrary to section 25 of the *Constitution* but constitutes exploitation. It is suggested that where exploitation results from an unequal bargaining relationship it provides the "further factor" that, together with the

[*] Luanda Hawthorne. BA LLB LLD (UP). Professor of Private Law, University of South Africa. Email: hawthl@unisa.ac.za.

inequality in bargaining power, is sufficient to establish that the term or contract is in conflict with public policy. This contributes to giving meaning to the term "public policy". To support this argument, reference is made to the *German Civil Code*, the *Swiss Civil Code*, consumer protection legislation and the philosophy of Wertheimer.

KEYWORDS: *Constitution*; contract law; public policy; inequality of bargaining power; exploitation.