

# The Constitutionalisation of the Test for Statutory Illegality in South African Contract Law: *Cool Ideas v Hubbard* 2014 4 SA 474 (CC)

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## Abstract

This paper investigates the constitutionalisation of the test for statutory illegality (the test) in South African contract law, firstly through a careful evaluation of the manner in which the Constitutional Court (CC) applied the test in *Cool Ideas v Hubbard*, secondly through the manner in which the CC purports to constitutionalise the test in the said case, and thirdly through asking if such a method is desirable in the constitutional dispensation. It can be conceded that the approach taken by the main judgment to the application of the test in this case is more compelling than that taken by Froneman J. However, the fundamental differences in these approaches, particularly in the determination of the impact of the *Constitution* and its underlying values, highlight the need for an investigation into the test and the way it should operate in the constitutional dispensation. The paper begins by setting out the test and shows that it is capable of reflecting the values that underlie the *Constitution* (while maintaining a workable level of legal certainty) and that the test can operate in a manner that enhances the vision and goals of the *Constitution*. It also proposes a framework within which the various factors of the test should be weighed up, with a view to determining whether the contract under investigation is valid or invalid. Then the paper evaluates the CC's application of the test. It criticises the main judgment for its incomplete undertaking of the enquiry envisaged in sections 8(1) and (2) of the *Constitution*, as it took into account neither the "spirit, purport and objects" underpinning section 25(1), nor the fundamental values of the *Constitution*. It also criticises Froneman J's judgment for not connecting the value of fairness with the "spirit, purport and objects" underpinning section 25(1) or the broader fundamental values of the *Constitution*. Thereafter, it considers the manner in which the CC purports to constitutionalise the test. It points out that equity considerations apply in all matters, whether a substantive right is implicated or not, as they ensure that the "application" and "interpretation" of a statute enhance and are in line with the "objective normative value system" that is the Bill of Rights. Lastly, it considers the desirability of the CC's approach to the application of the test and its constitutionalisation. It points out that the main judgment goes to the extremes of objectivity in interpreting the relevant provisions of the *Housing Consumers Protection Measures Act*, 1998 (within the application of the test), while Froneman J goes to the extremes of subjectivity. In this regard, it suggests that courts can use the "balance of convenience" test to adjust their decisions to accommodate the circumstances of each case. Therefore, it concludes that the approach to constitutionalising the test lies somewhere between that of the main judgment and that of Froneman J.

## Keywords

Contract law; statutory illegality; constitutionalisation; *Cool Ideas v Hubbard*.

## 1 Introduction

This paper investigates the constitutionalisation of the test for statutory illegality (the test) in South African contract law. In particular, it evaluates how the Constitutional Court (CC) purports to constitutionalise the test in the recent case of *Cool Ideas v Hubbard*.<sup>1</sup> The focus is primarily on the following issues: firstly, whether the CC applied the test correctly; secondly, whether the CC investigated the different factors in the test (those considered when the legislature has not expressly stated its intention about the fate of the contract); and lastly, how the CC purports to incorporate the *Constitution* and its underlying values into the test (to constitutionalise it).

The fundamentally different approaches taken in the three judgments (the majority judgment written by Majiedt AJ and the separate judgments of Jafta J and Froneman J) in *Cool Ideas v Hubbard* highlight the importance of an investigation into the test and the way it should operate, particularly in the constitutional dispensation. *Cool Ideas v Hubbard* further highlights the potential injustice that may result from the lack of concrete guidance as to how the test is to be constitutionalised.

The first part of this paper sets out the test in South African contract law. This part shows that the test is capable of reflecting the values that underlie the *Constitution* (while maintaining a workable level of legal certainty). It further shows that the test can operate in a manner that enhances the vision and goals of the *Constitution* – to form a democratic society, founded on "democratic values, social justice and fundamental human rights",<sup>2</sup> as a framework within which the various factors of the test should be weighed up, with a view to determining whether the contract under investigation is valid or invalid is proposed. The second part of the paper then sums up the findings of the CC in *Cool Ideas v Hubbard* in relation to the test. Then the following part first evaluates whether the CC applied the test correctly. Here the focus will be on the different approaches to the test adopted in the main judgment, the concurring judgment of Jafta J and the dissenting judgment

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<sup>1</sup> *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) (*Cool Ideas v Hubbard*).

<sup>2</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Limited: In re Hyundai Motor Distributors v Smit* 2001 1 SA 545 (CC) para 21 (*Hyundai Motor Distributors*).

of Froneman J. Secondly, it considers the way in which the CC purports to constitutionalise the test in *Cool Ideas v Hubbard*. Here the focus will be on how the CC intends for the *Constitution* and its underlying values to operate in the application of the test. Finally, it discusses whether the approach adopted by the CC in the application of the test and its constitutionalisation is desirable.

## 2 The common law test for statutory illegality

Legality is one of the requirements for the formation of a valid contract, but in some instances an agreement tainted by illegality will give rise to a contract, but such a contract will be unenforceable.<sup>3</sup> An agreement will be illegal if it violates a statutory prohibition or a common law rule.<sup>4</sup> However, a statutory prohibition on its own does not necessarily invalidate the agreement.<sup>5</sup> In some cases the statute may expressly state that a contract that violates its prohibitions is invalid and courts will give effect to the intention of the legislature as expressed in that statute.<sup>6</sup> Difficulties arise in those cases where the statute does not expressly state whether a contract violating its provisions is invalid. Here the courts must ascertain the intention of the legislature through interpreting the statute.<sup>7</sup> In this inquiry the following factors must be considered: the language of the provision in question, the object of the provision in the light of the object of the statute as a whole, the mischief it seeks to prevent, the presence of civil or criminal liability, any perceivable implication of inconvenience and injustice that may result from declaring the agreement invalid, and the constitutional mandate of promoting the "spirit, purport and objects of the Bill of Rights."<sup>8</sup> Courts have been warned not to hastily declare contracts invalid for violating statutes and thereby deprive contracting parties from the relief available in contract law unless the legislature's intention (as implied by the statutory

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<sup>3</sup> Van der Merwe *et al Contract* 165; also see *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) paras 181D-E (*Metro Western Cape*).

<sup>4</sup> Van der Merwe *et al Contract* 166; also see Bhana, Nortje and Bonthuys *Student's Guide* 162.

<sup>5</sup> Van der Merwe *et al Contract* 174; also see Bhana, Nortje and Bonthuys *Student's Guide* 237; Lubbe and Murray *Farlam and Hathaway Contract* 271.

<sup>6</sup> Christie and Bradfield *Law of Contract* 351; also see Bhana, Nortje and Bonthuys *Student's Guide* 162; *Metro Western Cape* para 181E.

<sup>7</sup> Hutchison and Pretorius *Law of Contract* 181; also see Kerr *Principles of the Law of Contract* 193; *ABSA Insurance Brokers (Pty) Ltd v Luttig* 1997 4 SA 229 (SCA) para 238F (*ABSA Insurance Brokers*).

<sup>8</sup> *ABSA Insurance Brokers* paras 238I-239A; also see *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) para 4 (hereafter *Contractprops*); Hutchison and Pretorius *Law of Contract* 182; Bhana, Nortje and Bonthuys *Student's Guide* 166-167; *Metro Western Cape* paras 188G-H.

provision) so dictates.<sup>9</sup> These factors must be weighed up with a view to exercising a value judgment to determine whether the contract is valid or void. The relative weight of each factor depends on the circumstances of the case. These factors can be set out pictorially to allow for a proper and visual weighing up process and the categorical imputation of the relevant contextual factors using table 1 below:

**Table 1: The test for statutory illegality in South African contract law framework**

| Contract falls within conduct prohibited by statute |                                                                                 |                                                  |                                         |                                                                                     |                                                                                            |
|-----------------------------------------------------|---------------------------------------------------------------------------------|--------------------------------------------------|-----------------------------------------|-------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| Text of statutory provision                         | Purpose of the provision informed by that of statute                            | Public-private law divide                        |                                         | Balance of Convenience test                                                         | Constitution                                                                               |
| Peremptory formulated terms                         | Object of statute - purposive approach (internal & external interpretive tools) | Public-private Contractual relationship          | Purely private Contractual relationship | Implication of declaration of invalidity                                            | Bhana's model: Substantive inquiry ss 8(1) & (2) – extent of horizontality                 |
| Permissive formulated terms                         | Mischief rule inquiry to determine mischief guarded by statute                  | Administrative and contract law principles apply | Contract law principles apply           | Implication of declaration of validity                                              | Bhana's model: Procedural inquiry ss 8(3) & 39(2) – how horizontality operates in the case |
| Indication of validity/ invalidity                  | Prohibition backed by penalty – penalty sufficiently protects the object?       | Indication of invalidity                         | Indication of validity/invalidity       | Onus on contract-asserter to prove burden or injustice of declaration of invalidity | S 39(2) constitutional values-based inquiry                                                |
| Contract valid/ invalid                             |                                                                                 |                                                  |                                         |                                                                                     |                                                                                            |

When a contract violates a statute, its validity or invalidity is first sought from the text of the statutory provision in question.<sup>10</sup> The validity of a contract will be in question if it falls within the conduct that the statute expressly or

<sup>9</sup> Kerr *Principles of the Law of Contract* 193; also see *St John Shipping Corporation v Joseph Rank Ltd* 1957 1 QB 267.

<sup>10</sup> Van der Merwe *et al Contract* 174; see as an example *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA) para 12 (*Qaukeni Local Municipality*); *Contractprops* paras 5-6.

impliedly prohibits.<sup>11</sup> In considering whether the text of the statute impliedly points to the validity or invalidity of the contract, the court has to consider whether the statutory provision in question is formulated in peremptory or permissive terms. In this sense, a peremptory term is one that is to be strictly adhered to and non-adherence suggests that the text of the statute points to the contract being invalid.<sup>12</sup> On the other hand, a permissive term is one that condones partial or non-adherence with its provisions.<sup>13</sup> The Supreme Court of Appeal (SCA) has pointed out that the distinction between peremptory and permissive terms serves only as a guide to the courts in the determination of whether the text of the statute points to the contract being valid or invalid.<sup>14</sup>

Courts have to bear the object of the statute in mind in assessing whether a particular provision is peremptory or permissive.<sup>15</sup> Courts have formulated guidelines to help them ascertain whether the terms of that particular provision are peremptory or permissive.<sup>16</sup> These guidelines include: semantic guidelines, jurisprudential guidelines and certain "mini-presumptions."<sup>17</sup>

Semantic guidelines focus on the linguistic meaning of the text of the statutory provision in question. First, words of a commanding nature suggest that the provision is peremptory.<sup>18</sup> In *Bezuidenhout v AA Mutual Insurance Association Ltd* the Appellate Division (AD) (as it then was) pointed out that the word "shall" strongly suggests that the provision in question is peremptory.<sup>19</sup> On the other hand, in *Motorvoertuigassuransiefunds v Gcwabe* it was found that the word "shall" will not in all cases mean that the provision in question is peremptory.<sup>20</sup> This

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<sup>11</sup> Kerr *Principles of the Law of Contract* 188; also see Hutchison and Pretorius *Law of Contract* 181.

<sup>12</sup> Botha *Statutory Interpretation* 176; also see *Henry v Branfield* 1996 1 SA 244 (C) paras 250B-C (the *Henry* case).

<sup>13</sup> Botha *Statutory Interpretation* 176; also see the *Henry* case paras 250B-C.

<sup>14</sup> Botha *Statutory Interpretation* 176; also see the *Henry* case paras 250B-C. Also see *Weeven Transitional Council v Van Dyk* 2002 4 SA 653 (SCA) para 13; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 4 SA 199 (SCA) para 22, where the SCA emphasised that non-adherence with a peremptory provision will not necessarily lead to the invalidity of that particular conduct, and that the court has to determine whether the purpose of the provision has, nonetheless, been attained.

<sup>15</sup> Botha *Statutory Interpretation* 177.

<sup>16</sup> Botha *Statutory Interpretation*.

<sup>17</sup> Botha *Statutory Interpretation* 177-179.

<sup>18</sup> Botha *Statutory Interpretation* 178.

<sup>19</sup> *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 1 SA 703 (A) (*Bezuidenhout* case); see also Botha *Statutory Interpretation* 178.

<sup>20</sup> *Motorvoertuigassuransiefunds v Gcwabe* 1979 4 SA 786 (A) (*Motorvoertuigassuransiefunds* case); also see Botha *Statutory Interpretation* 178.

shows that the presence of a commanding word in a statutory provision (particularly in the operation of the test for statutory illegality) will not necessarily mean that the text of the statute points to the contract in question as being invalid. Secondly, permissive words like "may" show that the persons at whom the statute is directed have a choice and such a provision will be seen as permissive.<sup>21</sup> Thirdly, text that is negatively formulated suggests that the particular provision is peremptory, while text that is positively formulated indicates that the provision is permissive.<sup>22</sup> In the realm of contract law, the operation of the former principle (negatively formulated text) in the test for statutory illegality was demonstrated in *Lende v Goldberg*,<sup>23</sup> where the court had to determine whether an employment contract that did not adhere to the requirements of the *Blacks (Urban Areas) Consolidation Act*<sup>24</sup> was to be visited with invalidity.<sup>25</sup> In considering the implicated provision in that case, the court acknowledged that the wording of that provision began with "[n]o person shall", which meant that the provision was negatively formulated and therefore pointed to the contract in question being invalid.<sup>26</sup> Lastly, when a statutory provision is couched in open-ended language it is seen as being permissive.<sup>27</sup>

The courts have also established jurisprudential guidelines to assist them in deciding whether a particular provision is peremptory or permissive.<sup>28</sup> These guidelines focus on the implications of choosing either that the terms of the provision in question are peremptory or permissive in the determination of whether the text of the statute points to the contract being valid or invalid.

The courts have further established "mini-presumptions" regarding particular instances, which also serve as guidelines in determining whether a particular provision is peremptory or permissive.<sup>29</sup> First, when the statute only protects government income, it is presumed not to invalidate the non-compliant contract, regardless of the attachment of liability.<sup>30</sup> Secondly, when a statute grants a "right, privilege or immunity", its provisions are

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<sup>21</sup> Botha *Statutory Interpretation* 178.

<sup>22</sup> Botha *Statutory Interpretation*.

<sup>23</sup> *Lende v Goldberg* 1983 2 SA 284 (C) (the *Lende* case).

<sup>24</sup> *Blacks (Urban Areas) Consolidation Act* 25 of 1945. S 10 *bis* of this Act required black persons to be in possession of a work permit that indicated that they were authorised to be within certain areas.

<sup>25</sup> The *Lende* case paras 287C-D.

<sup>26</sup> The *Lende* case paras 288E-G.

<sup>27</sup> Botha *Statutory Interpretation* 178.

<sup>28</sup> Botha *Statutory Interpretation* 178.

<sup>29</sup> Botha *Statutory Interpretation* 179.

<sup>30</sup> Botha *Statutory Interpretation* 179.

presumed to be peremptory and for such "right, privilege or immunity" to be claimed, the terms of that particular statute must be completely adhered to.<sup>31</sup> Thirdly, if a declaration of invalidity because of non-adherence with a particular statutory provision would render other provisions useless, it is presumed that such a provision is permissive.<sup>32</sup> Lastly, if a statute contains a time limit to perform particular conduct and the court has not been granted the power to extend such a time limit, it is presumed that such a provision is peremptory.<sup>33</sup>

Further, the courts consider the object of the particular provision as informed by the object of the statute as a whole in order to determine whether the legislature intended for a contract that falls within the prohibited conduct to be valid or invalid.<sup>34</sup> The courts ordinarily adopt a purposive approach in interpreting statutory provisions. As such, the words of the particular provision are contextualised and internal and external interpretive mechanisms are used to ascertain the object of the statute.<sup>35</sup> In addition, courts also use "interpretive factors such as the principles of justice, fair play, convenience, logic, effectiveness and morality."<sup>36</sup> In the application of the test these considerations are meant to operate in the light of the warning that courts should not hastily declare contracts invalid for statutory illegality. Further, the courts should consider the object of the statute, particularly whether the contract under investigation achieves that object or vitiates it, in order to ascertain whether a declaration of validity would ultimately defeat the object. In this regard the courts will take into account whether the statute protects only a particular segment of the public or if it protects a legitimate public concern by invalidating the contract.<sup>37</sup> In the latter case, an inference can be drawn that the legislature's intention points to the contract's being invalid.<sup>38</sup>

Ultimately, if allowing the contract under investigation to endure would vitiate the object of the statute, this suggests that the contract should be declared invalid.<sup>39</sup> An example of this can be found in *ABSA Insurance Brokers*, where the SCA had to determine first whether an agreement was

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<sup>31</sup> Botha *Statutory Interpretation* 179.

<sup>32</sup> Botha *Statutory Interpretation* 179.

<sup>33</sup> Botha *Statutory Interpretation* 180.

<sup>34</sup> *ABSA Insurance Brokers* paras 238I-239G; also see *Contractprops* paras 6-7.

<sup>35</sup> Botha *Statutory Interpretation* 177.

<sup>36</sup> Botha *Statutory Interpretation* 177.

<sup>37</sup> Hutchison and Pretorius *Law of Contract* 182.

<sup>38</sup> Hutchison and Pretorius *Law of Contract* 182.

<sup>39</sup> Botha *Statutory Interpretation*; see also *ABSA Insurance Brokers* paras 239G-H.

prohibited by the *Insurance Act*,<sup>40</sup> and if the answer is in the affirmative, secondly whether such prohibition rendered the agreement invalid.<sup>41</sup> In its application of the test, the SCA emphasised the importance of the object of the statute in the inquiry.<sup>42</sup> It found the object of the statute in that case to be the protection of the public, by providing for the way in which brokers should handle premiums held on behalf of insurers and by ensuring that such premiums are handled with care.<sup>43</sup> On this point, it held that if the prohibited contract were permitted to exist, this would vitiate the object of the statute and therefore concluded that the agreement was invalid.<sup>44</sup>

Together with the consideration of the object of the particular statute, the courts also consider the mischief the statute seeks to prevent in order to determine whether the legislature intended for a contract that falls within the prohibited conduct to be invalid.<sup>45</sup> If allowing the non-compliant contract to endure would result in the mischief that the statute seeks to prevent, then an inference can be drawn that the legislature intended for such a contract to be invalid.<sup>46</sup>

In the realm of contract law, the mischief rule seeks to contextualise the statute in question through understanding it from its historical basis, in order to ascertain the situation that culminated in the enactment of that statute.<sup>47</sup> It should be noted that in the operation of the test, the object of the statute and the mischief the statute seeks to prevent ordinarily go hand-in-hand and therefore should not be isolated from each other. In assessing the mischief the statute seeks to prevent, the courts ordinarily follow a four-fold inquiry. First, they have to determine what the pre-existing legal regime was prior to the enactment of the statute in question.<sup>48</sup> Secondly, they have to determine the mischief that was insufficiently catered for under the pre-existing legal regime.<sup>49</sup> Thirdly, they have to determine the manner in which the statute in question (the new legal regime) purports to prevent such mischief.<sup>50</sup> Lastly,

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<sup>40</sup> *Insurance Act* 27 of 1943.

<sup>41</sup> *ABSA Insurance Brokers* paras 235I-236A.

<sup>42</sup> *ABSA Insurance Brokers* para 239A.

<sup>43</sup> *ABSA Insurance Brokers* paras 239B-F.

<sup>44</sup> *ABSA Insurance Brokers* paras 239F-G, 241B.

<sup>45</sup> Hutchison and Pretorius *Law of Contract* 182; also see Bhana, Nortje and Bonthuys *Student's Guide* 166-167; Christie and Bradfield *Law of Contract* 355; *Qaukeni Local Municipality* para 15; *Pottie v Kotze* 1954 3 SA 719 (A) paras 726C-727A (the *Pottie* case).

<sup>46</sup> *Qaukeni Local Municipality* para 15; also see the *Pottie* case para 726H.

<sup>47</sup> Botha *Statutory Interpretation* 152.

<sup>48</sup> Botha *Statutory Interpretation* 152.

<sup>49</sup> Botha *Statutory Interpretation* 152.

<sup>50</sup> Botha *Statutory Interpretation* 152.



they have to determine the actual purpose of the legislature's preference for the particular manner in which the statute in question purports to prevent the mischief.<sup>51</sup>

An example of the application of this inquiry within the test for statutory illegality can be found in the *Pottie* case, where the AD (as it then was) had to determine whether a sale agreement that violated the *Transvaal Motor Vehicle Ordinance*<sup>52</sup> should be declared invalid.<sup>53</sup> The court considered the mischief the particular provision sought to prevent and the purpose of the Ordinance.<sup>54</sup> In this regard, the court emphasised that an agreement that violates a statutory provision will be declared invalid if allowing it to exist would result in "the very situation which the Legislature wishes to prevent".<sup>55</sup> On this point, the court held that the Ordinance had enough avenues for ensuring compliance with its provisions to the extent that the mischief guarded by the Ordinance will not surface and therefore concluded that the agreement was valid.<sup>56</sup> However, a different conclusion was reached in *Qaukeni Local Municipality*, where the SCA had to determine whether a tender agreement that did not conform to the statutory requirements for tenders should be declared invalid.<sup>57</sup> The SCA considered the mischief the statute sought to prevent – which was to prevent a situation where provincial tenders were awarded in an unfair manner.<sup>58</sup> The court pointed out that if an agreement that does not adhere to statutory requirements were declared valid in circumstances similar to those of this case, this would bring about the mischief the statute sought to prevent and therefore concluded that the contract was invalid.<sup>59</sup>

The difference between these two cases is that the former case involves two private parties, while the latter case involves a public-private relationship. It appears that courts distinguish between contracts entered into by and between private parties and contracts entered into by and between a private party and a public authority in the application of the test, particularly in the consideration of the mischief (as a factor in the test).<sup>60</sup>

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<sup>51</sup> Botha *Statutory Interpretation* 152.

<sup>52</sup> *Transvaal Motor Vehicle Ordinance* 17 of 1931.

<sup>53</sup> The *Pottie* case para 723B.

<sup>54</sup> The *Pottie* case paras 726C-727C.

<sup>55</sup> The *Pottie* case para 726H.

<sup>56</sup> The *Pottie* case para 727A.

<sup>57</sup> *Qaukeni Local Municipality* para 1.

<sup>58</sup> *Qaukeni Local Municipality* paras 15-16.

<sup>59</sup> *Qaukeni Local Municipality* para 16.

<sup>60</sup> For further detail see Cachalia 2016 *Stell LR* 93-94, where she states that courts distinguish between "government contracts" that are governed by contract law and those governed by administrative law. Within this distinction, she suggests that

This distinction is in line with the consideration of whether the statute in question protects only a segment of the public or a legitimate public concern in the determination of the object of the statute.<sup>61</sup> In *Qaukeni Local Municipality* the SCA confirmed its earlier decisions in *Eastern Cape Provincial Government v Contractprops*<sup>62</sup> and *Premier, Free State v Firechem Free State (Pty) Ltd*,<sup>63</sup> in that when a contract between a private party and a public authority does not adhere to the requirements set out by a statute, in order to encourage competition among bidders for public contracts, such a contract will be declared invalid.<sup>64</sup> The reason for this approach appears to be that the mere fact that the said contract does not adhere to statutory requirements means that it already has the effect of bringing about the mischief the statute seeks to prevent.<sup>65</sup> While the reasons for the distinction made by the SCA are to some extent unclear, the distinction may be justified on the ground that public-private contractual relationships may have an impact on the greater public that did not partake in the conclusion of the contract. Hence the need for a strict approach to protect such members of the public.<sup>66</sup> In private contractual relationships, on the other hand, the courts adopt a more flexible approach, because the parties negotiated the contractual terms and chose to be bound by them, and such terms largely have an impact only on the parties (owing to the principle of the sanctity of contract). However, it seems that this distinction might be unnecessary (at least within the consideration of the mischief in the application of the test), as the court may consider the mischief (as a factor in the test) with a view to making a value judgment whether to declare the contract valid or invalid, then consider the nature of the contracting parties and the impact of the contract on the public when considering the inconveniences and injustices that may result from its value judgment. In this way the test would be remedied from the potential fragmentation that this distinction may bring about in its operation. In essence (as the law stands), in private contractual relationships it appears that the courts

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courts should exercise a value judgment as to the degree to which the state should be treated differently from its private contractant, after considering issues of bargaining power, the nature of the power used by the State (strictly contractual or statutory powers) and public interest considerations.

<sup>61</sup> Hutchison and Pretorius *Law of Contract* 182.

<sup>62</sup> *Contractprops* para 4.

<sup>63</sup> *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA).

<sup>64</sup> *Qaukeni Local Municipality* paras 15-16.

<sup>65</sup> *Qaukeni Local Municipality* para 15.

<sup>66</sup> Cachalia 2016 *Stell LR* 89, where she suggests that when the government enters into a contract, it takes on certain duties by virtue of its choice to contract and some duties are placed on it by virtue of its constitutional imperatives. She further states that owing to the government's distinct role within the constitutional framework, its contracts may sometimes be "moulded" by or "yield to" administrative law rules.

consider the statute as a whole and whether it contains internal mechanisms to secure compliance with its provisions and thereby prevent the mischief from surfacing. If the answer is in the affirmative, then there might be no need to declare the contract invalid. If the answer is in the negative, this will point to the contract's being invalid, as there will be no mechanism that prevents the contract from bringing about the mischief the statute seeks to prevent. However, in public-private contractual relationships the courts adopt a strict approach and declare a contract invalid when it does not adhere to statutory requirements set to bolster competitive bidding processes for public contracts, as such non-adherence in itself is seen as bringing about the mischief sought to be prevented.

Further, the courts consider whether the statute imposes civil or criminal liability for its violation in order to determine whether the legislature intended for a contract that falls within the prohibited conduct to be valid or invalid.<sup>67</sup> If the answer is in the affirmative, then an inference may be drawn that the legislature intended for such a contract to be invalid.<sup>68</sup> However, such an inference may not be drawn where the liability attached sufficiently protects the public against the mischief the statute seeks to prevent.<sup>69</sup> This rule was confirmed by the AD (as it then was) in the *Pottie* case, where it noted that since the Ordinance (that was in question) did not say that a violation of its provisions rendered the violating conduct invalid, then an inference had to be drawn from its wording and the fact that the prohibition was followed by a criminal sanction.<sup>70</sup> The court further stated that such an inference was required by the rule of "construction" in terms of which conduct done in violation of a statutory prohibition backed by a sanction is on the face of it unlawful and invalid.<sup>71</sup> However, the court pointed out that there was room for the relaxation of this rule as the deciding factor was the legislature's intention.<sup>72</sup> This was later reiterated by the SCA in *ABSA Insurance Brokers*, where it pointed out that when the legislature attaches liability for the performance of certain conduct under a statute, it proscribes such conduct by implication.<sup>73</sup> The court went on to say that such a proscription operates

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<sup>67</sup> Hutchison and Pretorius *Law of Contract* 182; also see Bhana, Nortje and Bonthuys *Student's Guide* 166-167; *ABSA Insurance Brokers* paras 239F-G; the *Pottie* case paras 724D-H.

<sup>68</sup> The *Pottie* case paras 724H-725A.

<sup>69</sup> The *Pottie* case paras 724H-725D; also see Lubbe and Murray *Farlam and Hathaway Contract* 271; *Metro Western Cape* paras 188F-G; Christie and Bradfield *Law of Contract* 354.

<sup>70</sup> The *Pottie* case paras 724H.

<sup>71</sup> The *Pottie* case 724H.

<sup>72</sup> The *Pottie* case paras 725A-C.

<sup>73</sup> *ABSA Insurance Brokers* paras 238G-H.

to invalidate such conduct, regardless of whether the statute so declared or not.<sup>74</sup> However, the court held that there is room for the relaxation of this rule and that the liability imposed by the statute by itself does not necessarily render a contract that falls within the proscribed conduct invalid – the legislature's intention will be the deciding factor.<sup>75</sup> It follows that when a statute attaches liability for the violation of its provisions, this is an indication that the legislature may have intended for the non-compliant contract to be invalid. However, the courts have to decide after this factual inquiry, depending on the circumstances of the case (bearing in mind the rest of the factors in the test) whether the legislature intended for the liability attached to vindicate the object of the statute and thereby prevent the mischief from surfacing or whether it sought to invalidate the contract as well. Therefore, the factors of the test should be considered even if the statute attaches liability for its violation, with a view to exercising a value judgment to determine whether the contract is valid or invalid.

Further, the courts will consider the implications that may result from declaring the contract invalid.<sup>76</sup> This includes determining whether invalidating the contract would be more burdensome and unjust than letting it endure as tainted by illegality.<sup>77</sup> The way this factor is meant to operate was demonstrated in *Qaukeni Local Municipality*, where the SCA considered the implications of declaring the agreement invalid (though considered in a narrow respect in order to determine whether any injustice or burden would result from a declaration of invalidity).<sup>78</sup> The court found that declaring the contract invalid does not heavily burden the party asserting it, while allowing the contract to endure would place a heavy burden on the contract-denier.<sup>79</sup> The court further pointed out that such a burden on the contract-denier would be transferred to the government fiscus, and that such a situation could have been averted by adhering to the statutory requirements.<sup>80</sup> Lastly, the SCA took into account the fact that the implications of declaring the contract invalid were not asymmetrically distributed on one party, thereby indicating that the legislature could not

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<sup>74</sup> *ABSA Insurance Brokers* paras 238G-H.

<sup>75</sup> *ABSA Insurance Brokers* paras 238H-I.

<sup>76</sup> Hutchison and Pretorius *Law of Contract* 182; Lubbe and Murray *Farlam and Hathaway Contract* 271; Christie and Bradfield *Law of Contract* 355; Bhana, Nortje and Bonthuys *Student's Guide* 166-167; *Metro Western Cape* paras 188G-H; the *Pottie* case para 727A.

<sup>77</sup> Hutchison and Pretorius *Law of Contract* 182; the *Pottie* case para 727A; *Qaukeni Local Municipality* para 15.

<sup>78</sup> *Qaukeni Local Municipality* para 15.

<sup>79</sup> *Qaukeni Local Municipality* para 15.

<sup>80</sup> *Qaukeni Local Municipality* para 15.

have intended for such a contract to be invalid.<sup>81</sup> In this regard the SCA emphasised that all similar contracts should have the same fate (either they will be valid or invalid), particularly in similar circumstances (in particular, those involving public-private contractual relationships). They cannot differ because the implications of declaring them invalid are not clearly perceivable.<sup>82</sup> As pointed out above, the court concluded that the contract was invalid.<sup>83</sup> Further, in *ABSA Insurance Brokers* the SCA considered the implications of declaring the contract under investigation in that case invalid, and emphasised the fact that the appellant did not sufficiently prove that any hardship would be placed on it if the contract were declared invalid.<sup>84</sup> This indicates that the party asserting the contract carries the onus of proving that a heavy burden would be placed on it or it would suffer an injustice if the contract were declared invalid. In essence, the courts have to exercise a value judgment, taking into account the weight of the burdens and injustices that would be placed on the contracting parties should the contract be declared invalid. Ultimately the considerations above will be taken into account along with the overall effect of other factors in the test in order to determine whether the legislature intended for the contract to be valid or invalid.

Lastly, as is the case in the broader context of statutory interpretation, likewise in the narrower context of statutory interpretation within the application of the test, the courts must take care to execute their constitutional mandate of promoting the "spirit, purport and objects of the Bill of Rights."<sup>85</sup> This appears from section 39(2) of the *Constitution*, which requires courts to adopt an interpretation of a particular statute that has the tendency of promoting the "spirit, purport and objects of the Bill of Rights", as informed by its application as envisaged in section 8(1) of the *Constitution*.<sup>86</sup> In addition, when a specific right is implicated the courts must consider the matter in the light of sections 8(2) and (3) of the *Constitution*, which as Bhana observed involves a two-fold test – a substantive inquiry and a procedural inquiry.<sup>87</sup> The former is embodied in sections 8(1) and (2) of the *Constitution* and involves the consideration of the extent to which the

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<sup>81</sup> *Qaukeni Local Municipality* para 15.

<sup>82</sup> *Qaukeni Local Municipality* para 15.

<sup>83</sup> *Qaukeni Local Municipality* para 16.

<sup>84</sup> *ABSA Insurance Brokers* paras 240F-I.

<sup>85</sup> Bhana, Nortje and Bonthuys *Student's Guide* 166-167; also see Bhana and Meerkotter 2015 *SALJ* 499; Wallis 2015 *SALJ* 943.

<sup>86</sup> Bhana and Pieterse 2005 *SALJ* 870; also see Bhana 2015 *Stell LR* 7; Davis 2011 *Stell LR* 846; Bhana 2013 *SAJHR* 372; Currie and De Waal *Bill of Rights Handbook* 57; *Botha v Rich* 2014 4 *SA* 124 (CC) para 28 (the *Botha* case).

<sup>87</sup> Bhana 2013 *SAJHR* 366-367.

Bill of Rights horizontally applies in a particular case,<sup>88</sup> while the latter is embodied in sections 8(3) and 39(2) of the *Constitution* and involves the consideration of how the horizontal application of the Bill of Rights is meant to operate in that particular case.<sup>89</sup> Bhana correctly submits that this two-fold test largely causes the barrier between the direct and indirect horizontality of the Bill of Rights to fade away, as it is characterised by an interaction between the two within the two parts of the two-fold test to the extent that the barrier is largely left permeable.<sup>90</sup> (This will be shown below.) While it is accepted that the horizontality of the Bill of Rights stretches its reach to the common law, including the law of contract as envisaged by sections 8(1) and 39(2) of the *Constitution*,<sup>91</sup> this has not been received without tension. In the result, two schools of thought have emerged (a conservative and a progressive one) with different views as to how the Bill of Rights (particularly its underlying values) is meant to operate in the law of contract.

The main concern of the conservative school of thought is that bringing equity considerations into the law of contract may result in commercial uncertainty, as their content is abstract and too broad.<sup>92</sup> Certainty in the law of contract makes future interaction between contracting parties predictable. Making the enforcement of contractual terms contingent on a later determination of whether they are fair or not diminishes such certainty and makes the standards against which conduct is measured not the law but the presiding officer.<sup>93</sup> To cement these concerns Brand gives examples of the "uncertainty and controversy" that resulted in the High Court because of the minority judgment of Olivier JA in *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman*,<sup>94</sup> where the judge stated that the formal use of the existing rules of contract law could be relaxed in the circumstances of that case on grounds of equities.<sup>95</sup> He submits that this uncertainty was later clarified by the SCA in *Brisley v Drotsky*,<sup>96</sup> where the SCA explained that

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<sup>88</sup> Bhana 2013 SAJHR 367.

<sup>89</sup> Bhana 2013 SAJHR 367.

<sup>90</sup> Bhana 2013 SAJHR 367-375.

<sup>91</sup> Bhana 2015 *Stell LR* 6; also see Hawthorne 2003 SA *Merc LJ* 271.

<sup>92</sup> Cibane date unknown <http://thelawthinker.com/up-content/uploads/2014/07/BradCibane-Ubuntu.pdf> 20; see also Brand 2009 SALJ 78; Lewis 2003 SALJ 344; Brand 2016 *Stell LR* 242-243.

<sup>93</sup> Cibane date unknown <http://thelawthinker.com/up-content/uploads/2014/07/BradCibane-Ubuntu.pdf> 20; also see Lewis 2003 SALJ 344; Dafel 2014 SALJ 285; *Bredenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA) para 39.

<sup>94</sup> *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) (hereafter *Saayman*).

<sup>95</sup> Brand 2009 SALJ 78.

<sup>96</sup> *Brisley v Drotsky* 2002 4 SA 1 (SCA).

Olivier JA's minority judgment in *Saayman* is not authority for judges to disregard existing rules of the law of contract because it appears that they will lead to an unjust outcome.<sup>97</sup>

On the other hand, while the progressive school of thought acknowledges the seriousness of the concerns for certainty, they are nonetheless of the view that the *Constitution* seeks to develop prevailing legal rules so as to reflect its fundamental values.<sup>98</sup> In addition, they maintain that courts should ensure that the law of contract reflects the fundamental values of the *Constitution*.<sup>99</sup> In defence of their view, they argue that concerns about uncertainty brought about by infusing equity considerations into the law of contract are blown out of proportion by conservative thinkers, as it is being over-ambitious to believe that the law can ever be completely certain – a workable level of certainty will suffice.<sup>100</sup> They further argue that the benefits of constitutionalising the law of contract outweigh a partial disruption of contractual certainty.<sup>101</sup> From these submissions it seems that what is needed is a gradual and systematic incorporation of the values underlying the *Constitution* into contract law in order to preserve contractual certainty as far as possible.

In order to achieve a systematic incorporation of the values underlying the *Constitution* into the law of contract (particularly, into the test), courts need concrete guidance. It is in this regard that Bhana and Meerkotter criticise the CC in the *Botha* case for its failure to clearly unpack "the content of the 'objective normative value system' that is the Bill of Rights."<sup>102</sup> The lack of jurisprudence (at least from the courts) as to the exact scope of the "objective normative value system that is the Bill of Rights"<sup>103</sup> makes the

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<sup>97</sup> Brand 2009 SALJ 81.

<sup>98</sup> Davis 2010 SAJHR 85; also see Bhana and Meerkotter 2015 SALJ 500; *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* 2000 2 674 (CC) para 44.

<sup>99</sup> Davis 2010 SAJHR 85; also see Mupangavanhu 2008 *De Jure* 118.

<sup>100</sup> Lewis 2003 SALJ 345-346; also see Dafel 2014 SALJ 286; Bhana and Pieterse 2005 SALJ 866; Cibane date unknown <http://thelawthinker.com/up-content/uploads/2014/07/BradCibance-Ubuntu.pdf> 7, 20 and 21 states that these concerns have been addressed in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), where the court emphasised that courts should invalidate contracts that violate policy considerations with caution and when such violation is apparent from the facts of the case, for the sake of certainty.

<sup>101</sup> Bhana and Pieterse 2005 SALJ 867; also see Dafel 2014 SALJ 286.

<sup>102</sup> Bhana and Meerkotter 2015 SALJ 501; also see Davis 2010 SAJHR 89 where he criticises the CC in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) in a similar manner.

<sup>103</sup> Bhana and Meerkotter 2015 SALJ 501; also see Davis 2010 SAJHR 89; Brand 2009 SALJ 72 where it is explained that the Bill of Rights is a "value system" as opposed to a collection of rules.

indirect horizontality of the Bill of Rights difficult to achieve and most probably leaves judges unwilling to make meaningful advances in the constitutionalisation of the law of contract. Fortunately, in *Hyundai Motor Distributors*<sup>104</sup> the CC attempted to give guidance on how section 39(2) is meant to operate. It started by pointing out that section 39(2) serves as a guide to the interpretation of statutes in the constitutional dispensation and stated the following:

[A]ll statutes must be interpreted through the prism of the Bill of Rights. ... As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights.<sup>105</sup>

The CC explained that the "spirit" of the *Constitution* refers to the transitional and transformational characters of the constitutional framework, by extension; this includes "the Constitution's goal of a society based on democratic values, social justice and fundamental human rights."<sup>106</sup> The "purport" and "objects" of the *Constitution* are to be understood in the light of section 1 of the *Constitution*, which encompasses the fundamental values of the *Constitution*.<sup>107</sup> Then, the CC pointed out that an interpretation that "promotes the spirit, purport and objects of the Bill of Rights" is one that promotes "a society based on democratic values, social justice and fundamental human rights." In the final instance, the CC advised that, where a statutory provision can reasonably be interpreted in such a way that it remains consistent with the *Constitution*, such an interpretation should be adopted, and only when no such interpretation is available should the court revert to alternative remedies.<sup>108</sup> At the very least, the guidance provided by the CC can be used by courts as a point of departure in the inquiry into the indirect horizontality of the Bill of Rights as required by section 39(2) and in the two-fold inquiry (mentioned above) when a specific right is implicated. Therefore, it is largely up to the courts to develop these guidelines gradually on a case-by-case basis in order to give content and precise scope to the "value system"<sup>109</sup> that is the Bill of Rights.

In essence, when the legislature has not clearly stated that a contract that violates a statutory provision is invalid, the courts should consider the overall effect of the factors mentioned above, in an attempt to determine whether the legislature intended for the non-compliant contract to be valid

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<sup>104</sup> *Hyundai Motor Distributors* para 21.

<sup>105</sup> *Hyundai Motor Distributors* para 21.

<sup>106</sup> *Hyundai Motor Distributors* para 21.

<sup>107</sup> *Hyundai Motor Distributors* para 22.

<sup>108</sup> *Hyundai Motor Distributors* para 26.

<sup>109</sup> Brand 2009 SALJ 72.



or invalid. The court has to make a value judgment whether the legislature intended for the non-compliant contract to be invalid, or if it has attached liability to the prohibition, which adequately protects the object of the statute so that the mischief it seeks to prevent does not surface and the contract need not be declared invalid. If the court declares the non-compliant contract invalid then the consequences of illegality will follow, but if it is declared valid despite such non-compliance then a valid contract will exist. In the latter case the contracting parties get the benefit of contractual remedies.

### **3 *Cool Ideas v Hubbard***

In this case Cool Ideas concluded an agreement with Ms Hubbard (the construction agreement) in terms of which Cool Ideas was to build a home for Ms Hubbard against the payment of R2 695 600.00.<sup>110</sup> Thereafter Cool Ideas commissioned Velvori Construction CC (Velvori) to perform the building works.<sup>111</sup> When the construction agreement was concluded Cool Ideas was not licensed in terms of section 10 of the *Housing Consumer Protection Measures Act*<sup>112</sup> (the Act) to certify its competence to build homes.<sup>113</sup> In its defence Cool Ideas contended that it acted in accordance with the advice of the National Home Builders' Registration Council (NHBRC), that licensing was unnecessary before the commencement of the construction work.<sup>114</sup> However, Velvori was duly licensed to build homes under the Act, and it duly "enrolled" the construction work as required by the Act.<sup>115</sup> During the construction Ms Hubbard advanced certain sums of money to Cool Ideas, but upon completion of the superstructure she gave notice that she was not satisfied with certain aspects of the superstructure. Consequently she did not want to pay the outstanding balance of the agreed price.<sup>116</sup> Thereafter, Ms Hubbard instituted arbitration proceedings claiming damages for the unsatisfactory construction work, but Cool Ideas counterclaimed for the outstanding amount of the agreed price for the construction of the house in the sum of R550 000.00.<sup>117</sup> Pursuant to those proceedings an arbitral award was given in Cool Ideas' favour, and when Ms Hubbard refused to comply with the award, Cool Ideas approached the High Court asking for the award to be made a court order under section 31

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<sup>110</sup> *Cool Ideas v Hubbard* para 5.

<sup>111</sup> *Cool Ideas v Hubbard* para 5.

<sup>112</sup> *Housing Consumers Protection Measures Act* 95 of 1998 (the Act).

<sup>113</sup> *Cool Ideas v Hubbard* para 5.

<sup>114</sup> *Cool Ideas v Hubbard* para 10.

<sup>115</sup> *Cool Ideas v Hubbard* para 5.

<sup>116</sup> *Cool Ideas v Hubbard* para 6.

<sup>117</sup> *Cool Ideas v Hubbard* paras 6-7.

of the *Arbitration Act*.<sup>118</sup> During the exchange of pleadings pursuant to the action in the High Court, Cool Ideas was licensed under the Act as having the competence to build a home.<sup>119</sup> However, Ms Hubbard contended that the arbitral award was invalid and unenforceable on the ground that it had the effect of enforcing an agreement that violates a statutory prohibition that is backed by the imposition of criminal liability.<sup>120</sup> The CC had to determine whether the legislature intended for a non-compliant construction agreement to be invalid.<sup>121</sup> Section 10 of the Act states the following:

- (1) No person shall –
  - (a) carry on the business of a home builder; or
  - (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder.
- (2) No home builder shall construct a home unless that home builder is a registered home builder.<sup>122</sup>

Writing for the majority, Majiedt AJ began by seeking the correct interpretation of section 10(1)(b) of the Act. In this regard, the court stressed that in interpreting statutes, the words of the statute should be understood in their "ordinary grammatical meaning", except where such interpretation would lead to a ridiculous outcome.<sup>123</sup> It added that there were three interconnected provisos to this principle: first, a purposive approach should be adopted in interpreting the relevant section; secondly, the approach should be context-sensitive; and thirdly, the section must be interpreted in a manner that is consistent with the *Constitution*.<sup>124</sup> In its interpretation of section 10(1)(b) the court first dismissed Cool Ideas' heavy reliance on the word "receive" used in the section as being "misplaced."<sup>125</sup> It stated that sections 10(1) and (2) should be understood holistically and properly contextualised within the structure and purpose of the Act as a whole.<sup>126</sup> The court understood the sections as mandating the licensing of "home builders" that conduct "the business of a home builder" and "home builders" that sell or build homes for home purchasers pursuant to an agreement between the "home builder" and the home purchaser.<sup>127</sup> As such, it held that it is incorrect to isolate a single word in the relevant section in order to

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<sup>118</sup> *Arbitration Act* 42 of 1965; also see *Cool Ideas v Hubbard* paras 8-11.

<sup>119</sup> *Cool Ideas v Hubbard* para 13.

<sup>120</sup> *Cool Ideas v Hubbard* para 14.

<sup>121</sup> *Cool Ideas v Hubbard* paras 23-24.

<sup>122</sup> Section 10 of the Act.

<sup>123</sup> *Cool Ideas v Hubbard* para 28.

<sup>124</sup> *Cool Ideas v Hubbard* para 28.

<sup>125</sup> *Cool Ideas v Hubbard* para 34.

<sup>126</sup> *Cool Ideas v Hubbard* para 34.

<sup>127</sup> *Cool Ideas v Hubbard* para 34.

construct an argument that violates the express wording of the section and the object of both the section and the Act as a whole.<sup>128</sup> Lastly, the court held that even the fact that Velvori was licensed in terms of the Act did not remedy the violation by Cool Ideas of the relevant section, as section 10(7) mandates both contractors to be licensed.<sup>129</sup>

In considering the structure of the Act, the court found that the object of the Act was to safeguard home purchasers.<sup>130</sup> As such, the court concluded that the Act is premised on the existence of a construction agreement between a licensed "home builder" and a home purchaser, and therefore the Act cannot be interpreted to allow late licensing by a "home builder."<sup>131</sup> To bolster this conclusion the court relied on the provisions of section 13 of the Act, which provides the purpose of the NHBRC.<sup>132</sup> It found that the purpose of the NHBRC as envisaged by that section is to control the building sector by safeguarding home purchasers and setting a threshold for the quality of the building work.<sup>133</sup> It added that the home purchaser is most covered by the Act when a "home builder" is licensed before the construction work begins.<sup>134</sup> To further support its conclusion, the court also considered the broad powers given to the NHBRC under section 5, the protective measures aimed at reinforcing the safeguards provided to home purchasers under section 13, the fact that enrolment after the construction work has begun is provided for without a similar provision relating to licensing, and lastly the fact that the licensing requirement for "home builders" is backed by civil and criminal liability.<sup>135</sup> In the result, the court found that allowing late licensing would be contrary to the clearly perceivable purpose of the Act and also transgress the express wording and purpose of section 10(1)(b).<sup>136</sup> The court also found that a contrary conclusion would mean that the home purchaser would have no recourse to the remedies provided by the Act for unsatisfactory building work, until the "home builder" elects to be licensed.<sup>137</sup>

In determining whether Cool Ideas' constitutional property right had been arbitrarily stripped away, the court started by pointing out that the remaining

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<sup>128</sup> *Cool Ideas v Hubbard* para 34.

<sup>129</sup> *Cool Ideas v Hubbard* para 35.

<sup>130</sup> *Cool Ideas v Hubbard* paras 29, 33.

<sup>131</sup> *Cool Ideas v Hubbard* paras 29, 37.

<sup>132</sup> *Cool Ideas v Hubbard* para 30.

<sup>133</sup> *Cool Ideas v Hubbard* para 30.

<sup>134</sup> *Cool Ideas v Hubbard* para 30.

<sup>135</sup> *Cool Ideas v Hubbard* paras 31-36.

<sup>136</sup> *Cool Ideas v Hubbard* para 34.

<sup>137</sup> *Cool Ideas v Hubbard* para 30.

validity of the construction agreement meant that Cool Ideas had no recourse to an enrichment action at common law; as such, it would be unable to claim the remainder of the agreed price.<sup>138</sup> The court then explained that based on its earlier decision in *National Credit Regulator v Opperman*,<sup>139</sup> the right to claim money advanced to another person pursuant to an enrichment action amounts to property as envisaged in section 25(1) of the *Constitution*.<sup>140</sup> While not explicitly stated in the judgment, this appears to be an undertaking of the substantive inquiry of the two-fold test mentioned above, as envisaged by section 8(2) of the *Constitution*.

After determining that the property right was applicable in the present case, the court sought to determine whether the stripping away of Cool Ideas' property right was justifiable under the internal limitation of the implicated right (arbitrariness).<sup>141</sup> Thereafter the court set out the test for arbitrariness – that the law of general application mentioned in section 25(1) should have a sufficient cause for stripping away the property of the relevant person, and that the method it employs should be fair.<sup>142</sup> In determining whether there is sufficient cause, the court has to consider the type of property involved and the degree to which the law purports to strip it away.<sup>143</sup> In this analysis, the court should also consider whether there is proportionality between the method used to strip the right away and the outcome the law aims to achieve.<sup>144</sup> In applying this test the court found that there was proportionality between the method employed to strip away Cool Ideas' constitutional property right and the outcome the Act seeks to reach.<sup>145</sup> The court reached its finding on the basis that the safeguarding of home purchasers is a legitimate government goal that is achieved through the creation of a compensation fund for the benefit of home purchasers in cases of substandard building work by "home builders."<sup>146</sup> In order for this safeguarding method to function properly, "home builders" should be licensed so that they are brought within the records of the NHBRC for proper policing and so that they can make contributions to the compensation fund (this is the goal the provision in question seeks to achieve).<sup>147</sup> The provision

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<sup>138</sup> *Cool Ideas v Hubbard* para 38.

<sup>139</sup> *National Credit Regulator v Opperman* 2013 2 SA 1 (CC).

<sup>140</sup> *Cool Ideas v Hubbard* para 38.

<sup>141</sup> *Cool Ideas v Hubbard* para 39.

<sup>142</sup> *Cool Ideas v Hubbard* para 40.

<sup>143</sup> *Cool Ideas v Hubbard* para 40.

<sup>144</sup> *Cool Ideas v Hubbard* paras 40-41.

<sup>145</sup> *Cool Ideas v Hubbard* para 41.

<sup>146</sup> *Cool Ideas v Hubbard* para 42.

<sup>147</sup> *Cool Ideas v Hubbard* para 42.

requires the "home builder" only to be licensed and the licensing procedure is not cumbersome on the "home builder".<sup>148</sup> The court added that the method used (stripping away of property right) had a circumscribed scope, in that it captures only unlicensed "home builders."<sup>149</sup> It was held that stripping away of Cool Ideas' constitutional property right was not arbitrary and therefore the provision in question did not transgress section 25(1).<sup>150</sup> Again, while it is not expressly stated, the court appears to be undertaking the procedural inquiry in the two-fold test mentioned above. Note that while the test for arbitrariness involves the consideration of the fairness of the method used for stripping away the constitutional property right, the court does not expressly deal with the value of fairness in its application of the two-fold test or in its consideration of the test for arbitrariness. However, it does exercise a value judgment in determining the proportionality of the method used to the goals sought, which seems to be informed by the value of fairness, particularly, in its weighing up of the burden placed by the licensing process on a "home builder" as opposed to the prejudice that may be suffered by a home purchaser that contracted with an unlicensed "home builder".

Further, in determining whether the construction agreement should be declared valid or invalid the court found that the structure of the Act does not point to the construction agreement being invalid.<sup>151</sup> This is so because the provisions of sections 10(1) and (2) in the court's view are aimed at unlicensed "home builders" and preventing them from obtaining compensation for construction work they perform while unlicensed and not at the validity or invalidity of the construction agreement.<sup>152</sup> The court also pointed out that declaring the construction agreement invalid would render useless the provision stripping away the unlicensed "home builder's" right to obtain compensation and other provisions aimed at safeguarding home purchasers.<sup>153</sup>

Lastly, in considering whether equity considerations apply in this case the court held that they were not applicable, and even if they were it is undesirable for equity considerations to be applied in individual cases in order to circumvent the clear and unambiguous wording of a statute.<sup>154</sup>

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<sup>148</sup> *Cool Ideas v Hubbard* para 43.

<sup>149</sup> *Cool Ideas v Hubbard* para 43.

<sup>150</sup> *Cool Ideas v Hubbard* para 44.

<sup>151</sup> *Cool Ideas v Hubbard* para 47.

<sup>152</sup> *Cool Ideas v Hubbard* para 47.

<sup>153</sup> *Cool Ideas v Hubbard* paras 48-51.

<sup>154</sup> *Cool Ideas v Hubbard* para 52.

In a separate judgment Jafta J agreed with the order handed down by the main judgment but disagreed with some of its reasoning on the ground that the construction agreement is invalidated by a proper interpretation of the relevant provisions of the Act, even though the legislature did not expressly say so.<sup>155</sup>

In determining whether the legislature intended for the agreement to be invalid, Jafta J started by stating that conduct done in violation of a statutory prohibition is void and of no force in law.<sup>156</sup> He then pointed out that to ascertain whether such a violation renders the contract invalid, one must look at the text of the statute and whether the contract falls within the proscribed conduct.<sup>157</sup> If so, the contract will be invalid except when it is clear from the purpose of that statute that the legislature did not intend to invalidate it.<sup>158</sup> He then stated that there was nothing in the text of the Act which shows that the construction agreement should remain valid.<sup>159</sup> Jafta J held that an agreement that violates the statutory prohibitions in question is invalid because it cannot give rights to the contracting parties.<sup>160</sup> As such, he held that permitting any party to sue on any rights arising from the construction agreement would mean that the court is allowing the performance of unlawful conduct, hence when the validity of a statute itself is not challenged the courts should enforce its provisions.<sup>161</sup> In support of these findings Jafta J stated that the validity of the non-compliant contract is not vitiated by the text of the prohibition but by the fact that it violates a statutory prohibition.<sup>162</sup> This is because when the legislature wishes to prevent certain conduct it prohibits it, and courts cannot order the performance of conduct prohibited by a statute.<sup>163</sup>

Jafta J noted that the object of the Act is the protection of "housing consumer[s]" through the mandatory licensing of "home builder[s]" before they commence construction work or they commission another builder to perform the construction work.<sup>164</sup> He then held that the legislature seeks to achieve this purpose through the prohibitions in question and allowing an agreement that violates them to exist would limit the achievement of that

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<sup>155</sup> *Cool Ideas v Hubbard* para 66.

<sup>156</sup> *Cool Ideas v Hubbard* para 90.

<sup>157</sup> *Cool Ideas v Hubbard* para 91.

<sup>158</sup> *Cool Ideas v Hubbard* para 91.

<sup>159</sup> *Cool Ideas v Hubbard* para 96.

<sup>160</sup> *Cool Ideas v Hubbard* para 98.

<sup>161</sup> *Cool Ideas v Hubbard* paras 98-99.

<sup>162</sup> *Cool Ideas v Hubbard* para 102.

<sup>163</sup> *Cool Ideas v Hubbard* paras 102-103.

<sup>164</sup> *Cool Ideas v Hubbard* para 81.

purpose.<sup>165</sup> Therefore, he held that it would lead to an injustice and the violation of the *Constitution* to declare an agreement valid that can be enforced by only one party and not the other.<sup>166</sup> He concluded that the legislature could not have intended for such a situation.<sup>167</sup>

In his dissenting judgment, Froneman J mainly took issue with the manner in which the main judgment addressed the constitutional matters raised and its finding that equity considerations were not applicable.<sup>168</sup> He disagreed with the way in which the main judgment interpreted section 10(1)(b), as its interpretation strips away Cool Ideas' property right.<sup>169</sup> In the judge's view, section 10(1)(b) is capable of a reasonably practicable interpretation that does not strip away Cool Ideas' property right.<sup>170</sup> Before setting out his approach Froneman J pointed out that the construction of Ms Hubbard's home was undertaken by a licensed "home builder" and that Cool Ideas was unlicensed at the beginning of the construction, because it was advised by the NHBRC that licensing was unnecessary.<sup>171</sup> Therefore, the judge held that Ms Hubbard did not invoke section 10(1)(b) in order to rely on its safeguards to secure quality construction work from Cool Ideas, but to avoid paying the amount the arbitrator had ordered her to pay to Cool Ideas.<sup>172</sup> In other words, the provision was not used in this case to seek refuge in its intended purpose (to safeguard home purchasers) but as part of a tactic to avoid paying remuneration to Cool Ideas for work done. This conclusion seems to be based on the fact that Ms Hubbard herself used the arbitration clause to set the arbitration in motion in order to obtain compensation for the alleged substandard building work by Cool Ideas.<sup>173</sup> However, the arbitrator ordered her to pay the outstanding balance to Cool Ideas.<sup>174</sup> It seems that the judge took it that the arbitrator was satisfied that in fact the building work met the threshold set by the statute and what Ms Hubbard was alleging was not true.

Froneman J holds that since this matter was concerned with the taking away of Cool Ideas' ability to bring action based on an arbitral award that has not been challenged on the basis of unfairness in its proceedings or unfairness

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<sup>165</sup> *Cool Ideas v Hubbard* para 104.

<sup>166</sup> *Cool Ideas v Hubbard* para 104.

<sup>167</sup> *Cool Ideas v Hubbard* para 104.

<sup>168</sup> *Cool Ideas v Hubbard* para 122.

<sup>169</sup> *Cool Ideas v Hubbard* para 128.

<sup>170</sup> *Cool Ideas v Hubbard* para 128.

<sup>171</sup> *Cool Ideas v Hubbard* para 134.

<sup>172</sup> *Cool Ideas v Hubbard* para 134.

<sup>173</sup> *Cool Ideas v Hubbard* para 134.

<sup>174</sup> *Cool Ideas v Hubbard* para 134.

in its findings, the court should adopt an approach that does not strip away Cool Ideas' property right.<sup>175</sup> Further, he pointed out that the case was also concerned with the concept that courts should adopt an interpretation of a statute that advances the enjoyment and realisation of a constitutional right when such an interpretation can reasonably be achieved.<sup>176</sup> The judge submits that in this case such an interpretation can reasonably be achieved.<sup>177</sup> In this regard, he first looked at the object of the particular provision (which is to safeguard home purchasers), then he looked at the conduct that the Act sought home purchasers to attain.<sup>178</sup> Thereafter he concluded that the object of the Act as a whole is to ensure that "home builder[s]" maintain acceptable standards of quality in building homes for home purchasers.<sup>179</sup> He then points out that the Act can be interpreted in a manner that safeguards home purchasers while not stripping away Cool Ideas' constitutional property right.<sup>180</sup>

The first step in his interpretation is to take note that the relevant provisions impose criminal liability on an unlicensed "home builder" who has built a home – this strongly encourages "home builder[s]" to be licensed before commencing the construction of a home.<sup>181</sup> He then proposes that the prohibition on the receipt of payment by an unlicensed "home builder" should be interpreted restrictively and in isolation from the other prohibitions. As such it should be interpreted to mean that the proscribed conduct "applies only *at the time of receipt* ..., but you can register late."<sup>182</sup> In support of this proposition he states that the particular provision is not qualified to reinforce the requirement of licensing, such as "unless the person is a registered home builder *at the time of undertaking the construction*."<sup>183</sup> He further cites the fact that the Act makes provision for monitoring bodies such as the Minister and the NHBRC to oversee that the purpose of the Act is achieved and that the home purchaser is exposed to minimal risk.<sup>184</sup> He then points out that this interpretation will not prejudice Ms Hubbard, as she will still have the protection provided by the Act.<sup>185</sup>

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<sup>175</sup> *Cool Ideas v Hubbard* para 150.

<sup>176</sup> *Cool Ideas v Hubbard* para 150.

<sup>177</sup> *Cool Ideas v Hubbard* para 150.

<sup>178</sup> *Cool Ideas v Hubbard* para 151.

<sup>179</sup> *Cool Ideas v Hubbard* para 152.

<sup>180</sup> *Cool Ideas v Hubbard* para 153.

<sup>181</sup> *Cool Ideas v Hubbard* para 154.

<sup>182</sup> *Cool Ideas v Hubbard* paras 157-158.

<sup>183</sup> *Cool Ideas v Hubbard* para 159.

<sup>184</sup> *Cool Ideas v Hubbard* paras 160-164.

<sup>185</sup> *Cool Ideas v Hubbard* paras 165-167.



## 4 Analysis

This part evaluates whether the CC applied the test for statutory illegality correctly and whether it properly considered the different factors of the test. Here I criticise the CC for its incomplete consideration of the impact of the *Constitution* on its interpretation of section 10(1)(b).

Then I carefully consider the conclusion of the main judgment that equity considerations were not applicable in this case. I argue that this conclusion is contrary to section 39(2) of the *Constitution* and disregards the indirect horizontality of the Bill of Rights.

Lastly I discuss whether the approach adopted by the CC in applying the test and its constitutionalisation is desirable, particularly in the constitutional dispensation.

### 4.1 *The CC's application of the test for statutory illegality in contract law*

The main issue in this case was the determination of whether section 10(1)(b) requires a "home builder" to get licensed before the construction work begins or allows for late licensing. Whilst the main judgment and that of Froneman J largely considered the different factors of the test, the point of disjuncture in the two judgments is the impact of the *Constitution*, including the application of its underlying values. Whereas the main judgment acknowledges the impact of the *Constitution* in its three provisos to the fundamental principle of statutory interpretation (mentioned above), it held that the structure of the Act mandates a "home builder" to get licensed before the construction work begins, and a contrary interpretation would defeat the express wording of section 10(1)(b).<sup>186</sup> The court acknowledged that its interpretation of section 10(1)(b) strips away Cool Ideas' property right, nonetheless it found that the provision reasonably and justifiably limits Cool Ideas' property right in accordance with the internal limitation of section 25(1) of the *Constitution*.<sup>187</sup> Froneman J's judgment also acknowledges the impact of the *Constitution* in statutory interpretation, but emphasises the principle that courts should adopt an interpretation of a statute that "best" advances the enjoyment and realisation of a constitutional right.<sup>188</sup> In this regard Froneman J submits that section 10(1)(b) is capable of a reasonably practicable interpretation that does not strip away Cool Ideas' property right,

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<sup>186</sup> *Cool Ideas v Hubbard* paras 28-30.

<sup>187</sup> *Cool Ideas v Hubbard* paras 38-44.

<sup>188</sup> *Cool Ideas v Hubbard* para 150.

and this interpretation should be adopted.<sup>189</sup> It becomes clear from these two views that courts lack concrete guidance as to how the *Constitution* (including its underlying values) should apply in the test for statutory illegality.

It is appropriate to set out the methodology in terms of which the Bill of Rights ought to apply in private relations, particularly in the test for statutory illegality. As mentioned above, when a specific right is implicated, the matter should be considered in terms of sections 8(2) and (3) of the *Constitution*.<sup>190</sup> This inquiry should be done in accordance with the two-fold test advanced by Bhana, in terms of which sections 8(1) and (2) envisage the substantive inquiry of the two-fold test.<sup>191</sup> The substantive inquiry of the two-fold test obliges the courts to undertake a context-sensitive inquiry in order to ascertain whether it is appropriate for the particular right or duty to apply between private parties.<sup>192</sup> Within this investigation, courts must take into account the "spirit, purport and objects" underpinning that particular right, including the fundamental values of the *Constitution* (freedom, dignity and equality) and the vision of the *Constitution* as embodied in the preamble to the *Constitution*.<sup>193</sup> The procedural inquiry of the two-fold test as embodied in sections 8(3) and 39(2) of the *Constitution* obliges the courts to determine whether the statute in question sufficiently facilitates the enjoyment and realisation of the implicated right.<sup>194</sup> If so, the statute will be seen as giving sufficient effect to the implicated right or as being a reasonable and justifiable limitation of the implicated right, and the inquiry will end here.<sup>195</sup>

When considering whether the implicated statute sufficiently facilitates the enjoyment and realisation of the implicated right, courts must remember that at first instance, legal matters should generally be dealt with in accordance with legal rules.<sup>196</sup> In statutory interpretation this means that the courts should first seek an interpretation of a statute that is in line with the Bill of Rights before seeking to strike down the statute for being inconsistent with the Bill of Rights.<sup>197</sup> In other words, the courts should first seek to interpret the implicated statute in a way that enhances the implicated right to the degree of its application in that particular case as found in the substantive

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<sup>189</sup> *Cool Ideas v Hubbard* para 150.

<sup>190</sup> Bhana 2013 SAJHR 372; Currie and De Waal *Bill of Rights Handbook* 57.

<sup>191</sup> Bhana 2013 SAJHR 367.

<sup>192</sup> Bhana 2013 SAJHR 365.

<sup>193</sup> Bhana 2013 SAJHR 365.

<sup>194</sup> Bhana 2013 SAJHR 367-368.

<sup>195</sup> Bhana 2013 SAJHR 368.

<sup>196</sup> Currie and De Waal *Bill of Rights Handbook* 56.

<sup>197</sup> Currie and De Waal *Bill of Rights Handbook* 57.

inquiry of the two-fold test. Only when that interpretation is not reasonably practicable should the court consider whether the statute reasonably and justifiably limits the implicated right. This was also stated in *Govender v Minister of Safety and Security*,<sup>198</sup> where the SCA stated that in dealing with the constitutional validity of a statute, courts should first assess the purpose of the statute and the provision in question, then assess the scope and meaning of the implicated right, and thereafter determine whether the statute can be interpreted in a way that is in line with the *Constitution*.<sup>199</sup> If the statute is capable of such an interpretation, then such an interpretation must be adopted.<sup>200</sup> It should be noted that the court's interpretive powers in this investigation are circumscribed to an interpretation that is reasonably practicable in the light of the purpose of the statute.<sup>201</sup> In the last instance, if the only practicable interpretation violates the implicated right, the court should determine whether the right is capable of being limited in accordance with its internal limitation or section 36 of the *Constitution*.<sup>202</sup> If the violation cannot be justified then the statute must be struck down as unconstitutional.<sup>203</sup>

Both the main judgment and that of Froneman J seem to have undertaken the substantive inquiry of the two-fold test (section 8(2)), and correctly found that section 25(1) of the *Constitution* applies in this case and that the result of the remaining validity of the construction agreement would be to strip away Cool Ideas' constitutional property right. However, the main judgment can be criticised for its incomplete undertaking of this inquiry, as it neither took into account the "spirit, purport and objects" underpinning section 25(1) nor the fundamental values of the *Constitution*. The main judgment could have done this within the procedural inquiry of the two-fold test as part of the arbitrariness test (in which fairness is a factor to be considered in determining proportionality). Hence, the main judgment's consideration of the internal limitation of section 25(1) can be criticised for not being sufficiently comprehensive. If the use of the internal limitation of section 25(1) could not sufficiently justify the violation, then the court could have undertaken the broader section 36 justification inquiry, which could have

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<sup>198</sup> *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA) (the *Govender* case).

<sup>199</sup> The *Govender* case para 11; see also Currie and De Waal *Bill of Rights Handbook* 58.

<sup>200</sup> Currie and De Waal *Bill of Rights Handbook* 58.

<sup>201</sup> Currie and De Waal *Bill of Rights Handbook* 58.

<sup>202</sup> Currie and De Waal *Bill of Rights Handbook* 59.

<sup>203</sup> Currie and De Waal *Bill of Rights Handbook* 59.

allowed for a more context-sensitive justification inquiry.<sup>204</sup> On the other hand, Froneman J took into account the value of fairness in relation to his proposed interpretation of the relevant statutory provision.<sup>205</sup> Froneman J's approach can also be criticised for not connecting the value of fairness with the "spirit, purport and objects" underpinning section 25(1) or the broader fundamental values of the *Constitution*. In other words, Froneman J did not justify his use of fairness based on the "spirit, purport and objects" underpinning section 25(1) or the fundamental constitutional values of dignity, freedom and equality or in terms of section 39(2) of the *Constitution*. This means that Froneman J uses a free-floating concept of fairness, which raises the concerns of uncertainty stressed by the conservative school of thought (discussed above).<sup>206</sup>

Further, both the main judgment and that of Froneman J undertook the procedural inquiry of the two-fold test (section 8(3)). While Froneman J was of the view that his alternative interpretation is reasonably practicable in the light of the purpose of the Act, the main judgment was of the view that such an interpretation violates the express wording of section 10(1)(b) and both its purpose and that of the Act as a whole.<sup>207</sup> The question then becomes whether the interpretation proposed by Froneman J is reasonably practicable in the light of the purpose of the Act. If not, then the only practicable interpretation will be that of the main judgment, which involves a reasonable and justifiable limitation of section 25(1).

First, section 10(1)(a) prohibits any "person" from conducting "the business of a home builder" without being licensed, while section 10(2) prohibits a "home builder" from building a home without being licensed. The Act defines a "home builder" as "a person who carries on the business of a home builder."<sup>208</sup> It appears that the two sections are linked and the use of the word "person" in section 10(1)(a) and the word "home builder" in section 10(2) indicates that these provisions aim to capture not only incompetent builders, but also those that have the competence to build homes but are not licensed under the Act. It is important to note that these provisions are not characterised by the non-receipt of payment. Section 10(1)(b) seems to be aimed particularly at incompetent builders in that it prohibits any "person"

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<sup>204</sup> See Rautenbach 2009 *TSAR* 623, where the author emphasises the importance of using the "nuanced process of justification" provided for in the limitation clause, as its disuse causes the Bill of Rights to be "increasingly denuded of meaning".

<sup>205</sup> *Cool Ideas v Hubbard* para 134.

<sup>206</sup> Brand 2016 *Stell LR* 251.

<sup>207</sup> *Cool Ideas v Hubbard* paras 29-34, 150.

<sup>208</sup> Section 1 of the Act.

from getting payment pursuant to "any agreement" with a home purchaser relating to the selling or building of a home without such a person being licensed in terms of the Act. The Act then attaches civil and criminal liability for the violation of sections 10(1) and (2).<sup>209</sup> It is important to note that section 21(1) does not distinguish between section 10(1)(a) and section 10(1)(b). This means that a person that falls within the conduct prohibited by section 10(1)(b) is faced with both the liability in terms of section 21(1) and the non-receipt of payment. This indicates that the legislature intended for incompetent builders who perform any conduct relating to the selling or building of a home under "any agreement" with a home purchaser without being licensed to incur liability and be deprived from getting payment. This also indicates that the view of Froneman J in support of late licensing is not reasonably practicable, as late licensing would defeat the purpose of sections 10(1)(b) and 21(1) and go against the wording of the former provision. Cool Ideas was unfortunate to fall within section 10(1)(b) owing to its subcontract with Velvori. Had it not subcontracted Velvori, it may have fallen within a different prohibition.

Secondly, Froneman J supports his interpretation by adding that section 10(1)(b) is not qualified by the incorporation of particular words (mentioned above) to reinforce the requirement for licensing.<sup>210</sup> However, this approach overlooks the fact that the section is formulated in negative terms, in that it uses the words "no person shall" at the beginning and it further uses a commanding term like "shall", which indicates that the section is peremptory and that the person at whom it is directed has no choice but to abide by its wording.<sup>211</sup> Ultimately, while the interpretation proposed by Froneman J attempts to save the Act from potentially violating the *Constitution*, it also has the effect of limiting the protection the legislature sought to afford to home purchasers. Consequently, it appears that the interpretation proposed by Froneman J is not reasonably practicable in the light of the purpose of the Act, and the interpretation in the main judgment is to be preferred.

As a final point, Jafta J reached a different conclusion and found that the construction agreement is invalid. In essence, he was of the view that when a statute prohibits the performance of certain conduct, a contract that falls

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<sup>209</sup> Section 21(1) of the Act.

<sup>210</sup> *Cool Ideas v Hubbard* para 159.

<sup>211</sup> Botha *Statutory Interpretation* 178; compare *Bezuidenhout* case above note 2 and *Motorvoertuigassuransiefunds* case above note 21. In the provision in question (s 10(1)(b)) the word "shall" is used in a section that is formulated in negative terms which strongly indicates that it is in fact peremptory; also see the *Lende* case above note 23; the *Henry* case above note 12.

within such conduct is automatically invalidated by the prohibition, as the legislature intended to prevent such a contract through the prohibition.<sup>212</sup> In the light of the test for statutory illegality set out above, Jafta J's view should be rejected as it incorrectly reflects the legal position relating to statutory illegality.

#### **4.2 The manner in which the CC purports to constitutionalise the test**

In considering whether equity considerations apply in this case, the main judgment found that they were not applicable and even if they were, it is undesirable for equity considerations to be applied in individual cases in order to circumvent the clear and unambiguous wording of a statute.<sup>213</sup> In this regard Froneman J disagreed and pointed to the court's earlier decision that in assessing whether a term of an arbitration agreement violates public policy, the public policy scale must be informed by the "spirit, purport and objects" of the Bill of Rights.<sup>214</sup> It must be noted that the operation of equity considerations as envisaged by section 39(2) of the *Constitution* does not seek to circumvent the clear and unambiguous wording of a statute, but ensures that the "application" and "interpretation" of that statute enhances and is in line with the "objective normative value system"<sup>215</sup> that is the Bill of Rights. The question to be determined relates to the applicability of equity considerations as envisaged in section 39(2) of the *Constitution*.

The direct horizontality of the Bill of Rights means that it creates rules and remedies of its own in cases where ordinary rules of law are not in line with its provisions.<sup>216</sup> On the other hand, the indirect horizontality of the Bill of Rights means that the Bill of Rights is seen as an "objective normative value system" which represents a community of values that must be reflected in the interpretation, development or application of "all law".<sup>217</sup> When applied in this manner, the Bill of Rights does not create legal rules but operates through the rules of law by requiring its underlying values to be reflected in the application of such legal rules.<sup>218</sup> As stated above, when a specific right is implicated, the courts should approach the matter in accordance with the two-fold test advanced by Bhana. As submitted by Bhana (and seen above) the two-fold test involves an interaction between direct and indirect horizontality at both levels of the two-fold test to the extent that the barrier

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<sup>212</sup> *Cool Ideas v Hubbard* paras 98-102.

<sup>213</sup> *Cool Ideas v Hubbard* para 52.

<sup>214</sup> *Cool Ideas v Hubbard* para 124.

<sup>215</sup> Currie and De Waal *Bill of Rights Handbook* 31.

<sup>216</sup> Currie and De Waal *Bill of Rights Handbook* 31.

<sup>217</sup> Currie and De Waal *Bill of Rights Handbook* 31.

<sup>218</sup> Currie and De Waal *Bill of Rights Handbook* 31.

between direct and indirect horizontality is largely left permeable.<sup>219</sup> Therefore, even when a specific right is implicated, its "spirit, purport and objects" must be investigated and enhanced through the interpretation, application or development of the relevant law. In addition, it is submitted that section 39(2) provides for the indirect horizontality of the Bill of Rights as informed by its application in terms of section 8(1) and mandates the courts to adopt an interpretation of a statute that enhances the Bill of Rights and its underlying values.<sup>220</sup> It is further submitted that section 39(2) applies in all matters even where no guaranteed substantive right is implicated, even in cases where a party to the dispute does not base its case on section 39(2).<sup>221</sup> Therefore, equity considerations will apply in all matters – when a specific right is implicated they will be considered within the substantive inquiry of the two-fold test in considering the "spirit, purport and objects" underpinning that right (and the fundamental constitutional values), and when no right is implicated equity considerations will apply through existing legal rules. The guidelines provided by the CC in *Hyundai Motor Distributors* should be used as the point of departure in the investigation of the content of the "spirit, purport and objects" underpinning a particular right or the Bill of Rights as a whole. As such, Froneman J was correct in his finding that equity considerations were applicable, but he failed to ground his consideration of the value of fairness either in the "spirit, purport and objects" underpinning the implicated right or in the broader fundamental values of the *Constitution*.

#### **4.3 Desirability of the CC's approach to the test and its constitutionalisation**

While the main judgment and that of Froneman J largely consider the relevant factors of the test, they do not properly deal with the issues relating to the impact of the *Constitution* on the matter at hand. The difficulty lies in the determination of the proper approach to the interpretation of section 10(1)(b) of the Act in order to facilitate Cool Ideas' enjoyment and realisation of its constitutional property right as envisaged by section 25(1) of the *Constitution*. On this point, the main judgment seems to have gone to the extremes of objectivity in interpreting the relevant provision, while Froneman J seems to have gone to the extremes of subjectivity. It is submitted that statutes (as laws of general application) should in principle be interpreted

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<sup>219</sup> Bhana 2013 SAJHR 375.

<sup>220</sup> Bhana 2013 SAJHR 372; also see Currie and De Waal *Bill of Rights Handbook* 57; the *Botha* case para 28.

<sup>221</sup> Bhana 2013 SAJHR 372; also see Currie and De Waal *Bill of Rights Handbook* 57; the *Botha* case para 28.

objectively to apply broadly within the community.<sup>222</sup> However, even within this objective interpretation, statutes should be contextualised by taking into account the broader society, its history and its goals. If statutes are interpreted to accommodate individual cases, this may lead to a situation where the law provides individual solutions for individual cases, which is undesirable and renders the law unworkable. In order to make statutory interpretation more accommodating in individual cases, within the application of the test for statutory illegality, courts may use the "balance of convenience" test. The "balance of convenience" test allows the court to investigate the implications of its decision within the context and circumstances of the case before it. Here it can adjust its decision in relation to the hardships and injustices that it may cause to the parties involved (as discussed above). Therefore, the ideal approach to the constitutionalisation of the test is somewhere between that of the main judgment and that of Froneman J.

## 5 Conclusion

This paper has explained how the test for statutory illegality is meant to operate. It has done so in the following terms. When the legislature has not clearly stated that an agreement that violates a statutory prohibition is invalid, the courts should consider the overall effect of the following factors – the language of the provision in question, the object of the provision in the light of the object of the statute as a whole and the mischief it seeks to prevent, the presence of civil or criminal liability, any perceivable implication that may result from declaring the agreement invalid, and the constitutional mandate of promoting the "spirit, purport and objects of the Bill of Rights,"<sup>223</sup> When a specific right is implicated, the courts must consider the matter in the light of sections 8(2) and (3) of the *Constitution*, which consideration involves a two-fold test – a substantive inquiry (embodied in sections 8(1) and (2) of the *Constitution*) and a procedural inquiry (embodied in sections 8(3) and 39(2) of the *Constitution*).<sup>224</sup> Courts must weigh up these factors with a view to exercising a value judgment to determine whether the contract is valid or void. The relative weight of each factor depends on the

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<sup>222</sup> Van Staden 2015 *Stell LR* 550-582. Van Staden explains that this principle advances the notion that everyone is equal before the law and is in line with s 36(1) of the *Constitution*, which allows only a law of general application to limit a constitutional right.

<sup>223</sup> *ABSA Insurance Brokers* paras 238I-239A; also see *Contractprops* para 4; Hutchison and Pretorius *Law of Contract* 182; Bhana, Nortje and Bonthuys *Student's Guide* 166-167; *Metro Western Cape* paras 188G-H.

<sup>224</sup> Bhana 2013 *SAJHR* 366-367.



circumstances of the case.

Then the paper investigated the CC's application of the test for statutory illegality. Here it criticised the main judgment for its incomplete undertaking of the sections 8(1) and (2) inquiry, as it neither took into account the "spirit, purport and objects" underpinning section 25(1) nor the fundamental values of the *Constitution*. It also criticised Froneman J's judgment for not connecting the value of fairness with the "spirit, purport and objects" underpinning section 25(1) or the broader fundamental values of the *Constitution*.

Then it considered the applicability of equity considerations in this case. Here it pointed out that the operation of equity considerations ensures that the "application" and "interpretation" of the statute in question enhances and is in line with the "objective normative value system"<sup>225</sup> that is the Bill of Rights. In this regard, it found that equity considerations apply in all matters. When a specific right is implicated, equity considerations should be considered within the substantive inquiry of the two-fold test in considering the "spirit, purport and objects" underpinning that right (and the fundamental constitutional values). When no right is implicated, equity considerations should apply through existing legal rules as envisaged in section 39(2) of the *Constitution*.

Lastly, it considered the desirability of the CC's approach to the application of the test and its constitutionalisation. Here it found that the main judgment and that of Froneman J largely consider the relevant factors of the test, but the former goes to the extremes of objectivity in interpreting the statute, while the latter goes to the extremes of subjectivity. It pointed out that the court could have used the "balance of convenience" test to adjust its decision to accommodate the context and circumstances of this case. Consequently, the approach to constitutionalising the test lies somewhere between that of the main judgment and that of Froneman J.

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### **List of Abbreviations**

|    |                      |
|----|----------------------|
| AD | Appellate Division   |
| CC | Constitutional Court |

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|            |                                              |
|------------|----------------------------------------------|
| NHBRC      | National Home Builders' Registration Council |
| SAJHR      | South African Journal of Human Rights        |
| SALJ       | South African Law Journal                    |
| SA Merc LJ | South African Mercantile Law Journal         |
| SAPL       | South African Public Law                     |
| SCA        | Supreme Court of Appeal                      |
| Stell LR   | Stellenbosch Law Review                      |
| TSAR       | Tydskrif vir die Suid Afrikaanse Reg         |