SACHS J ABRIDGED JUDGMENT

Barkhuizen v Napier

121. The facts in this case are as scanty as the relevant bundle of contractual terms are voluminous and the legal implications vast. The parties are the applicant, Mr Barkhuizen, and Mr Napier, representing an insurance broking company, Hamford (Pty) Ltd (Hamford). They agreed on a statement of facts in the Pretoria High Court in the following spartan terms:

> "The applicant was at all relevant times insured by Hamford. On 24 November 1999 the applicant's insured motor car, a BMW with registration number JSM 825 GP, was involved in a motor car accident. He duly informed the insurer of the event on 2 December 1999. On 7 January 2000 Hamford repudiated the claim of the applicant in writing. On 8 January 2002 the applicant served the particulars of his claim on Hamford."

122. The time periods were of particular importance because Hamford relied on a provision in one document in the bundle to the effect that if they rejected liability for any claim, they would be released from liability unless summons was served on them within 90 days of repudiation. They entered a special plea dependent on the enforcement of this provision. When compared with the normal prescription period for launching contractual claims, 90 days is undoubtedly a very short obligatory period for the institution of legal proceedings. But the primary question, in my opinion, is not whether Mr Barkhuizen was obliged to show on the facts of the case that this time period operated in practice unfairly against him. The basic issue, I believe, is whether, objectively speaking, and taking account of the fact that the clause relied upon was contained in a standard form document annexed to but not forming an intrinsic part of what appears to have been the actual negotiated terms of

the contract, the enforcement of the time-bar would be consistent with public policy in our new constitutional dispensation.

123. This raises the issue of whether and to what extent concepts of consumer protection require that received notions of sanctity of contract be revisited. Should considerations of public policy in our present constitutional era compel courts to refuse to give legal effect to an imposed, onerous and one-sided ancillary term buried in a standard form contract that unilaterally and without corresponding advantage, limits the enjoyment of an important constitutionally protected right, namely, that of access to court? In my view, the stated facts when coupled with the bundle of contractual documents contained in the Particulars of Claim, are sufficient to enable this Court to pronounce without further evidence on the public policy issues raised.

124. In this respect I feel that the enquiry made by Ngcobo J with regard to the fairness of the provision did not go far enough. In my view, what contractual fairness in the light of the Constitution requires is a special examination of the provenance of the time-bar and not just an analysis of whether Mr Barkhuizen has shown that he was in fact treated unfairly by its operation. The question is whether the fairness that public policy demands, permits the invocation at all by Hamford of the clause. In my view the answer can be found without further evidence. No question of onus arises. The documents speak for themselves.

The actual contractual arrangements

125. In considering the appropriate manner in which to evaluate the time-bar, it is impossible to avoid going through the tedious process of examining the four documents before this Court which are said to establish the contractual arrangements in which it appears. There has been no suggestion from either party that there are any

other relevant factors bearing on these arrangements, though it does appear from the documents that what was involved was a renewal of an insurance policy previously entered into.

126. Before considering the fourth and last document I note three points. The first is that it appears from the documents themselves that the negotiations were largely if not completely conducted by correspondence, and that these three contractual documents were prepared and signed by Hamford, with the terms being based on information provided by the applicant, recorded by Hamford and intended to be binding if Hamford was not advised to the contrary within 14 days. The second is that no time limitation for bringing proceedings is referred to in these three documents. And the third is that no mention whatsoever is made of any further document to be regarded as part of the contract, that is, the correspondence does not refer to an attached contract of re-insurance with Lloyd's, the fourth document included in the bundle. I now turn to consider the status of that fourth document.

127. *The fourth document:* The fourth document is a printed document of 29 pages, each headed with the word "Lloyd's" under which is stamped the words "Hamford: Sertifikaat van Versekering"

128. Before considering the fourth and last document I note three points. The first is that it appears from the documents themselves that the negotiations were largely if not completely conducted by correspondence, and that these three contractual documents were prepared and signed by Hamford, with the terms being based on information provided by the applicant, recorded by Hamford and intended to be binding if Hamford was not advised to the contrary within 14 days. The second is that no time limitation for bringing proceedings is referred to in these three documents. And the third is that no mention whatsoever is made of any further document to be regarded as part of the contract, that is, the correspondence does not refer to an

attached contract of re-insurance with Lloyd's, the fourth document included in the bundle. I now turn to consider the status of that fourth document.

129. *The fourth document:* The fourth document is a printed document of 29 pages, each headed with the word "Lloyd's" under which is stamped the words "Hamford: Sertifikaat van Versekering"

131. On the fourth page in a section headed "General", the first five lines purport to state the contractual relationship between the Insured (whose name is not given) and the Insurer. They read:

> "The Insurer agrees to insure the Insured, where he holds insurable interest in the property, in respect of the insured events subject to all the terms, exceptions and conditions contained herein or endorsed hereon upon the payment and acceptance of the premium as specified in the Schedule for the period of insurance. The proposal form completed by the Insured shall be the basis of this option . . . of the Insurer by payment, replacement, reinstatement or repair."

A multitude of provisions appear in the following 22 pages, dealing with terms covering such diverse themes as the meaning of headnotes, loss or damage arising out of computers not being compliant with the year 2000, averaging, automatic inflation margins, war and nuclear risks. Much space is taken up with "Special Exclusions".

132. If one pages through these 22 pages diligently, on the fourth page one comes across several headings, the fourth of which reads: "Claims Procedures and the Requirements". After stating that notification of an event likely to give rise to a claim must be given as soon as possible and the claim submitted within 30 days, eight further procedural requirements are stipulated. Then follows a sub-heading

"Requirements". Three are listed on this page. At the top of the fifth page are four more provisions, including the one at the heart of this litigation. Clause 5.2.5 reads:

> "If we reject liability for any claim made under this Policy we will be released from liability unless summons is served on Lloyd's SA or Hamford (Pty) Ltd within 90 days of repudiation."

More than 20 pages of small print in single space follow, covering a vast range of topics, much of it relating to matters such as sea-craft that could have no bearing on the relationship between the applicant and the insurer. Finally, at the foot of the 29th page the reader is informed as follows:

> "Copyright © 1997. The contents and layout of this document remains the sole and exclusive property of Hamford (Pty) Ltd and no part of it may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of Hamford (Pty) Ltd."

133. Reading the four documents together establishes that the negotiated terms between the parties are contained in Document 3, the Schedule, and not in Document 4, the self-entitled Certificate of Insurance. Furthermore, none of the documents are signed by the insured, and although Documents 1 and 2 (the letters signed on behalf of Hamford) draw attention to the Schedule, they do not refer to the Certificate of Insurance. Document 2 invites the applicant to peruse Document 3, the Schedule, and states that if he does not advise to the contrary within fourteen days, the details will be assumed to be correct. The applicant's attention is then specifically drawn to the need for compliance with security requirements and the importance of his vehicle being inspected.

134. The fourth document does not appear to have been discussed by the parties. Presumably, however, it had been attached in the previous year to the negotiated documents. I will assume in favour of the insurer that the applicant was aware of its existence and of the fact that in some rather vague way the relationship between the insurer and Lloyd's as reflected in it had a bearing on his relationship with Hamford. Yet not only was it not signed by him, there is no evidence from Hamford that its provisions were drawn to his attention. It was in fact a prolix, dense and hard to read example of a standard form contract, sometimes referred to as a contract of adhesion, and copyrighted to boot.

Standard form contracts

135. Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a "take-it-or-leave-it" basis, thus eliminating opportunity for arm's length negotiations.[4] They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the "fine print" of the contract.

136. As it is impracticable for ordinary people in their daily commercial activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through endless small print in endless standard forms, would be beyond the expectations that could be held of any ordinary person who simply wished

to get his or her car insured. What the insured in fact looks for is a reliable insurer that offers what he or she thinks are reasonable terms as regards cover and premiums. Indeed to expect the would-be purchaser of short-term insurance to seek full legal advice on every term in the standard form contract would both require that the expense of the premium be exceeded many times over, and result in the absurdity of the short term of the cover expiring before comprehensive clarity on each and every provision was obtained.

137. Standard form contracts, such as the one in the present case, undoubtedly provide benefits for those who produce and rely on them. In the context of mass production of goods and services, the use of standard forms gave rise to the most significant new phenomenon in the practice of making contracts in the twentieth century— the application of mass contracts to consumer transactions. For a business dealing with consumers, lawyers devised printed contracts which purported to govern exclusively the business relationship between the parties. Standard form contracts are thus ordinarily the product not of negotiations but of the employment of legal teams by sellers of goods and services to serve their interests. In a business context, such a standard form contract preserves the wisdom of the in-house lawyers about the best way in which to handle recurrent problems of negotiation and performance.

138. In many consumer and business transactions, the contract will be concluded on the basis of a printed document which purports to contain all the terms of the contract. In some cases the printed document will be signed by both parties, but often it is merely handed over or posted at the time of the formation of the contract.[8] Some doubt has been expressed about the validity of such standard forms to count as contracts at all. The process often resembles an imposition of will rather than mutual

consent to an agreement, so these transactions have been described as contracts of adhesion.

139. The use of standard forms responds to two economic pressures. They reduce the transaction costs of contracting by making available at no extra cost a suitable set of terms. In addition, the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate sales staff. For these reasons, it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.

The legal status of standard form contracts

140. A strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom. Davis J has presented the argument in the following terms:

> "Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community — a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated.
>
> But the principles of equality and dignity direct attention in another direction. Parties to a contract must adhere to a minimum threshold of mutual respect in which the 'unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public

interest in the sanctity of contracts'. The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution. . . .

In short, the constitutional State which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*." (References omitted.)

141. I should add that the legal convictions of the community should not be equated with the convictions of the legal community. The doctrine of sanctity of contract and the maxim pacta sunt servanda have through judicial and text-book repetition come to appear axiomatic, indeed mesmeric, to many in the legal world. Their virtue if applied in an unlimited way is not self-evident, and their reach, if not their essence, have come to be severely restricted in open and democratic societies. This has happened over several decades through the overlapping effects of consumer protection struggles, scholarly critiques, legislative interventions and creative judicial reasoning. The jurisprudential pedestal on which it once imperiously stood has been singularly narrowed in the great majority of democratic societies. Our new constitutional order, I believe, further attenuates its one-time implacable application.

142. These broad considerations provide an important backdrop against which public policy in the present matter has to be viewed. More directly, there appear to be three specific factors which in combination raise serious questions about the enforceability on public policy grounds of the specific standard form clause in the present matter.

143. The first is that an expressly guaranteed constitutional right is engaged, namely the right to have a dispute between the parties resolved by a court.[14] This is an area where public and private law meet. The courts are there precisely to ensure that

legal disputes are not settled through self-help but through recourse to an impartial tribunal. Indeed, the courts have developed the law of contract over the centuries because they have been relied upon to hold the balance between the parties and establish appropriate norms and standards for regulating their respective rights. The special significance of the right of access to the courts will be dealt with later.

144. Secondly, the area of activity relates to matters of considerable public concern. Insurance for car users is not a luxury but part and parcel of every-day life, a virtual necessity for many vehicle owners. The insurance industry deals with members of the public who come off the streets and place their faith in the solvency, efficiency, probity and integrity of the insurers. Insurance companies compete on aspects concerning cover, no-claim bonuses and premiums, not on the basis of what appears in the small print. Its public service character is reflected in self-regulation as an industry, and the appointment of an Ombudsman. Insurance thus has become a necessity for large sections of our society— it is not a personal indulgence. The insurance industry is highly organised and large insurance companies play a major role in public life. The public interest in promoting fair dealing in insurance contracts so as to protect relatively vulnerable individuals contracting with large, specialist business firms, is accordingly strong.

145. In this respect legal tradition, if unmodified, will frequently lag well behind social and commercial reality. As Rakoff pointed out in an influential article, "freedom of contract" has long been defined in terms of the separation of the market and the state, private and public law; at its fullest reach, it is the doctrine of laissez faire. But to use such a framework to deal with contracts of adhesion, is to err both in valuing highly a claim to freedom that is inapposite, and to overlook the elements of liberty that are actually at stake. Far from enforcement of the organisation's standard

form terms furthering fundamental human values, the standard document grows out of and expresses the needs and dynamics of the organisation. He explains that:

> "Emphasis on the standard analysis . . . obscures the manner in which individual freedom really is at stake. A conception of contractual freedom modelled on the opposition between individual and state is inadequate in industrialized, organized and institutionalized society. Institutions other than the state can and do dominate the individual within the framework of private law as ordinarily conceived. . . . What the courts should say is that enforcing boilerplate terms trenches on the freedom of the adhering party. Form terms are imposed on the transaction in a way no individual adherent can prevent, and a major purpose and effect of such terms is to ensure that the drafting party will prevail if the dispute goes to court. The adhering party is remitted to such justice as the organization on the other side will provide. . . . [T]he use of contracts of adhesion enables firms to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms." (Footnote omitted.)

146. I would add that this is not to say that once we recognise that the legal enforcement of standard form terms provides the basis for domination of this sort, we are pushed toward the conclusion that such terms should be completely unenforceable. Such a conclusion would be over-robust. If business firms play an important part in public life, and if their ability to do so relies significantly on the use of standard forms, some degree of use of the forms is sustainable. I will suggest later that what is required is neither a blanket acceptance of standard form terms, nor a blanket rejection, nor an ad hoc determination by each judge in accordance with his or her personal predilections as to what is fair or not. What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society. More specifically it calls for examination of the "tendency" of the provision

at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society.

147. Thirdly, the clause in question appeared in a classic example of a standard form contract. Unlike other leading cases that have been litigated on in recent years, where the challenged clause was one of which both parties were aware at the time of contracting, but was sought to be struck down because of its extortionate character, the clause in the present case was not signed by Mr Barkhuizen, but buried in a voluminous add-on document. On the face of it the actual bargain struck between the parties was contained in the letter sent by Hamford to the applicant, and the Schedule that accompanied it. These two documents convey what the parties actually agreed to. The Certificate of Insurance with Lloyd's in which Clause 5.2.5 can be found, was sent to him in circumstances not clear from the record. It contains endless provisions in a font sufficiently small to reduce the costs of the paper used while simultaneously discouraging any reasonable person from ploughing through it. Clause 5.2.5 sought unilaterally and without giving Mr Barkhuizen any corresponding benefits, to impose onerous terms on him that he had apparently not knowingly agreed to, and to restrict the ordinary rights he would have had to seek enforcement of his claim under the law of contract.

148. In my view, it is the combination of these three factors that characterises this case and establishes the specific matrix in which it must be evaluated. Of particular relevance is the enforceability or otherwise of terms which might technically be brought within what is referred to as "the contract", but which did not form part of the actual consensus or real agreement between the parties. The potential

unreasonableness in the eyes of the community, leading to a possible finding of violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be aware.

149. It is appropriate at this stage to consider the relevance, if any, of the fact that the applicant was not a poor and illiterate person likely to be bamboozled by any complex legal document. Standard form contracts by their very nature have standard effects. The fact is that one-sided clauses, the existence or import of which the consumer is likely to be largely or totally unaware, hit the computer-literate owner of a relatively new BMW who buys online, with the same impact as they do the owner of the jalopy close to the scrap yard, who signs with a thumbprint. It is not only the indigent and the illiterate who in practice remain ignorant of everything the document contains; the fact that consumer protection is especially important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers. If, in our new constitutional order, the quality of public policy, like the quality of mercy and justice, is not strained, then the wealthy must be as entitled to their day in court as the poor.

150. The questions before us, then, are as follows: does public policy, propelled by the letter and spirit of our Constitution, regard received notions of contract law as encapsulated in the notion of sanctity of contract, to be inviolate and unchanging? Does it countenance a person being bound by onerous terms even though they were unilaterally attached to the actual bargain made? To what extent does public policy in

an open and democratic society require that the service-provider who authored such provisions show that these terms were specifically drawn to the consumer's attention? How central to public policy is the fact that these terms attenuate a constitutionally protected right in a manifestly one-sided way? And what weight does public policy attach to the reality that the person negatively affected cannot in the circumstances reasonably be expected to have understood the provision to constitute an obligation actually undertaken by him or her under the contract? To answer these questions it is necessary to look at the manner in which contract law has evolved over the centuries in relation to the central issue of mutual consent lying at the heart of contractual obligation. Freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy. Yet the evolution of contract law suggests that the notion of sanctity of contract has been used to undermine rather than reinforce true volition.

The evolution of contract law: from actual to imputed consensus

151. The right, and power, to make a contract evolved over time to become a central part of the bundle of legal rights that constituted legal personality. Indeed, as Maine demonstrated in the nineteenth century, the emergence of the concept of contract as a means of organising relationships between people, was seen as marking the maturity of a legal system. The historical movement from "status to contract", in his famous phrase, was not only vital, it was inevitable. The making of contracts was an aspect of freedom. It is not surprising, therefore, that the common law, which historically was a powerful tool in the evolution of political freedom, should adopt the attitude that the less interference with an individual's exercise of the right and power to contract, the better. As Atiyah has shown, this attitude of the common law vis-à-vis contract was intrinsically bound up with the economic doctrine of laissez faire. It

presupposed freedom to contract or not to contract, and non-interference by the courts under the governing principles of the law of contract. What gave a particular character to contract law, however, was the development of the notion that consent to contractual terms could be inferred objectively.

152. Atiyah explains the process in the following terms:

"When we turn to contract law itself, the decline in the importance of consent, or free choice, is manifest in a variety of ways. I need not dilate on the extensive use in modern times of standardised written contracts which are drawn up by one party and merely presented for signature to the other. This phenomenon has been much written about and is now widely acknowledged to involve substantial derogations from the consensual model of contract. Frequently one party has little effective choice in the matter at all, and neither reads nor understands, nor in any real sense agrees to the terms contained in such standard documents. But it is worth pausing to ask how such documentary contracts ever came to be accepted as possessing the validity of genuine agreements. Given the importance attached to the element of consent in the classical model of contract, how was it that the judges were able to conceive of such written documents as contractual?"

153. His answer is that when faced with written documents, the courts in practice looked less for signs of genuine agreement, and insisted more on the external conduct of the parties. Once the document could be treated as contractual, it made the task of the courts so much easier; the dispute could be solved by looking at the terms in the document, and there would be no need to go into the broader and more difficult questions involved in searching for "implications", or trying still more broadly to find a just solution to the dispute.

154. In recent decades, however, more emphasis has been placed on restoring a truly consensual approach. This has come about not because judges have been prepared to overturn settled principles of the common law in order to dispense "palm tree justice". As Fridman explains, a prime factor in this evolution may well be the greater interest of the State, i.e. society at large, in the regulation of private arrangements. A contract may no longer be of concern solely to the parties. The public in general may be concerned with the consequences of such arrangements,

whoever the parties and whatever the subject-matter of the arrangement. “Our more liberal, democratic and egalitarian society,” he states, “places more emphasis upon the achievement of just result than on the maintenance of technical doctrine derived from precedents that stretch back several centuries.”

155. Prolix standard form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. It may be said that far from promoting autonomy, they induce automatism. The consumer’s will does not enter the picture at all. Indeed, it could be contended that the question has moved from being one of whether judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.

156. A distinction needs to be drawn, then, between those aspects of the contract where the minds concerned actually met, and a range of surrounding provisions that were never discussed at all, but that, like Mount Everest, were just there. Little wonder that such provisions characteristically appear in small print. Their objective is not to record negotiated terms but to be as un-prominent as possible so as to provide the least possible distraction from finalising the contract, while securing the greatest obligatory reach for the consumer and the most-reduced prospect of liability for the provider. Thus, while businesspeople can get their lawyers to scrutinise the small print with professional lenses and advise accordingly, ordinary consumers cannot be expected to do the same. The result is that much of the contract is in reality not a record of what was agreed upon but a superimposed construction favouring one side. In my view, to treat mass-produced script as sanctified legal Scripture is to perpetuate

something hollow and to dishonour the moral and philosophical foundation of contract law. It certainly does not promote the spirit of openness central to our new constitutional order.

157. I now turn to consider the significance of these historical and philosophical considerations for the issue of unenforceability of contracts that go against public policy, as animated by the Constitution, in South Africa.

Public policy in South African contract law

158. As the majority in the Supreme Court of Appeal held in *Sasfin* the interest of the community or the public are of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.

159. The Court cited as authority what Innes CJ said in *Eastwood v Shepstone*:

> "Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result."

It went on to add that no court should therefore shrink from the duty of declaring void a contract contrary to public policy when the occasion so demands—

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be

careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."

In grappling with this often difficult problem, the judgment continued, it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. A further relevant, and not unimportant, consideration was that "public policy should properly take into account the doing of simple justice between man and man".

160. More recently the Supreme Court of Appeal was called upon to deal with the implications for public policy of a contractual term that inhibited access to the courts. In *Bafana Finance* Cachalia AJA, writing for a unanimous Court, said:

"That a court may not enforce an agreement because the objective it seeks to achieve is contrary to public policy is firmly part of our law. And in this determination 'public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.

. . . .

Our Courts have had no difficulty in declaring contracts contrary to public policy where their *tendency* . . . is to restrict or prevent a person from vindicating his or her rights in the courts. Thus in *Schierhout v Minister of Justice* Kotze JA stated:

> 'If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.'

. . . .

There can be no doubt that the *tendency* of the clause [in the present matter] is to deprive the respondent of his right to approach the court for redress from his parlous financial position. To deprive or restrict anyone's right to seek redress in court, as the

cases cited above make clear, is offensive to one's sense of justice and is inimical to the public interest." (Footnotes omitted.) (Emphasis in the original.)

161. While establishing the importance of contractual terms being compliant with public policy, these cases do not in themselves indicate whether, or to what extent, standard form contracts raise public policy concerns. I will accordingly seek to establish relevant objective factors that might provide pointers to what public policy requires with regard to standard form contracts in general, and to terms limiting access to court in particular. I will look at the following: international practice with regard to the status and reviewability of standard form contracts; research done and proposals made by the South African Law Reform Commission (SALRC), leading to the recent publication of the Consumer Protection Bill; academic opinion; and relevant statutory provisions regarding prescription and time limits for the bringing of civil proceedings.

Guidance from international practice

162. In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies. As Collins points out, one of the foremost general challenges for legal regulation of markets during the twentieth century was the requirement to limit the advantages which businesses could obtain against consumers by deploying standard form contracts. This has been a world-wide concern.

163. The SALRC has stated that "public policy . . . is more sensitive to justice, fairness and equity than ever before." It added that—

> "With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through 'interpretation' of contractual terms were sufficient, and that legislative action was required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, the Federal Republic of Germany, the Netherlands, and Australia as well. They are all based on the principle of good faith in the execution of contracts."

164. The United Kingdom standard form contracts are governed by a consumer protection statute of 1977 and Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts, which provides:

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

This broad provision is restricted in its scope by Article 4(2):

> "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, insofar as these terms are in plain intelligible language."

165. Collins observes, however, that when attention is focused on ancillary terms, the conception of fairness undergoes a shift. Instead of fairness being measured against a fair price, usually the ordinary market price, the criterion of assessment becomes one of a mixture of balancing reciprocal ancillary obligations and conformity to reasonable expectations. The idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damages for breach, should be matched by corresponding benefits to the other party. Conformity to reasonable expectations suggests that the ancillary terms should not

deviate from a reasonable package of terms for transactions of that type unless the parties have expressly negotiated the point. The courts are not permitted, then, to uphold a challenge to the fairness of a contract on the ground that the main subject matter of the contract represented a poor bargain. For challenges to ancillary terms, however, a combination of the ideas of balance of advantage and conformity to reasonable expectations will suffice.

166. It appears that a number of South American countries have also enacted legislation since 1990 providing for consumer protection against unfair contracts similar to legislation existing in so-called first world countries. According to the SALRC these statues were heavily influenced by the Mexican Consumer Protection Law of 1975 and the Brazilian Consumer Protection Code of 1990, as well as Spanish and French consumer protection law.

167. It is noteworthy, too, that in the case of long-term international commercial transactions reasonableness rather than purely formal compliance is regarded as the yardstick against which duties of requisite good faith are tested. This renders the issue of good faith one of discretion and understanding, rather than one of formalistic principles. What is reasonable depends on the circumstances of the case and the normative inquiry of how one should conduct oneself. The process is not a mechanical one of interpreting the parties' intentions in light of formalistic principles. Rather, it is more an attempt to determine what is deemed to be proper conduct. Nassar explains that:

> "Acknowledging a duty to cooperate, in situations where it is thought to best serve the contractual relationship and its goals, moves the contractual model away from a classical conceptualization — where individuals are free to conduct their businesses as they please, their agreements being the only self-imposed limitation — towards a relational one. Under the latter conceptualization, one is expected to conduct his

affairs in conformity with an existing set of values, or what one may call a code of conduct. As is the case with the general standard of good faith, reasonableness, as opposed to honesty, requires sincere efforts to further the contractual relationship and achieve its goals. By falling short of the behavioural standards required under the circumstances, one can wind up in breach of his contractual obligations, regardless of whether one has acted in bad faith — that is, dishonestly. The criterion to test the reasonableness of questioned activity is whether the conduct conforms to reasonable business judgment. A party's motivations for his conduct do not affect the determination of the standard of good faith performance."

168. The last word in this section belongs to an observation by the Hong Kong Law Commission that sums up much of the relevant argument:

"As Lord Atkin put it, 'finality is a good thing but justice is better'. Certainty is a pragmatic rather than a principled consideration craved by lawyers so that they can advise their clients upon their rights. We do not belittle certainty, but we do not feel it is paramount. Certainty in this context is sometimes sought to be justified by the principle of sanctity of contract, that a party must abide by his agreement. This assumes of course that a piece of paper signed by that party is truly his agreement. But in reality that party has not genuinely consented to the terms on that paper, which are in standard form and have not been read (or been expected to be read) by him, let alone been the subject of negotiation. The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining. Unfortunately, in modern life, there is rarely the time or the opportunity for such bargaining; it has been replaced by the convenient form and the standard clause."

Official proposals for statutory reform in South Africa on consumer protection

169. The whole question of the reviewability of allegedly unfair terms in contracts has been subjected to extensive research by the SALRC. Its conclusion was that the common law as it was being applied was inadequate for providing appropriate remedies in relation to contract terms that were unconscionable, oppressive or unreasonable. In its Report it pointed out that opinion had shifted substantially since

the time (1981) when Professor Hahlo of the University of Witwatersrand could write—

> "Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place."

170. In modern contract law, the Report stated, a balance had to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other. Its view was that there was a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced.

171. It acknowledged that the main objection to the said proposal was based on the uncertainty argument. This argument was a straightforward one: the main aim of a contract is to regulate the future relationship between the parties as regards a specific transaction. The very foundation of contract law was to create certainty, to protect the expectations of the parties, to secure to each the bargain made. That was why the idea of contract, based on autonomy of the will of freedom of contract, was the very basis of all commercial and financial dealings and practices, from the simple supermarket purchase to the most involved building contract. If a court was given a review power, it meant in practical terms that the court could re-make the contract, relieve one party of his or her obligations, wholly or partly, and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract,

whether or not that contract was going to be re-written by a court, using as its yardstick vague terms such as “good faith”, “fairness”, “unconscionability”.

172. The Commission, however, was not persuaded by these arguments. It accepted that any change effected by the proposed legislation would produce a measure of legal uncertainty and consequent litigation, at least in the short term, when many contracts might be challenged. The Commission was nevertheless of the view that this was a price that must be paid if greater contractual justice was to be achieved; that certainty was not the only goal of contract law, or of any other law; and lastly, in any event, that the fears provoked by the proposed Bill were exaggerated in the light of the experience of countries that had already introduced such legislation.

173. The Commission consequently recommended the enactment of legislation addressing the issue. Unreasonableness, unconscionability or oppressiveness should be the yardstick, and guidelines should be included in the proposed legislation. The Commission concurred with the view, however, that a court would apply more flexible criteria when a contract concluded by so-called business people was being considered, than would be the case where other contracting parties were involved.

174. To my mind, the findings of the Commission and the publication of the draft Bill provide strong evidence that public policy has moved radically away from automatic application of standard form contracts towards a more balanced approach in keeping with contemporary constitutional values. What public policy seeks to achieve is the reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition.

Academic opinion

175. Few issues seem to have united academic commentators as much as a jointly perceived need to ensure that courts refused on grounds of public policy to enforce contracts, or contractual terms, that were unfair or unconscionable. Aronstam's book published in 1979 was the precursor of a great body of literature calling for the updating of contract law in this respect. Leading writers on contract law commented on the unfairness of the manner in which standard form contracts operated. The judgment of the Supreme Court of Appeal which is being appealed against in this Court, observes the dismay amongst many academic commentators at the failure of that Court to develop the common law in a more robust manner so as to deal with perceived unfairness. It must be granted that it would be self-referential and inconclusive to take the views of academics as to what the legal convictions of the community are, as evidence of what actually constitutes these convictions. Nevertheless, taken with the other indices mentioned in this part of the judgment, I believe that the near-unanimity of scholarly opinion on the need for fairness in contracts, at the very least reinforces the approach that I am developing, and is manifestly in keeping with the constitutional values of human dignity, equality and freedom.

Statutory regulation as an indicator of public policy in respect of time limits

176. In determining the legal convictions of the community attention should also be paid to the manner in which the legislature has dealt with appropriate time periods with regard to when civil claims prescribe, as well as time limits for the institution of proceedings against the State. The declared purpose of the Institution of Legal Proceedings Against Certain Organs of State Act, as stated in its preamble, is to regulate and harmonise periods of time within which to institute legal proceedings

against certain organs of State and to give notice of such proceedings. Under section 2(2)(b), debts which became due after the commencement of this statute are governed by Chapter III of the Prescription Act. The effect of this is that the prescription period for delictual debts against the State organs governed by the Act is now three years. Similarly the Road Accident Fund Act provides for prescription of a claim after three years in a case where the identity of the driver or owner of a motor vehicle has been established, and after five years where the claim has been lodged in terms specified by the Act. It is doubtful whether public policy would not require us to look askance at the ability of large private firms that dominate the short-term insurance industry unilaterally to impose onerous rules against consumers, when these rules are forbidden to State organs dealing with public funds in the public interest.

The enforceability of Clause 5.2.5

177. Bearing in mind the above indicators as to what the legal convictions of the community are in relation to consumer protection generally, and the status of one-sided terms in standard form contracts in particular, I turn to consider the enforceability of Clause 5.2.5 in the light of public policy as currently infused with constitutional values.

178. This Court has on different occasions upheld appeals from decisions of the Supreme Court of Appeal on the ground that that Court had failed to take due account of the duty to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights. In the present matter however, Cameron JA, writing for a unanimous court, forcefully underlined the principle that—

> "[T]he courts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus 'public policy' now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."

Given this clear awareness of the duty, I would ordinarily be reluctant to cavil at the evaluation made by the Supreme Court of Appeal of how best to fulfil that duty and ensure that the common law is imbued with, rather than alien to, constitutional values.

179. Because of the line of reasoning he followed, however, Cameron JA did not in the end find it necessary to consider the possible effect of the Bill of Rights on the enforceability of Clause 5.2.5. He held that the applicant had no rights at all that needed to be viewed through the optic of the Constitution, summarising his reasoning as follows:

> "On the evidence before us, there is nothing to suggest that the plaintiff did not conclude the contract with the insurer freely and in the exercise of his constitutional rights to dignity, equality and freedom. This leads to the conclusion that constitutional norms and values cannot operate to invalidate the bargain he concluded. That bargain contained at its heart a limitation of the rights it conferred. The defendant's plea invokes that limitation, and there is nothing before us to gainsay its defence."

While respecting the elegance of the reasoning, I cannot support it.

180. As I see it, the bargain did not in reality contain at its heart a limitation of the rights it conferred. At its heart was an agreement that covered the use to which the car could be put, the damage to be insured against and the premiums to be paid. Possibly

because of the manner in which the matter was argued, Cameron JA did not deal with what I believe to be the most salient feature of the contractual arrangement in dispute in this matter, namely, that the time-bar was contained in an ancillary clause buried in the dense standard form text of the added-on Lloyd's Certificate of Insurance. Indeed, Clause 5.2.5 was as far removed as one could get from the heart of the contract, obscurely located in the fourth document of the bundle annexed to the Particulars of Claim. It appears not to have been part of the actual bargain concluded, and not to be a provision of the kind which a reasonable car-owner renewing an insurance policy could be expected to read, let alone digest.

181. Thus, after having followed due procedures in reporting the accident, the applicant undoubtedly had a right given to him under the contract and buttressed by section 34 of the Constitution, to sue Hamford for the damage to his car. The matter at issue, then, is the one posed by virtue of the laconic pleadings to be resolved as a matter of law: in the light of the importance that considerations of public policy, now animated by section 34 of the Constitution, give to the right of access to court, should Mr Barkhuizen's right to proceed with his claim be taken away at all by Clause 5.2.5 which was tucked away in the small print of the added-on Certificate of Insurance?

182. It is not, of course, the smallness of the print itself that is significant, though its minimalism may be symptomatic of a deeper malady. Whether small print is legally innocuous or legally obnoxious will depend not so much on the font as on the subject matter. Thus, absent evidence to the contrary, one may assume that even when in small print, provisions which clearly and directly define the extent of the risk and hence influence the premium to be charged, merely record what has actually been agreed upon between the parties. In the present agreement, the Schedule contains boxes to be filled in so as to distinguish insured drivers on grounds of age and gender,

and whether the insured vehicle is used for business or private purposes only. It is in a document provided to Mr Barkhuizen at a time when he was invited to consider the terms. One may fairly infer that the information recorded is descriptive of the bargain actually struck. There is nothing intrinsically unreasonable or hostile to the consensual nature of contract law in an open and democratic society, in the idea of determining the premium on grounds which the insurer may believe are statistically or actuarially significant, to which both parties have agreed and in respect of which no question of offensive stereotyping or demeaning profiling arises.

183. In the case of Clause 5.2.5, however, the position is different. And this is not because it is in small print, nor merely because it bears harshly on the applicant. Its enforceability is open to challenge because on its face it—

- was contained in a standard form document;
- was not part of the actual terms on which reliance was placed by the parties when the agreement was reached;
- was prepared with legal expertise on behalf of insurers who specialise in handling insurance claims and routinely engage in litigation, for use on a general basis in relation to people usually without legal expertise and who in the ordinary course of events could not be expected to get a legal opinion on the document in which it appears;
- wholly favours the party that drafted it without any apparent reciprocal benefit for the insured;
- lies buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent on to the insured after negotiations had been completed;

- is not highlighted in the text so as visually, and in keeping with internationally accepted standards of consumer protection, to bring the consequences of non-compliance to the attention of the insured at the time the contract was entered into;
- similarly, is not accompanied by a requirement that its import be timeously brought to the attention of the insured at the moment of repudiation, when the time period begins to run against the insured who stands to be prejudiced by non-compliance with its provisions;
- is for a time period less than ten per cent of that in respect of which either an ordinary contractual claim, or else a claim against the Road Accident Fund, would prescribe;
- has the effect of significantly limiting a right to have a dispute settled by a court, a right long recognised by the common law and now guaranteed as a fundamental right by the Constitution;
- is not subject to express qualifications in case of impossibility or difficulty of compliance, nor apparently permissive of condonation where considerations of justice would require that its harshness be tempered by prolongation of the time;
- impacts in an unbalanced way, not generally permitted in open and democratic societies, on the relationship between insured and insurers in respect of an activity of considerable public interest; and finally,
- when invoked does not simply limit or qualify the insurance claim, but wipes the claim out altogether, enabling the insurer to keep the premium, while the insured loses the right to find out if he or she should in fact have been paid for the damage done to his car.

Taken together, as they must be, I believe that these factors establish convincingly and on an objective basis, and without more being required, that Clause 5.2.5 in and of itself offends against public policy in our new constitutional dispensation and should not be enforced.

Conclusion

184. Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world. Yet just as the best should not be the enemy of the good, so the worst should not be the friend of the bad. As our society normalises itself, issues that were once relatively submerged now surface to claim full attention. In this way achievement of the larger constitutional freedoms enables us to attend to and develop the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society. People should not feel that arcane, lawyer-made and highly technical rules beyond their ken, leave them with a sense of having been cheated out of their rights by the big enterprises with which they perforce have to do business. And as long as government and the legislature continue to be preoccupied with major questions of social transformation, and only now begin to tackle consumer protection in a comprehensive way, the common law, under the impulse of the values of our new constitutional order, is called upon to shoulder the burden of grappling in its own quiet and incremental manner with appropriate legal regulation to ensure basic equity in the daily dealings of ordinary people.

185. I would hold, then, that in the particular contractual circumstances of this case, considerations of public policy animated by the Constitution dictate that the time-bar clause in question limiting access to court, should not be enforced, and that the

insured should not be deprived of his right to proceed with his claim on the merits. On this basis, and leaving open for future consideration whether onerous and unilaterally imposed terms in standard form contracts of adhesion should in general be regarded as offensive to public policy in our new constitutional dispensation, I would uphold the appeal and dismiss the special plea.