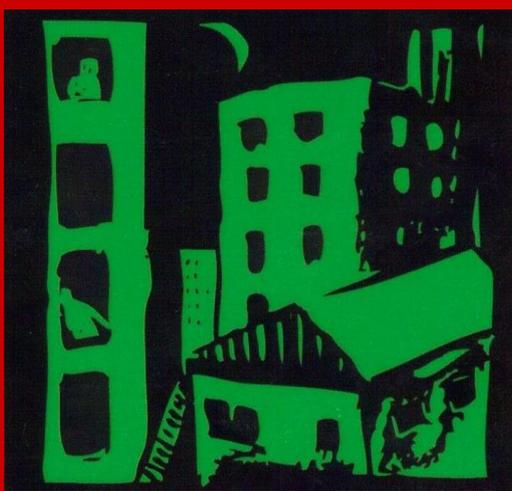


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**Deciding non-constitutional matters of general public importance in South African law: can constitutional values be used?**

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**ABSTRACT**

*The Constitution of the Republic of South Africa, 1996 is supreme. It can be used to assess the soundness of various policies and laws. This statement has however been challenged based on the apparent limited range of the provisions of the Constitution. The Bill of Rights enshrined in the Constitution comprises of dedicated rules intended to address certain issues. Owing to this supposed*

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\* This article is sourced from part of a chapter of the author's LLM dissertation (University of Cape Town).

*limitation, some have questioned the tag of supremacy attached to the Constitution. The article examines how the Constitutional Court has decided issues which did not raise clear constitutional questions to determine whether values could be used to decide various issues of law. This determination, similarly, informs whether constitutional values could be used to administer matters of general public importance that are not founded on clear constitutional questions.*

**Keywords:** Constitutional Court; constitutional values; matters of public importance; public policy; the common good.

## 1 INTRODUCTION

The extension of the jurisdiction of the South African Constitutional Court to decide matters of general public importance creates a dilemma about the standard that the Court should assume. Some have argued that the Constitution of the Republic of South Africa, 1996 (the Constitution) is not an all-embracing instrument that can be used as a canvas to paint the South African law.<sup>1</sup> Others have argued that the determinacy of legal rules should be protected from the potentially disruptive influence of flexible standards and constitutional values.<sup>2</sup> Accordingly, the Constitution is not sufficient to direct matters that do not raise clear constitutional questions. They argue that matters that do not raise clear constitutional questions should not fall within the scope of constitutional values, and should not be adulterated by the injection thereof.<sup>3</sup> It was long held that the use of policies not grounded on clear rules or principles of law leads to uncertainty. Burrough J in *Richardson v Mellish*<sup>4</sup> held:

“ I, for one, protest, as my Lord has done, against arguing too strongly upon public policy. It is a very unruly horse, and when once you get astride it you never know where it will carry you.”<sup>5</sup>

The question then is: should the courts decide non-constitutional matters with the aid of the instruments of the common law or customary law, because they guarantee certainty, devoid of the need for a broader constitutional alignment? This question is

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<sup>1</sup> Van der Vyver JD “The private sphere in constitutional litigation” (1994)10 *THRHR* 360; Van der Merwe D “Constitutional colonisation of the common law: a problem of institutional integrity” (2000) *Journal of South African Law* 12; and Visser PJ “A successful constitutional invasion of private law” (1995)11 *THRHR* 745.

<sup>2</sup> Botha H “Freedom and constraint in constitutional adjudication” (2004) 20 *South African Journal on Human Rights* 249 at 267.

<sup>3</sup> See Botha (2004) at 249.

<sup>4</sup> *Richardson v Mellish* (1824) 2 Bing 229.

<sup>5</sup> See *Richardson v Mellish* (1824) 2 Bing at 252.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

located in the notion that such matters would not raise clear constitutional questions; thus the Constitution may not be readily invoked to resolve such matters.<sup>6</sup> If this is the correct assumption, then the Court should adopt measures outside of the frontiers of the Constitution in adjudicating matters that do not raise obvious constitutional questions. Is this what the legislature intended when extending the jurisdiction of the Court?

On the contrary, the Constitution states that it is supreme, and that all other matters must conform to it.<sup>7</sup> This then paints a picture different to the description of the constricted Constitution articulated above. The theory of an all-embracing Constitution when properly analysed leads to the inference that recommends the infusion of constitutional values into any interpretation of the law.<sup>8</sup> Therefore the courts are mandated to promote the constitutional promise, particularly to ensure that policy, law or conduct runs concurrently with the promise.<sup>9</sup> However, what are those foundations and how can they assist the courts in interpreting the law? This is the question the article seeks to answer. Freedom, equality and human dignity are principles that embody constitutional values,<sup>10</sup> but these values also have sub-elements, for example, fairness, reasonableness and equity.<sup>11</sup> The author argues that these values should be invoked in matters that do not raise clear constitutional questions. It is argued that when the Constitution is not applied directly to private disputes it does not mean it has no bearing upon such matters; judges are mandated to interpret the law in a manner that comports with constitutional values.<sup>12</sup> Weinrib asserts that judges have a duty to sustain constitutional values, and that this task should be accomplished through proper interpretation.<sup>13</sup> Has this philosophy conferred a different responsibility on the courts and have the courts promoted constitutional values in all matters?

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<sup>6</sup> *S v Boesak* 2001 (1) SA 912 (CC) at para 15; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at paras 9 & 10.

<sup>7</sup> See s 2 of the Constitution.

<sup>8</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44.

<sup>9</sup> *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) at para 99: "Where State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so."

<sup>10</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 3.

<sup>11</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (*Barkhuizen* (2007)) at para 104.

<sup>12</sup> Sprigman C & Osborne M "Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes" (1999) 15 *South African Journal on Human Rights* 25 at 28.

<sup>13</sup> Weinrib LE "Sustaining constitutional value: the Schreiner legacy" (1998) 14 *South African Journal on Human Rights* 351 at 372.

This article intends to unravel the reach of constitutional values using two modules. In the first module, the article unravels the direct use of constitutional values in matters that do not overtly and directly infringe a constitutional provision. For this purpose, the *Carmichele* case is used to highlight this technique. In the second module, the sub-elements of constitutional values are analysed in cases where a constitutional question may be vexing to raise, let alone a constitutional provision coming into the picture. For this purpose, the *Barkhuizen* case is used to highlight this technique. The cases are deliberately selected: first, to illustrate how courts may be hard-pressed to apprehend whether the Constitution can affect so-called non-constitutional matters. Secondly, to illustrate how values sourced from the Constitution can affect non-constitutional matters. This assessment, perhaps, justifies the argument for the use of constitutional values in the resolution of legal matters, particularly when the values are aligned with the philosophy of the common good. The author argues that matters of general public importance that do not raise clear constitutional questions must be assessed with the use of values. If the matter of general public importance is petitioned to the Constitutional Court (“the CC”), it should similarly invoke the values to promote the standard that governs.

## 2 THE COURTS’ JURISDICTION OR AUTHORITY TO SET STANDARDS IN THE CONTEXT OF THE COMMON GOOD

The Constitution granted all courts (including bodies performing quasi-judicial functions) the authority to develop the law and equally provides the High Courts, the Supreme Court of Appeal (hereafter SCA) and the CC the authority to test the constitutional validity of statutes using standards.<sup>14</sup> This mandate is intended to urge all courts to align the law with the standards that fulfil the constitutional mandate.<sup>15</sup> In other words, the High Courts, the SCA and the CC must aid the legislature in setting standards that advance the South African law while all courts must interpret the law with the aim of promoting constitutional standards. This is a constitutional directive that must be realised through judgments that transcend inequality, unfairness and injustice. The presiding officers of all courts are, or must be, properly trained to evaluate the law and determine whether it advances the constitutional mandate. It is of prime importance for all courts to determine whether the matter has to be steered in a

<sup>14</sup> Sections 39(2) & 173 of the Constitution.

<sup>15</sup> Carefully examine sections 39(1)(a); 39(2); 7(1) & 1(a) of the Constitution. Also see *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para 17; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) (*Carmichele (SCA)* (2001)); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at para 142 and *Hassam v Jacobs NO* 2009 (11) BCLR 1148 (CC) at para 28. See further Klare KE “Legal culture and transformative constitutionalism” (1998) *South African Journal on Human Rights* 146; Van der Walt AJ “Transformative constitutionalism and the development of South African property law (part 1)” (2005) *Journal of South African Law* 655; Van der Walt AJ “Dancing with codes – protecting, developing and deconstructing property rights in the constitutional state” (2001) 118 *South African Law Journal* 258; and Davis DM “Transformation: the constitutional promise and reality” (2010) 26 *South African Journal on Human Rights* 85.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

direction that is constitutionally acceptable. This is a task that should be undertaken carefully, as will be illustrated below when the author assesses the *Barkhuizen* case. A court when deciding a case should ensure that all laws (old or recent) comport with the constitutional standards and its decision should advance the common good and fuel public confidence in the courts.

The High Courts and the SCA are equally mandated to ensure that every law promotes the standard that underpins the constitutional promise. This is not a duty reserved solely for the CC. Therefore all courts must ensure that matters of general public importance are aligned with standards that promote the constitutional mandate.<sup>16</sup> The High Courts and the SCA have not always performed the duty of adjudicating private and public matters with utmost appreciation of this constitutional mandate.<sup>17</sup> This has urged the CC to lead the way in standard setting adjudication.

This article is intended to illustrate how the High Courts and SCA have neglected their constitutional mandate, and similar failures in matters of general public importance should result in the CC allowing appeals. At times, the High Courts and the SCA find it difficult to connect the matters brought before them with the Constitution and its values, or simply fail to set appropriate standards. The cases discussed in this article best illustrate the phenomenon of constitutional mandate oversight. In a sense, it could be argued that the CC should assume a duty of setting standards in matters of general public importance if the High Courts and the SCA fail to do so and justice demands the intervention. This means that where matters of public importance are not properly administered by the High Courts and the SCA, the CC should assert its jurisdiction.

The extension of the jurisdiction of the CC is meant to jettison the technical question created by strict interpretation of that Court's previous limited jurisdiction.<sup>18</sup> This is done to provide the CC with discretion to hear matters that gravely affect the public. In respect of the extension, it makes little difference whether a matter raises a constitutional question; the granting of an appeal should depend on whether the matter has great public effect and requires the CC's elucidation of the law. However, the question remain as to which standard must a court adopt to decide matters that do not raise constitutional questions. In other words, the question is – how should all courts decide non-constitutional matters?

In its entirety the article promotes the notion that the Constitution should guide all courts in their decision making, even in so-called non-constitutional matters. The theory of the common good should similarly guide the courts to produce decisions that benefit

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<sup>16</sup> *Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) at paras 18-19.

<sup>17</sup> See *Carmichele* (SCA) 2001) and *Napier v Barkhuizen* [2006] 2 All SA 469 (SCA) (*Napier* (2006)).

<sup>18</sup> *Van der Walt v Metcash Trading Limited* 2002 (5) BCLR 454 (CC) at para 32.

a large number of people and not only a few. What sets the common good apart from other concepts is that it is a notion of the virtue that is comprehended to be internal to the requirements of a social relationship.<sup>19</sup> When individual rights are weighed against the common good certain measures must be central in balancing a conflict of interests. Of course, the law should promote individual rights and liberties, but should equally recognise that rights do not operate in isolation. When a law or policy undercuts individual rights to an extent that the upshot affects a great number of people and there is no reasonable justification for the limitation, then the law or policy runs against the common good. Similarly, excessive use or recognition of individual rights would undermine the common good if societal harmony is compromised.<sup>20</sup> The common good is achieved when the promotion of individual rights leads to societal harmony and coherence. This is so, even when a privileged few may perceive the law or policy as marginalising or disenfranchising their interests. Indeed, it is inaccurate to assume that there cannot be recognition of individual rights and liberties in the theory of the common good.

The recognition of individual rights and liberties must yield public benefits that culminate in the good for all. The Constitution is formulated to profit society at large, hence consideration of the theory of the common good becomes relevant in the interpretation of the law and the development of policy. The theory of the common good combined with consideration of the standards the Constitution intends to promote must be used to determine whether the mandate the Constitution seeks to promote is realised. The theory of the common good is an appropriate measure that demonstrates how the law can benefit the public at large, and how the courts should interpret the law to achieve this.<sup>21</sup>

### 3 AN ILLUSTRATION OF STANDARD SETTING THROUGH VALUES

The CC generally accepts appeals to promote the standard that directs the South African law, particularly to ensure that the common good prevails. Where the High Courts and the SCA neglect to advance the law, the CC is likely to intervene. The CC is likely to accept appeals on matters of general public importance where it sees the need to elucidate the standard that governs. The article peruses two of the cases that were controversial, immensely critiqued and highlighted the CC's desire to infuse values into the law. The *Carmichele* and *Barkhuizen* cases provide an adequate illustration of the difficulty the High Court and the SCA encountered in setting appropriate standards and how values can be used to achieve the same. Though the cases are old, they represent a fitting illustration of the High Courts' and SCA's neglect of their constitutional mandate and similarly expose the CC's desire to infuse values in legal matters. The author merely

<sup>19</sup> Hussain W "The common good" in Zalta EN (ed) *The Stanford encyclopedia of philosophy* available at <https://plato.stanford.edu/archives/spr2018/entries/common-good/> (accessed 19 September 2021).

<sup>20</sup> Raban O "Law and the common good" (2008) 4 *Socio-Legal Review* 9 at 10-11.

<sup>21</sup> *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at para 24.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

intends to introduce, perhaps, the reason why the CC should assume a broader duty in standard setting through the invocation of values.

### 3.1 The *Carmichele* case

The *Carmichele* case demonstrates how rigid the High Court and the SCA interpreted the law, holding true to conventional wisdom and underplaying the duty to promote constitutional values. The common law or old legislation that has not been constitutionally tested may be interpreted in a manner that preserves its roots rather than steering it in a direction that is constitutionally acceptable. This view proved to be true when the SCA preserved the common law when it stated that a person (government institution included) can be held liable for delictual damages if the person had a duty to prevent damage but fails to do so.<sup>22</sup> Therefore, damages only flow from express responsibility for a person to act in a certain manner in order to prevent a loss.<sup>23</sup> It is submitted that: “The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be weighed”.<sup>24</sup>

The matter would be decided on what ought to be reasonable, and the SCA held that this should be “determined with reference to the legal perceptions of the community as assessed by the court”.<sup>25</sup> What is in effect required is that the conflicting interests of the community and the interests of the parties inter se be carefully weighed, and that a balance be struck in accordance with what the court conceives to be society’s notions of what justice demands.<sup>26</sup> A legal duty is not determined by mere recognition of social attitudes and public and legal policy. The inquiry must go further to determine whether the defendant ought to have, reasonably and practically, prevented harm to the plaintiff.<sup>27</sup> This was the position in the common law before the CC decided the matter in *Carmichele v Minister of Safety and Security (Carmichele (CC) (2001))*.<sup>28</sup> The SCA was unable to connect the matter to the Constitution, thus failing to harness the matter with constitutional values. The SCA’s impression of the law may be appropriate where the

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<sup>22</sup> *Government of the Republic of South Africa v Basdeo* 1996 (1) 355 (A) at 367.

<sup>23</sup> *Minister van Polisie v Ewels* 1975(3) SA 590 (A) at 597.

<sup>24</sup> See *Carmichele (SCA)* (2001) at para 7.

<sup>25</sup> See *Carmichele (SCA)* (2001) at para 7.

<sup>26</sup> *Minister of Law and Order v Kadir* 1995(1) SA 303 (A) at 318.

<sup>27</sup> See *Carmichele (SCA)* (2001) at para 7.

<sup>28</sup> 2001 (4) SA 938 (CC).

state's constitutional mandate is not at issue; otherwise it is inappropriate because the Constitution has broadened the responsibility of the State quite immensely.<sup>29</sup>

The facts of the *Carmichele* case are as follows. On the morning of 6 August 1995, Alix Jean Carmichele (the appellant) was viciously attacked and injured by Francois Coetzee. Carmichele sustained head injuries and a broken arm in the attack. The attack took place at the home of Julie Gosling at Noetzie, a small secluded village on the sea outside Knysna. Coetzee was a convicted criminal, having been found guilty in 1994 in the Regional Court at Knysna on charges of housebreaking and indecent assault, for which he had been sentenced to a fine and a suspended period of imprisonment. At the time of the attack on Carmichele, Coetzee was, in addition, facing a charge of having raped Eurona Terblanche. The attack on Carmichele occurred when Coetzee had been released on his own recognizance (free bail) for the Eurona Terblanche case. Coetzee was once again summoned to appear before court to determine whether he should be taken into custody following his release from Valkenberg Hospital for observation on his impulsive behaviour. Coetzee had appeared in the Knysna Magistrate's Court when he was again released on his own recognizance pending a decision by the Attorney-General on whether the case of the attack on Eurona Terblanche should be tried in the High Court or the Regional Court. While Coetzee was on bail, he attacked Carmichele.<sup>30</sup>

Coetzee was convicted of attempted murder and housebreaking in the Knysna Regional Court for the Carmichele attack and was sentenced to an effective term of imprisonment of 12 1/2 years. Carmichele instituted proceedings in the Cape of Good Hope High Court (CGHHC) for damages against the Minister for Safety and Security and the Minister of Justice and Constitutional Development. She claimed that members of the South African Police Service (SAPS) and the public prosecutors at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm. Carmichele's case, as pleaded, hinged on the fact that the members of the SAPS as well as the public prosecutors at Knysna owed her a legal duty to act in order to prevent Coetzee causing her harm and that they had negligently failed to comply with that duty. The police and prosecutors at all relevant times acted in the course and scope of their employment as servants of State institutions. The High Court found that there was no duty on the State to prevent the attack; thus the suit failed.<sup>31</sup>

Carmichele appealed the High Court decision to the SCA. The SCA held that "the legal duty contended for must be confined to a duty, on the part of the police, to provide the prosecutor with full information and a duty, on the part of the prosecutor, to oppose

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<sup>29</sup> Langa PN & Cameron E "The Constitutional Court and Supreme Court of Appeal after 1994" (April 2010) *Advocate* 28 at 28-29.

<sup>30</sup> See *Carmichele* (SCA) (2001) at para 2.

<sup>31</sup> See *Carmichele* (SCA) (2001) at para 4.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

bail and to give the court full information relevant to Coetzee being remanded in custody or released”.<sup>32</sup> The SCA further held that

“There is obviously no absolute duty resting on a prosecutor to oppose bail in all cases. The prosecutor has a public duty to oppose bail in appropriate cases, but a breach of this duty does not necessarily constitute a legally actionable omission at the instance of any individual member of the public. Whether a legal duty is owed in that situation to any individual member of the public depends on what is reasonable, having regard to all the facts and circumstances of the particular case and the interplay of factors mentioned by the authorities to which I have referred. It also depends on whether the claimant stands in a special relationship to the defendant such as distinguishes the claimant from any other member of the public”.<sup>33</sup>

In the SCA’s opinion it was reasonable for the prosecutor not to have opposed the release of Coetzee on his own recognizance because the law did not compel such a duty. The SCA held that: “For this reason the prosecutor did not owe the appellant a legal duty either to oppose bail or to ensure his subsequent re-arrest”.<sup>34</sup> According to the SCA there were other factors which illustrated that the State owed Carmichele no duty to prevent the attack. The common law requires that there should be a special relationship between parties in the suit. The opinion of the SCA was that the special relationship never existed between the prosecutor and Carmichele. This is incorrect because the Constitution created a special relationship between the State and citizens, and this compels the State to ensure adequate safety of the citizenry.<sup>35</sup> The SCA held:

“ There must be some relationship between the person who owes the legal duty and the person to whom the duty is owed, the breach of which would expose the latter to a particular risk of harm in consequence of an omission, which risk is different in its incidence from the general risk of harm to all members of the public, is well-established in English law and is also in accordance with our law.”<sup>36</sup>

Although the SCA recognised that generally the law ought to protect vulnerable women against perpetrators of violent crimes, in the *Carmichele* circumstances it would be hard to establish a special relationship which triggered the duty for the prosecutor to have Coetzee remanded in custody.<sup>37</sup> The SCA, therefore, failed to connect the case with the

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<sup>32</sup> See *Carmichele* (SCA) (2001) at para 15.

<sup>33</sup> See *Carmichele* (SCA) (2001) at para 17.

<sup>34</sup> See *Carmichele* (SCA) (2001) at para 19.

<sup>35</sup> Sections 198(a) & 205(3) of the Constitution.

<sup>36</sup> See *Carmichele* (SCA) (2001) at para 20.

<sup>37</sup> See *Carmichele* (SCA) (2001) at para 21.

Constitution and its values and heavily relied on the common law to reach its conclusion. The values of human dignity, equality and freedom never aroused the SCA to the fact that these values could have led it to a different decision.

### 3.2 Standard setting in the *Carmichele* case

The CC in *Carmichele* (CC) (2001) focused on the right to dignity and the right to freedom and security of the person to establish the liability of the State and its servants.<sup>38</sup> This article seeks to depart a little from this constricted view to illustrate how constitutional values can be applied to various matters without stretching the connotations and going beyond context. The author intends to illustrate how values can be used to balance various interests and rights, but consciously ignores the laws the CC applied in the case. Therefore, the case is assessed through a broader standard setting approach, affording the accused similar rights and interests as afforded to the victim. Nevertheless, freedom of the accused entails freedom not to be arbitrarily detained or prevention of detention without a just cause.<sup>39</sup> The article intends to illustrate the reach of the Constitution, particularly how its values can be used to decide various matters of law, some of which do not raise constitutional questions or directly infringe the rights of the parties concerned.

Within the context of deciding non-constitutional matters of public importance, how can the values of human dignity, freedom and equality be used to influence the outcome of cases like *Carmichele*? First is to establish what considerations best advance the interest of the community or would promote the common good. The CC has described this balancing act in the following manner:

“[I]n the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question ...”<sup>40</sup>

The Constitution requires all courts to balance the rights and interests not only for the benefit of the parties involved in the dispute but for a broader public benefit that should extend far beyond the dispute. It is quite clear that no right would automatically be infringed when the accused is arraigned for bail hearing purposes. There is clearly no constitutional question that can be raised until the court has decided on the release of

<sup>38</sup> See *Carmichele* (CC) (2001) at para 62.

<sup>39</sup> Section 12(1)(a) of the Constitution.

<sup>40</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 104. The Court used the balancing act with the aid of s 36 of the Constitution.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

the accused. Even so, constitutional values can be invoked to determine whether the release of the accused would serve the common good, thus also promoting constitutional standards.

### 3.2.1 *The use of freedom as a value*

The Constitution expressly provides that the values entrenched therein shall be interpreted in a manner that underlies an open and democratic society based on freedom and equality.<sup>41</sup> In this respect, the constitutional value of freedom must be invoked to balance the right to freedom of the parties affected by the matter. The right to freedom of the accused should,<sup>42</sup> therefore, be weighed against the right to freedom and security of the persons in the community.<sup>43</sup> In cases where the interest of the community or the common good is not promoted when a right or interest is advanced, then it means the constitutional standard is improperly applied, and vice-versa. Two questions that should be raised to establish whether the common good prevails must be focused on a limitation of rights or interest. First, it should be determined whether the common good prevails when a certain decision is adopted. Secondly, it should be determined whether the limiting of rights or interest would benefit the public. This is generally what happens in bail hearings. Questions, such as, is the accused a danger to the community; will the accused's release defeat the ends of justice; is the accused a flight risk; and, is the accused likely to intimidate or be a danger to witnesses, prove important in assessing whether bail is warranted.<sup>44</sup> If the answer to all these questions is negative, then it would be in the common good that those who are accused be allowed bail, since they do not pose any threat to the community or the ends of justice. Therefore, the public benefits if the risk of harm to any of its members is minimised and the ends of justice would not be frustrated or defeated. Limiting the accused's right to freedom would be necessary where his release would threaten the ends of justice or would place the lives of others in jeopardy.

### 3.2.2 *The use of equality as a value*

The constitutional value of equality is important in determining whether the common good prevails.<sup>45</sup> Equality entails that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>46</sup> Every person has the right to equal protection and benefit of the law, which includes a right to be released from detention if

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<sup>41</sup> *S v Williams* 1995 (3) SA 632 at para 37.

<sup>42</sup> Sections 12(1)(a) & 21(1) of the Constitution.

<sup>43</sup> Section 12(1)(c) of the Constitution.

<sup>44</sup> Section 60(4) of the Criminal Procedure Act 51 of 1977 (CPA).

<sup>45</sup> *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) at para 6.

<sup>46</sup> Section 9(1) of the Constitution.

the interests of justice permit.<sup>47</sup> Similarly, the community has the right to equal protection and benefit of the law, in that dangerous criminals should not be released on bail.<sup>48</sup> The constitutional value of equality determines which right or interest should be limited for the benefit of the community. Thus, the enquiry is: would it benefit the community if a dangerous criminal is remanded in custody.

Similarly, would it arbitrarily infringe the right of the accused if the accused is remanded in custody in situations where the accused is prone to violence and may injure a witness or any person? Should the right of the accused surpass the common interest of the community, which recognises individual and collective rights? It should be kept in mind that while the Constitution advances individual rights, it recognises that individual rights are central in the coherence of the whole community. In other words, individual rights do not operate in isolation. Within this context, it must be determined whether the release of the accused promotes the common good. Though there is no direct infringement of the right to equality, the constitutional value of equality can still be used to assess the soundness of the State's decisions.

### 3.2.3 *The use of human dignity as a value*

The value of human dignity should also prove important in assessing whether the common good prevails. As O'Regan J puts it: "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern."<sup>49</sup> This then entails that the State must respect and have concern for the citizenry. This includes respect for various rights that the community members bear. Therefore, there is a duty on the State to respect individual rights and must have concern for the wellbeing of the citizens. When weighing whether the accused should be released from detention, the wellbeing of those who are not directly affected and the accused's right to freedom must be carefully considered. The State must assess whether the incarceration of the accused breaches his/her right to human dignity. Of course, the incarceration of an innocent person or a person who is not a threat to the community or the interest of justice is undesirable and would unduly limit the right to freedom.<sup>50</sup>

The Constitution is intended to guarantee that every person enjoys the right to freedom which culminates in the advancement of the right to human dignity.<sup>51</sup> This is not only a sound legal policy but a virtue supported through the notion of the common good. In the same vein, the members of the community have a right to human dignity

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<sup>47</sup> Section 35(1)(f) of the Constitution.

<sup>48</sup> See s 12(1)(c) of the Constitution & s 60 of the CPA.

<sup>49</sup> See *S v Makwanyane* (1995) (6) BCLR 665 (CC) at para 328.

<sup>50</sup> See s 12(1)(a) of the Constitution.

<sup>51</sup> *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) para 69.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

which the courts must protect, and thus the conduct of the accused must not be ignored.<sup>52</sup> This would include protecting the community against dangerous criminals to limit the threat to their wellbeing. This is a constitutional commitment placed on the State to protect its citizens.<sup>53</sup> The State's failure to adequately and reasonably protect its citizens amounts to a constitutional breach. Similarly, such failure could also mean that any person's dignity could be undermined, as happened in the *Carmichele* case. In other words, the State's failure to protect its citizens amounts to a violation of the Constitution; though such violation could not be directly attributed to the State or its servants, the State's omission to reasonably ensure protection of its citizens when it could have done so would have made the violation possible.

### 3.3 The *Napier v Barkhuizen* case

The *Barkhuizen* case provides a proper illustration of how values can be used to decide difficult cases, and how they can be used to decide issues that are non-constitutional. The author merely intends to introduce the reason why the CC should exercise its jurisdiction in matters of general public importance that do not raise explicit constitutional questions. Even though the *Barkhuizen* matter was referred to the CC because a constitutional question was raised, the Court used guiding principles and their sub-elements with limited reference to specific provisions of the Bill of Rights. The CC sought to use standards that promote certainty of the law, reasonableness and fairness.<sup>54</sup> The CC's approach illustrates that very few matters, if any, could not be tested with the use of standards that underpin the whole philosophy of constitutionalism. The *Barkhuizen* case is assessed in order to illustrate this.

*Napier v Barkhuizen* (*Napier* (2006)) presents the difficulty the SCA encountered when it had to align the law with appropriate constitutional standards. The facts of the case are as follows. Barkhuizen insured his 1999 BMW 328i motor vehicle for R181 000 with a Lloyd's of London insurer, represented in South Africa by Napier. On 24 November 1999 the vehicle was involved in an accident. Barkhuizen informed the insurer of the incident timeously, but on 7 January 2000, the insurer rejected liability. Barkhuizen served summons on the insurer more than two years later, on 8 January 2002. This was done contrary to a time clause in the contract indicating that if the insurer rejects liability for any claim made under the policy the insurer will be released from liability unless summons is served within 90 days of repudiation.<sup>55</sup>

The insurer's plea relied on the time-bar clause. In response Barkhuizen relied on the Constitution. Barkhuizen pleaded that the time-bar constituted a limitation period

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<sup>52</sup> Section 10 of the Constitution. See also *S v Rudolph* 2010 (1) SACR 262 (SCA) at paras 13 and 15.

<sup>53</sup> Sections 198(a) & 205(3) of the Constitution.

<sup>54</sup> *Daniels v Campbell* 2004 (5) SA 331 (CC) at para 94.

<sup>55</sup> [2006] 2 All SA 469 (SCA) at para 1.

which was contrary to public interest on the grounds that it gave the insured an unreasonably short period after repudiation to institute action; it was a drastic provision which infringed the common law right of an insured to approach the courts; it served no useful or legitimate purpose; and, in breach of section 34 of the Bill of Rights, it limited the right of the insured to have a justiciable dispute decided in a court of law.<sup>56</sup>

The SCA held that regarding limitation on the right to access the courts, two questions must be answered. The first question that must be answered is to what extent the Bill of Rights' provisions should apply between contracting parties. The second question is whether, if the Bill of Rights applies, section 34 renders the time-bar unconstitutional.<sup>57</sup> The SCA asserted that based on the evidence adduced it was difficult to infer whether the Constitution had been violated.<sup>58</sup> Cameron JA held further that:

“Thus, though the learned Judge found that the contract's time-bar was unfair, this conclusion does not present as self-evident, and on the evidence, I cannot find any warrant for it. An insurer has an undeniable interest in knowing within a reasonable time after repudiating a claim whether it must face litigation about it. Whether 90 days is reasonable for this purpose the evidence is simply too meagre to allow us to assess. Although the period is much shorter than the statutory prescription period of three years, the clause certainly does not exclude the courts”.<sup>59</sup>

The SCA accepted that though the period is much shorter, the clause certainly did not exclude the courts' jurisdiction entirely, that is, it did not deprive the insured of the right to approach the courts. The SCA further held that the second result of the limited evidence adduced before it was that the ambit of Barkhuizen's constitutional challenge to the term was very narrow.<sup>60</sup> When arguing before the SCA Barkhuizen's counsel referred to the constitutional values of dignity, equality and the advancement of human rights and freedoms. The SCA held that these values do not provide general all-embracing touchstones for invalidating a contractual term.<sup>61</sup> The SCA referred to *Brisley v Drotzky*<sup>62</sup> which held that “the Constitution prizes dignity and autonomy highly, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements”.<sup>63</sup> The SCA held that, the Constitution requires the courts to employ its values to achieve a balance that

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<sup>56</sup> See *Napier* (2006) at para 2.

<sup>57</sup> See *Napier* (2006) at para 5.

<sup>58</sup> See *Napier* (2006) at para 9.

<sup>59</sup> See *Napier* (2006) at para 10.

<sup>60</sup> See *Napier* (2006) at para 11.

<sup>61</sup> See *Napier* (2006) at para 11. The author contests this opinion below.

<sup>62</sup> *Brisley v Drotzky* 2002 (4) SA 1) (SCA) at para 94.

<sup>63</sup> See *Napier* (2006) at para 12.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

strikes down the unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives.<sup>64</sup> The SCA pointed out that “it is relatively easy to see how the Constitution’s foundational values of non-racialism and non-sexism could lead to the invalidation of a contractual term”.<sup>65</sup>

The SCA further stated that, less immediately obvious is how the values of human dignity, the achievement of equality and the advancement of human rights and freedom may affect particular contractual outcomes. A factor of particular importance is the parties’ relative bargaining positions, for it is here that the constitutional values of equality and dignity may prove decisive.<sup>66</sup> The SCA asserted that if a person is coerced to contract with the insurer on terms that infringed his constitutional rights to dignity and equality in a way that requires the court to develop the common law of contract, then the court may assert its jurisdiction. But without any illustration that constitutional rights have been violated, the broader constitutional challenge cannot even get off the ground.<sup>67</sup>

The SCA in concluding stated that there is nothing to suggest that Barkhuizen did not conclude the contract with the insurer freely and in the exercise of his constitutional rights to dignity, equality and freedom. Therefore, the constitutional norms and values cannot operate to invalidate the bargain Barkhuizen concluded.<sup>68</sup> The SCA was of the view that the case did not raise clear constitutional questions, and thus the case was less deserving of the CC’s attention. The author therefore adopts the opinion of Cameron J in *Barkhuizen v Napier* (*Barkhuizen* (2006)), where the Judge indicated that the case does not raise a clear constitutional question. In this respect, the case will be deliberated ignoring the constitutional question raised in the CC as well as the Court’s opinions on that constitutional question.

### **3.4 Analysing the value laden approach the Court adopted to decide non-constitutional issues in the Barkhuizen case**

In analysing *Barkhuizen* (2007) the author seeks to invoke a broader use of constitutional values (guiding principles). As already indicated, the author intends to completely ignore the issue that brought the matter to the CC, namely, the right to access the courts. The assessment is restricted to issues that could be regarded as non-constitutional, particularly the right to enforce or refute a contract. This is not a constitutional right in a true sense, and one would have to be fanciful and creative to fashion a constitutional question where there is no clear limitation of the right to

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<sup>64</sup> See *Napier* (2006) at para 13.

<sup>65</sup> See *Napier* (2006) at para 14

<sup>66</sup> See *Napier* (2006) at para 14.

<sup>67</sup> See *Napier* (2006) at para 16.

<sup>68</sup> See *Napier* (2006) at para 28.

freedom and the right to equality. This statement must not be construed as meaning that these constitutional values were not limited in *Barkhuizen* (2007). In the same vein, others could see the enforcement or refutation of contracts more as interests than rights.

In South African law a contract can only be enforced if a binding agreement is concluded between the parties concerned. Therefore, the parties to a contract must agree on the terms of their agreement. It is overt that the parties must reach consensus about the obligation they intend to create.<sup>69</sup> The doctrine of consensus in contract law is intended to determine whether a contract or any of its provisions can be enforced by a court of law.<sup>70</sup> Therefore, where parties reach consensus about the obligation they intend to create, the contract and its partisan provisions comes to life. Equally, a contract cannot be enforceable if consensus is not reached regarding the obligation the parties intend to create,<sup>71</sup> or where there is a provision which operates harshly against the party who has not assented to it.<sup>72</sup> It is clear that contracts concern the interests of the parties, and in most cases the interests are founded on the agreement to render a specific performance.

The Court in *Barkhuizen* (2007) decided contract issues by adopting an approach that illustrated a use of values enshrined in the Constitution. The raising of a constitutional question of access to courts provided the Court with the opportunity to do so. Ngcobo J held that

“... the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them”.<sup>73</sup>

Although Ngcobo J was of the view that the Bill of Rights could provide remedies, it is quite clear that there is no provision in the Bill of Rights devoted to the right to enforce contracts; what he actually meant was that when freedom or equality is limited in contractual agreements then a constitutional issue arises. The issue of contract

<sup>69</sup> *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A).

<sup>70</sup> See *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA); *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products & Busaf* 2004 (5) SA 226 (SCA).

<sup>71</sup> *Conradie v Rossouw* 1919 AD 279.

<sup>72</sup> Thus, where parties are not in agreement about a certain term of a contract, no binding agreement is created until the parties reach unanimity about that term; see *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 851-2 and *Blundell v Blom* 1950 (2) SA 627 (W) at 632.

<sup>73</sup> See *Barkhuizen* (2007) at para 30.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

enforcement, which raises no explicit constitutional questions, can be decided only with the use of guiding principles and the notion of the common good. To prove this, constitutional values and their sub-elements that the court employed in *Barkhuizen* (2007) are highlighted in italics. This is similarly intended to illustrate how these values affect and interact with each other.

### 3.4.1 How the CC used freedom as a value

Regarding freedom, the CC held that it was concerned with a contract between two parties, the *reasonableness* or otherwise of which must be assessed by reference to the circumstances of the parties.<sup>74</sup> In other words, the freedom the parties exercised must inform the reasonableness of the contract. This was a constitutional error that the majority of the court committed through narrowing the issue only to the parties concerned in litigation, where the contract was offered to the general public. The CC held that

“While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a time limitation clause if it would result in *unfairness* or would be *unreasonable*. This approach requires a person in the applicant's position to demonstrate that in some circumstances it would be unfair to insist on compliance with the contract”.<sup>75</sup>

The CC seemingly was oblivious of the fact that the notion of the common good requires that the public benefits from its decision, and thus that narrowing the issue to revolve around litigants is not an appropriate technique to promote the common good. In departing from a narrow analysis, the CC acknowledged that the determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships.<sup>76</sup> Although the CC acknowledged the gravity of the matter to the public interest, it continued to diverge from principles of public policy. Public policy (which perhaps must promote the common good), the CC held, imports the notions of *fairness*, *justice* and *reasonableness*. These notions according to the Court represent constitutional values and must be used to determine the soundness of contractual interests or rights. Public policy would prohibit the enforcement of a contractual term if its enforcement would be unjust or unfair.<sup>77</sup>

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<sup>74</sup> See *Barkhuizen* (2007) at para 64.

<sup>75</sup> See *Barkhuizen* (2007) at para 70.

<sup>76</sup> See *Barkhuizen* (2007) at para 90.

<sup>77</sup> See *Barkhuizen* (2007) at para 73.

Sachs J, in the minority opinion, held that to use a framework of *laissez faire* to deal with contracts of adhesion,<sup>78</sup> is to err both in valuing a claim to *freedom* that is inapposite, and to overlook the elements of *liberty* that are actually at stake.<sup>79</sup> The interest of the community must be advanced through the concept of public policy. Contracts that are clearly inimical to the *interests of the community* (the common good), 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.<sup>80</sup> In modern contract law 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.<sup>81</sup>

Sachs J demonstrates that in contracts of adhesion freedom may be limited and as such it would not match freedom expressed in the constitutional framework, which necessitates a reasonable liberty of action, and not the apparent or purported one. Thus, if a contract is offered to the public it must be balanced between the freedom the public exercise in entering contracts and the commercial interest of the contract enforcer. The enforcement of the contract based on apparent or purported use of freedom goes against the constitutional value of freedom. Thus, suspicious or purported freedom is not a constitutionally acceptable freedom. Standard form contracts or contracts of adhesion are contracts that are drafted in advance by the supplier of goods or service provider and are presented to the consumer on a “take it or leave it” basis, thus eliminating the opportunity for arm’s length negotiations.<sup>82</sup> The onus to prove that freedom to act is not unduly limited rests with the person who raises the *pacta sunt servanda* to enforce the contract. In other words, the drafter of the standard form contract must illustrate that the contract promotes fairness and freedom that accord with constitutional standards, as the drafter exercised sole discretion in formulating the contents of the contract.

### 3.4.2 How the CC used equality or equity as a value

Alive to the Court’s constitutional mandate, Moseneke J, in a minority decision, took a correct approach by considering factors outside of the parties involved in the litigation. The judge asserted that the inquiry into whether the contract offends public policy should not hinge on the peculiar condition of the contracting parties but with an objective assessment of the terms of their bargain.<sup>83</sup> When it has to be determined

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<sup>78</sup> Standard form contracts or contracts of adhesion are contracts which are prepared beforehand by big corporations, and they generally contain non-negotiable terms and clauses.

<sup>79</sup> See *Barkhuizen* (2007) at para 145.

<sup>80</sup> See *Barkhuizen* (2007) at para 158.

<sup>81</sup> See *Barkhuizen* (2007) at para 170.

<sup>82</sup> See *Barkhuizen* (2007) at para 135.

<sup>83</sup> See *Barkhuizen* (2007) at para 96.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

whether a contractual term is at variance with public policy, it matters little, or perhaps matters not, what the personal attributes of the party seeking to escape the results of the contract are. It is the possible impact of the challenged stipulation that should be determinative of what public notions of *fairness* may tolerate.<sup>84</sup> Trite as it is that the constitutional values permit individuals the *dignity* and *freedom* to regulate their affairs, they also require that bargains, even if freely concluded, may not steer a course inimical to public notions of *equity* and *fairness*, which are now sourced from constitutional values.<sup>85</sup>

Moseneke J illustrates that when a great number of people will be affected by the matter, the focus should not be narrowed to the parties who are directly affected. It would make little sense for the courts to apply substantive equality to determine the fairness of contracts of adhesion. The doctrine of *pacta sunt servanda* is hinged on the necessity to ensure legal certainty.<sup>86</sup> It would accordingly be absurd that the doctrine of *pacta sunt servanda* should lead to uncertainty and inequality. Let us assume that the same contract offered to Barkhuizen is offered to three women who are single parents. The first of the women is a judge, the second a school teacher, and the third a security officer. The security officer often works long hours and has little time to consult a solicitor. If the insurer rejects the claim by the three women, and they approach the court for relief after the period allotted in the time-bar has expired, should the court discriminate between the women? As the security officer can prove that she was incapable of complying with the time clause, must the contract be held to be against public policy?<sup>87</sup> Would the enforcement of the contract between the insurer and the judge not similarly offend public policy? How about the contract between the insurer and the school teacher? The same CC held that “...[c]entral to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek ..... In principle, too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants”.<sup>88</sup>

Both the SCA and the CC in the *Barkhuizen* matter held that the decisive factor is the erudition of a litigant. The question then is: would this approach epitomise the constitutional standard of equality or equity, thus advancing the common good?<sup>89</sup> To

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<sup>84</sup> See *Barkhuizen* (2007) at para 97.

<sup>85</sup> See *Barkhuizen* (2007) at para 104.

<sup>86</sup> *Brisley v Drotzky* 2002 (4) SA1 (SCA) paras 88-95 per Cameron J. See also Brand FDJ “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” (2009) 126 *South African Law Journal* 71 at 88 & 90.

<sup>87</sup> See *Barkhuizen* (2007) at paras 11, 29, 30, 34, 51, 58, 59 & 70.

<sup>88</sup> *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC) at para 32.

<sup>89</sup> See *S v Bhulwana; S v Gwadiso* (1995) (12) BCLR 1579 (CC) at para 32.

crystallize the fault in the majority's opinion, let us assume that the judge with her legal acumen proves the contract to operate harshly against her, while the school teacher and the security officer fail to discharge such proof. Owing to the judge proving her case, should the contract be declared to be against public policy in her case but not in the cases of both the teacher and the security officer? In this respect, it should be asked, what really is the public policy to which the court was referring? The same CC has held that

“.....In regard to mere differentiation the constitutional state is expected to act in a rational manner, it should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental principles of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner”.<sup>90</sup>

Amongst the three women, the judge according to the CC in the *Barkhuizen* case, should fail to convince the court of the harshness of the agreement because she should be able to interpret the contract. Of course, the fact that the judge like the security officer, could have commitments that deprive her of the opportunity to approach the court timely should not be ignored. The circumstances of the judge and the security officer could, in fact, limit them from approaching the court timeously. Thus, different people of different classes could experience the same difficulties. As Sachs J puts it:

“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”.<sup>91</sup>

Thus it is surprising why character differentiation should take centre stage in disputes relating to contracts of adhesion generally offered to the public at large. Why should the court differentiate between litigants when there is no need to do so?

All courts should be mindful of the fact that equality within a constitutional framework should not be observed in a myopic fashion grounded on a narrow public policy model. The use of equality must not be focused on specifics, unless it is employed to promote substantive equality. Even if personal attributes and commitments of the litigants were to be considered in determining the enforceability of contracts of adhesions, that would lead to more uncertainty because different people live their lives differently. Equally, it cannot be sustained that the signing of a standard contract binds the signatories even when it offends public policy. The contract should be enforceable only if it meets constitutional standards. The Constitution states that everyone is equal

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<sup>90</sup> See *Prinsloo* (1997) at para 25.

<sup>91</sup> See *Barkhuizen* (2007) at para 149.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

before the law and has the right to equal protection and benefit of the law.<sup>92</sup> This provision should offer the courts, including the CC, proper guidance in deciding matters directly affecting the general public. Clearly this standard should guide the courts when dealing with matters that extend far beyond the issue at hand. The courts are a harbour for the resolution of various conflicts, and they should ensure that orderly and fair solutions to those conflicts are found.<sup>93</sup> Dealing with public matters in a manner that dampens the standard of equality surely does not endorse public policy that promotes the notion of the common good. In any case, where the use of values leads the courts to adopt different opinions or fails to provide the courts with clear guidance, then the notion of the common good could prove to be an invaluable measure.

### 4 COMMENTS

The constitutional values are not limited to those explicitly expressed in the Constitution; they also include those that are implied. The CC, for instance, has stated that the value of equality is not limited in scope.<sup>94</sup> This then means that the value of equality can absorb any principle that advances the law and that promotes equity. As was illustrated in *Barkhuizen* (2007), the CC had to determine whether the law was fair, reasonable and equitable. To transform the law, judicial officers carry the responsibility of justifying their decisions not only through relying on authority, but through invoking concepts and values.<sup>95</sup> Constitutional values affect many areas of the law; thus, all interpreters of laws must recognise the constitutional agenda. When all courts interpret statutes, a contextual approach to interpretation would similarly enhance the constitutional promise of the common good.<sup>96</sup> Where the use of constitutional values fails to guide the CC because of different opinions on the standard that governs,<sup>97</sup> then the notion of the common good should provide the necessary guidance. This article has illustrated that the CC's inquiry should be broad enough to consider the interest of all who are affected by the matter, directly and indirectly.

It is quite clear that both cases would have reached their highest point at the SCA if the CC had failed to connect the matters with the Constitution.<sup>98</sup> Accordingly, important matters would not have reached the highest court. The courts should therefore recognise that “as the conditions of humanity alter and as ideas of justice and equity

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<sup>92</sup> Section 9(1) of the Constitution.

<sup>93</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 63.

<sup>94</sup> *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at para 51.

<sup>95</sup> Langa PN “Transformative constitutionalism” (2006) 17 *Stellenbosch Law Review* 351 at 353.

<sup>96</sup> *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at para 28.

<sup>97</sup> See the different opinions of the Court in *Barkhuizen* (2007).

<sup>98</sup> *Van der Walt v Metcash Trading Limited* 2002 (5) BCLR 454 (CC) at para 32.

evolve, so do concepts of rights take on a new texture and meaning”.<sup>99</sup> The decision of the SCA in *Barkhuizen* (2006) confirms this view and it has attracted criticism in academic circles, owing to the fact that constitutional standards should influence contract law.<sup>100</sup> Therefore the narrowing of the law to mirror a classic appreciation of contract law simply underrates the standard the South African law intends to create.<sup>101</sup> The appropriate standard setting in *Barkhuizen* (2006) appears to have been merely an unsuccessful afterthought.<sup>102</sup>

Woolman in critiquing the decision of the CC states that the *Barkhuizen* court attempted to finesse the problem of direct application by asserting that there is no law at issue - merely a private contract, and, at best, the common-law commitment to the sanctity of contract.<sup>103</sup> According to Woolman this is problematic. Although the CC erred in attempting to adopt a view that the matter could not directly be connected to the Constitution,<sup>104</sup> its application of a broader constitutional inquiry is to be commended.

Even though there is a clear surge to constitutionalise the law in general, the extent of the application of constitutional standards remains a lively debate. Fagan states that the *Carmichele* case shows just how important it is for judges to respect and understand private law.<sup>105</sup> He argues that the judgments were not concerned with whether the State itself had committed a delict against the plaintiff, but only with whether a policeman or prosecutor in its employ had done so.<sup>106</sup> He paints a picture that encourages conformity to private law, and its underlying principles.<sup>107</sup> Fagan argues that not all matters could raise clear constitutional questions.<sup>108</sup> These are what Fagan considers non-constitutional matters. However, as constitutional values form part of the agenda setting at the CC, they are appropriate to set standards. Roederer states that “the spirit, purport and objects of the Bill of Rights may in fact have a narrowing effect upon the range of interpretations of any given right in the Bill of Rights. Any given rule in the Bill

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<sup>99</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 97; *Minister of Home Affairs & another v Fourie & another; Lesbian and Gay Equality Project & eighteen others v Minister of Home Affairs & others* 2006 (1) SA 524 (CC) at para 102.

<sup>100</sup> Bhana D “The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)” (2007) 124 *South African Law Journal* 269 at 274.

<sup>101</sup> See Bhana (2007) at 271, 273, 274 & 277.

<sup>102</sup> See *Napier* (2006) at para 16.

<sup>103</sup> Woolman S “The amazing, vanishing Bill of Rights” (2007) 124 *South African Law Journal* 762 at 774.

<sup>104</sup> See *Barkhuizen* (2007) at paras 23-26.

<sup>105</sup> Fagan A “Reconsidering *Carmichele*” (2008) 125 *South African Law Journal* 659.

<sup>106</sup> See Fagan (2008) at 659-60.

<sup>107</sup> See Fagan (2008) at 664-5.

<sup>108</sup> See Fagan (2008) at 667.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

of Rights may have a number of possible purposes and interpretations”.<sup>109</sup> This proves to be true, particularly when all courts seek to set standards that consider the broader public.

Sutherland, adopting a broader constitutional view, states that “the Constitution can serve as an important engine for reform of general contract law and insurance law. In this process the protection of vulnerable consumers should loom large”.<sup>110</sup> In this respect, writers have criticised the role of the courts in constitutionalising the law.<sup>111</sup> The courts therefore have to play their part in ensuring that appropriate standards are set, otherwise another State institution may intervene.<sup>112</sup>

### 5 CONCLUSION

The question that the policy founded on broad values may lead to uncertainty and may prove problematic when used to decide cases remains arguable. This policy has been likened to a horse that is difficult to mount and ride. In *Driefontein Consolidated Mines Ltd v Jansen* it was stated : “Public policy is a high horse to mount and is difficult to ride when you have mounted it.”<sup>113</sup> Though the Constitution contains broad values that others can describe as indeterminate,<sup>114</sup> they are not problematic to invoke to realise a broader public benefit.<sup>115</sup> Unlike the “high horse”, they are neither hard to mount nor to ride. The values used in conjunction with the notion of the common good can elucidate what is publicly acceptable. In a sense, no conduct or law should glide under the radar meant to review laws. Therefore, matters of general public importance can be properly administered through the invocation of values under South African law. Of course, the

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<sup>109</sup> Roederer C “Remnants of apartheid common law justice: the primacy of the spirit, purport and objects of the Bills of Rights for developing the common law and bringing horizontal rights to fruition” (2013) 29 *South African Journal on Human Rights* 219 at 237.

<sup>110</sup> Sutherland PJ “Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) – part 2” (2009) 20 *Stellenbosch Law Review* 50 at 72.

<sup>111</sup> MacQueen HL “Delict, contract, and the Bill of Rights: a perspective from the United Kingdom” (2004) 121 *South African Law Journal* 359; Friedman N “The South African common law and the Constitution: revisiting horizontality” (2014) 30 *South African Journal on Human Rights* 63; Van der Walt J “Progressive indirect horizontal application of the Bill of Rights: towards a co-operative relation between common-law and constitutional jurisprudence” (2001) 17 *South African Journal on Human Rights* 341; Bhana D “The development of a basic approach for the constitutionalisation of our common law of contract” (2015) 26 *Stellenbosch Law Review* 3; and Cheadle H & Davis D “The application of the 1996 Constitution in the private sphere” (1997) 13 *South African Journal on Human Rights* 44.

<sup>112</sup> The legislature had to amend the Short-term Insurance Act 53 of 1998 to prohibit unreasonable time bars.

<sup>113</sup> *Driefontein Consolidated Mines Ltd v Jansen* (1901) 17 TLR 604 at 605.

<sup>114</sup> See generally Van der Merwe (2000).

<sup>115</sup> See *Pharmaceutical Manufacturers Association* (2000) at para 44.

principle of separation of powers should direct the High Courts, the SCA and the CC on the degree of the review with regard to legislation.<sup>116</sup> Accordingly, every review or assessment of laws must be constitutionally acceptable.<sup>117</sup> [This point aligns itself with s173 (inherent powers) – which is not made clear in your Introduction – kindly do so] It was made clear in section 2.... Does not have to be in the introduction, section 2 is where the roles of the courts were briefly discussed

The CC should determine whether a court a quo has properly advanced the law before accepting appeals on matters of general public importance. This entails that the CC should assess whether it would reach a different opinion to that of the court a quo in considering the whole constitutional scheme.<sup>118</sup> This should be done through assessing whether the values that underpin the South African law have been advanced, and to determine whether the decision of the court a quo benefits the public at large. Of course, the mere determination of whether the values are employed is not enough; the aim should be to determine whether the employment of the values has benefitted a large number of people instead of the privileged few. The matters of general public importance affect many people, and similarly the constitutional mandate directs that the law should benefit all.<sup>119</sup> The promotion of the laws that benefit all is the scheme on which the Constitution is founded. This should be the point of departure in assessing the appeal for matters of general public importance at the CC having regard to constitutional values.

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<sup>116</sup> Lenta P “Democracy, rights disagreements and judicial review” (2004) 20 *South African Journal on Human Rights* 1 & Davis DM “Adjudicating the socio-economic rights in the South African Constitution: towards ‘deference lite’?” (2006) 22 *South African Journal on Human Rights* 301.

<sup>117</sup> See Lenta P “Judicial Restraint and overreach” (2004) 20 *South African Journal on Human Rights* 544 at 548.

<sup>118</sup> *East Zulu Motors (Proprietary) Limited v Empangeni Ngwelezane Transitional Local Council* 1998 (1) BCLR 1 at paras 9 and 10.

<sup>119</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at para 83.

## DECIDING NON-CONSTITUTIONAL MATTERS OF GENERAL PUBLIC IMPORTANCE

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