ESCAPING THE 'SHIFREN SHACKLE' THROUGH THE APPLICATION OF PUBLIC POLICY: AN ANALYSIS OF THREE RECENT CASES SHOWS SHIFREN IS NOT SO IMMUTABLE AFTER ALL*

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1 INTRODUCTION

Nearly five decades ago, and in the wake of debate in legal circles, the *Shifren* principle found its way into our law pursuant to the Appellate Division decision in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*.[1] In terms of this principle, 'contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject-matter of a contract, which they may alter only by again resorting to writing'.[2] This is achieved by way of the so-called 'non-variation clause' which is typically worded in a formulaic way, in order to entrench both itself and all the terms of the contract against oral variation, along the following lines: 'no variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement'. The Appellate Division in *Shifren* upheld the validity and enforceability of such a clause and in so doing effectively made a policy decision necessitated by the paradox inherent in a non-variation clause. On the one hand, it limits contractual freedom by curtailing the parties' ability to change their minds and alter the contract, but on the other hand, this limitation is itself a manifestation of the parties' contractual freedom pursuant to which they, by prior design, agreed to this limitation in order 'to enhance certainty in their future dealings and to minimise disputes between them.'[3] The *Shifren* principle represents an endorsement of the latter view and in formulating it, a unanimous Appellate Division purportedly put an end to the debate regarding the effectiveness of such clauses.

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[1] 1964 (4) SA 760 (A).

[2] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 89 per Cameron JA.

[3] Ibid.

The debate may have ended, but not, it would seem, the controversy: to date, the *Shifren* principle 'remains controversial'.[4] This is because in practice, its application frequently leads to harsh and unjust results as it allows a party to go back on his or her word, notwithstanding the other party's good faith reliance on it. As Lewis notes, 'what appears fair at first glance may later appear to be unduly burdensome.'[5] McLennan, writing in 2001, went so far as to criticise the principle for allowing a 'suppression of the truth'[6] and called for its abolition, stating that, '[e]ven if there ever had been any justification for the non-variation clause, it has no place in the modern law of contract.'[7] However, the *Shifren* principle remains very much alive and well, with non-variation clauses making an appearance in almost every modern contract – particularly since the dawn of the era of mass standard-form contracting. The clause certainly has its worth and it is submitted that McLennan's strong assertion, with respect, perhaps does not take into adequate consideration the benefits of this clause in our current commercial world. As Bosielo J has remarked:

> 'It seems to me that the fundamental reason why parties would, in their own wisdom, elect to embody a non-variation clause in their contracts, is to protect themselves and try avoid the uncertainty and serious pitfalls which go hand in glove with oral agreements concomitant with serious evidentiary hurdles which may prove difficult and costly to scale.'[8]

The principle does therefore have its benefits and it has thus been consistently reaffirmed by our courts; albeit with the proviso introduced by the Supreme Court of Appeal in 1998 that 'a non-variation clause curtails common law freedom to contract and must hence be restrictively interpreted.'[9] The *Shifren* principle therefore need not be abolished, as McLennan suggested. Instead, the question is how the courts ought best to mitigate its frequently inequitable effects. In 2002, in *Brisley v Drotsky*,[10] the Supreme Court of Appeal had to consider this question in a challenge to the *Shifren* principle on constitutional grounds. The court unanimously reaffirmed this 'die-hard' addition to our law, but (particularly) through the separate concurring judgment of Cameron JA, opened the door to the possibility of loosening the '*Shifren* shackle'.[11] Cameron JA predicted that the appropriate tool to mitigate potential

[4] *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) para 1.
[5] Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330 at 346.
[6] J S McLennan 'The demise of the "non-variation" clause in contract?' (2001) 118 *SALJ* 574 at 575.
[7] Ibid at 580.
[8] *Industrial Development Corporation of SA v Ballie Foods CC* [2007] JOL 19301 (T) para 5.1.
[9] *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 841F.
[10] *Brisley* supra note 2.
[11] *Nyandeni* supra note 4 para 2.

hardship caused by *Shifren* would be the age-old doctrine of public policy in its new constitutional guise. He noted:

> 'It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so.'[12]

This prediction has come to pass. In this article, I discuss three recent cases which illustrate a loosening of the *Shifren* shackle through the application of the tenets of public policy as now informed by the Constitution.[13] In each case, the court refuses to enforce a non-variation clause on the basis that to do so would offend public policy.[14] Each case arises out of a distinct contractual setting: (i) *Nyandeni Local Municipality v Hlazo*[15] concerns an employment contract; (ii) *GF v SH*[16] arises in the family law context and concerns a written maintenance agreement; and (iii) *Steyn v Karee Kloof Melkery (Pty) Ltd*[17] concerns, *inter alia*, a sale of business agreement concluded in a commercial setting. I focus, in particular, on the *Nyandeni* judgment in so far as it represents precisely the kind of judicial 'activism and ingenuity'[18] in fine-tuning public policy as an instrument of 'judicial control over contractual enforcement'[19] that our jurisprudence – particularly that of our apex courts – has thus far been so desperately lacking.[20]

Before turning to discuss these cases, I proceed to canvass by way of background, the Supreme Court of Appeal's endorsement of the *Shifren* principle and the attempts of the lower courts to circumvent it on 'dubious grounds'[21] by employing various technical doctrinal devices. I illustrate how the string of failed attempts to employ the notion of good faith as an independent basis on which to refuse to enforce contractual terms that operate

[12] *Brisley* supra note 2 para 93.
[13] The Constitution of the Republic of South Africa, 1996.
[14] In *Valodia v Cooper Bezuidenhout Incorporated* unreported case no. 2387/2013 [2013] ZAFSHC 171 (26 September 2013) para 5, De Wet AJ notes that these three cases, 'all dealt with circumstances where the demands and the requirements of public policy justified a departure from the Shifren principle'.
[15] *Nyandeni* supra note 4.
[16] *GF v SH* 2011 (3) SA 25 (GNP).
[17] *Steyn v Karee Kloof Melkery (Pty) Ltd* unreported case no. 2009/45448 [2011] ZAGPJHC 228 (30 November 2011).
[18] F D J Brand '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 *SALJ* 71 at 89.
[19] Ibid at 87.
[20] See for example, Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 *SALJ* 269 at 275 where she states that, 'the SCA's lack of substantive engagement with…[public policy] issues is regrettable as it leaves one with the impression that lip-service is being paid to constitutional values.'
[21] *HNR Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) para 19.

harshly (such as the non-variation clause), has revived the flexible 'overarching corrective doctrinal control mechanism'[22] of public policy in its constitutional guise to mitigate injustice in contract. The net result has been an incremental loosening of the Shifren shackle. These cases collectively reveal judicial reasoning in line with the 'dictates of experimental constitutionalism'[23] and a concomitant striking of the requisite balance between a range of competing considerations such as *pacta sunt servanda* and the need for commercial certainty, versus the need to ensure good faith and equity in contract. The *Nyandeni* judgment, in particular, represents an answer to Sachs J's call in *Barkhuizen v Napier*[24] to ensure that,

> 'the common law, under the impulse of the values of our new constitutional order…shoulder[s] 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.'[25]

The trio of cases under discussion epitomises an effort on the part of the high courts to build on the foundations laid in *Barkhuizen*. In this trio, the courts develop the common-law of contract on non-variation clauses through the application of public policy, as informed by the Constitution. More specifically, the analysis of the cases illustrates how the second leg of the public policy test as formulated in *Barkhuizen* has enabled the courts to mitigate the harsh effects of the *Shifren* principle by taking account of the particular circumstances of the parties at the time of enforcement of the non-variation clause.

2 FROM *SHIFREN* TO *BRISLEY* AND THE USE OF 'SOPHISTRY' TO ESCAPE THE SHACKLE

2.1 The permissibility of self-imposed formalities: The finding in Shifren

Freedom of contract is a fundamental principle of the law of contract.[26] In terms of this principle, parties are, within the bounds of legality and possibility, free to decide whether, with whom and on what terms to contract. Having exercised this freedom, the principle of *pacta sunt servanda* in turn ensures that contracting parties honour their word through 'the exact enforcement of contractual obligations created in circumstances which are consistent

[22] Gerhard Lubbe 'Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395 at 398.
[23] Stuart Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *SALJ* 762 at 794.
[24] 2007 (5) SA 323 (CC).
[25] Ibid para 184.
[26] See, for example, Dikgang Moseneke 'Transformative constitutionalism: its implications for the law of contract' (2009) 20 *Stell LR* 3 at 9, who puts it thus: '[c]ontractual relations are considered to arise by free volition between private parties with equal bargaining power, who act in good faith and are therefore bound by their word – *pacta sunt servanda*.'

with freedom of contract and consensuality.'[27] By virtue of this contractual autonomy, parties are furthermore free to choose *how* they contract. Thus, writing in 1920 for the Appellate Division in *Goldblatt v Freemantle*,[28] Innes CJ, in referring to the general rule that writing is not required for contractual validity, held that freedom of contract means that it will always be open to parties to agree that their agreement will not be binding unless or until reduced to writing.[29] This case is thus early authority for the fact that the courts will respect the effectiveness of self-imposed formalities. The non-variation clause is one such formality, albeit one of an unusual nature as it prescribes formalities for subsequent agreements. It essentially enables parties to a contract to 'make fundamental law for themselves'[30] by mandating future compliance with certain formalities in order to achieve a valid variation of the original agreement.

It is not hard to see why such clauses elicited polarised debate as to their effectiveness prior to the Appellate Division's stamp of approval in *Shifren*: *pacta sunt servanda* together with – where the circumstances so demand – considerations of fairness and equity, are equally in favour of and against their enforcement.[31] The *Shifren* decision brought an end to the 'saga'[32] by exercising a policy choice in favour of this self-imposed formality. In a mere four page judgment delivered by Steyn CJ on behalf of a unanimous court, the Appellate Division sweepingly dismissed the reservations of those against the non-variation clause. The court reasoned that where the parties insert a non-variation clause in their contract that entrenches both itself and all other terms of the contract against subsequent oral variation, there is no good reason *not* to hold the parties bound to this clause to which they *both* agreed. Their clear goal in inserting it was to prevent disputes and the difficulties of proof of oral agreements and thereby ensure certainty in their dealings with one another. Such a clause clearly operates in favour of both parties, who with *animus contrahendi* agreed that no oral or tacit variation would have any contractual force save where reduced to writing and signed by them both. To this extent, it did not curtail their contractual autonomy, for they would still be free to change their minds provided the formalities they themselves prescribed are met. A refusal to give

[27] S W J (Schalk) Van der Merwe, L F Van Huyssteen, M F B Reinecke & G F Lubbe *Contract General Principles* 4 ed (2012) 9.
[28] 1920 AD 123.
[29] Ibid at 128-9.
[30] Louise Tager 'The effect of non-variation clauses in contracts' (1976) 93 *SALJ* 423 at 425.
[31] See Brand op cit note 18 at 80 where the crux of this debate is succinctly summarised.
[32] H R Hahlo 'Non-variation clauses' (1965) 85 *SALJ* 4, referring to P M A Hunt's description of the debate as the '*Shifren* saga'.

effect to the non-variation clause would be an unwarranted departure from the basic prescripts of *pacta sunt servanda* and there was no force in the argument that the same could equally be said of a refusal to give effect to the subsequent oral agreement, for the parties themselves chose to limit their ability to alter the contract. As such, the clause could not be said to be an affront to the principle of freedom of contract. It was therefore not contrary to the public interest to uphold it.[33] And so, the *Shifren* principle found its way into our law.

2.2 Predictions of sophistry come to pass

This decision was met with much comment and criticism.[34] Hahlo predicted that, '[i]t is likely that as the result of *Shifren's* case the use of non-variation clauses by companies doing business with the public will greatly increase'[35] with such clauses becoming a typical addition to prolix standard-form contracts. The other concern, which was expressed by Kahn,[36] was that the endorsement of the non-variation clause would lead to 'chicanery' as attempts would be made to use it to enable a party who admits of an oral variation to escape it and go back on his or her word. A related worry was that, in the face of the injustice of such an outcome, attempts would be made to disguise a variation as something falling short thereof by drawing artificial distinctions using doctrinal tools such as waiver and estoppel. This prediction turned out to be apt with various lower courts attempting to grapple with the 'riddle':[37] when is a variation not a variation? Van der Merwe et al summarise the juristic nature of a variation succinctly as follows: '[it] entails an alteration of the legal consequences of the contract by mutual agreement of the parties, and includes not merely amending a term, but also excising a term from the contract.'[38]At first blush, this definition seems straightforward enough to avoid any complexity: a variation, in essence, results in a definite and permanent alteration of the agreed terms of a contract.[39] Anything falling short of this will therefore not be shackled by *Shifren*, notwithstanding a non-variation clause in the relevant agreement.

[33] *Shifren* supra note 1 at 766-7.
[34] Tager op cit note 30 at 423-4.
[35] Hahlo op cit note 32 at 6.
[36] Ellison Kahn *Contract and Mercantile Law Through the Cases* (1971) 190.
[37] *Van As v Du Preez* 1981 (3) SA 760 (T) at 765E.
[38] Van der Merwe et al op cit note 27 at 133.
[39] See, for example, Tukishi Manamela 'The enforcement of an oral pactum de non petendo where a contract contains a non-variation clause' (2001) 13 *SA Merc LJ* 655 at 658, where he states that, 'a variation involves a definite alteration of contractual obligations by the mutual agreement of both parties.'

Unfortunately, however, in the face of an inequitable result, the courts have complicated matters by using technical and often artificial reasoning to avoid the label of a 'variation' and thereby either soften or circumvent *Shifren*. This was primarily done through attempts to distinguish the conduct in question as a form of waiver,[40] to the extent that the latter fell outside the purview of the non-variation clause. Such attempts have generally been unsuccessful, but where the distinction has been successfully drawn, it has usually been pursuant to tenuous reasoning. Thus, in *Phillips v Miller (2)*,[41] Margo J referred with approval to the view expressed in *Cheshire & Fifoot's Law of Contract*:

> 'The enigma is to formulate some test by which to distinguish the one from the other. The search will be in vain…the dichotomy is visionary and one from which reason recoils. The truth is that every alteration of the kind with which we are concerned is a variation of the contract, but that it is called a waiver when the court is willing to give effect to the intention of the parties.'[42]

The courts nonetheless continued to grapple with various doctrinal devices in order to draw these somewhat illusory distinctions in the hope of ensuring a just result. Various forms of waiver that have been successfully invoked as falling short of a variation include: (i) the waiver of an accrued right arising from a breach of contract, such as the right to cancel the contract or claim damages;[43] (ii) an agreement not to enforce a right accruing under a contract, such that the capacity to enforce it is merely suspended (rather than abandoned) for a specific period or until some contingency arises (*a pactum de non petendo*);[44] and (iii) the discharge of an accrued obligation to make a particular performance under a contract through the creditor's acceptance of a substituted performance (*datio in solutum*)[45] or by his release of the debtor from the obligation.[46] Attempts have also been made to preclude reliance on a non-

[40] A waiver has been defined broadly by Manamela as: 'either a bilateral agreement which merely suspends the enforcement of the contract without substantively altering its legal consequences, or a unilateral act entailing the abandonment of a right or remedy without altering the contract.' Ibid at 657-8.
[41] 1976 (4) SA 88 (W) at 92-3.
[42] Chesire, Fifoot & Furmston's *The Law of Contract* 11 ed by M Furmston (1986) 548-9.
[43] See for example *Impala Distributors v Tanus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 277-8; *Palmer v Poulter* 1983 (4) SA 11 (T).
[44] See for example *Hilsage Investments (Pty) Ltd v National Exposition (Pty) Ltd* 1974 (3) SA 346 (W) at 354; *Impala Distributors* supra note 43 at 277. See also *Miller v Dannecker* 2001 (1) SA 928 (C) at 934, 936, 937 where the court distinguishes between a pactum de non petendo and a waiver.
[45] See *Van As* supra note 37 in which the lessor's acceptance of a reduced rental over a 13 month period effectively amounted to a datio in solutum in that it did not alter the terms of the written lease agreement. See further *Van der Walt v Minnaar* 1954 (3) SA 932 (O); *Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank of SA Limited* 1964 (3) SA 221 (T) 227; *Janse vam Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) at 326I-327D. On datio in solutum generally, see D J Joubert '*Datio in Solutum*' (1997) *De Jure* 29.
[46] Our courts have further held that the conclusion of a novation; a genuine settlement; the election of an undisclosed principle to come into the contract and claim performance of the third party in favour of himself; the renewal of a lease and any subsequent agreement between the parties on an issue not dealt with in the original agreement, all fall short of constituting 'variations' and thus do not fall foul of a non-variation clause.

variation clause by raising estoppel by representation as a defence,[47] however, as Van der Merwe et al note, 'the approach has been cautious […] and examples of successful reliance on estoppel in this context are far and few between.'[48] Overall, the reported judgments represent strained attempts, through the use of labels based upon frequently tenuous distinctions, to avoid the enforcement of a non-variation clause where it would yield a harsh result. Hutchison remarked that these cases give one the 'dominant impression that the law has become excessively complicated and technical'.[49] The knock-on effect in practice has been a parallel increase in technicality of drafting as drafters of commercial contracts, having become aware of the loopholes created by this artificial judicial reasoning, began catering for all contingencies by either extending the scope of the non-variation clause itself,[50] or by simply lumping it together with a host of other so-called 'boilerplate clauses' such as the now standard non-waiver and non-cancellation clauses.

Thus, the question arose: what now? How might a party to a contract wriggle out of the strictures of *Shifren* where the equitable black-letter doctrines fail to remedy an injustice? The answer was initially sought in the concept of bona fides or good faith. In the 2001 Cape Provisional Division decision of *Miller v Dannecker*,[51] Ntsebeza AJ held that the oral agreement in question did not amount to a variation in breach of the non-variation clause, but was instead a valid and enforceable *pactum de non petendo*.[52] McLennan notes that, 'the use of this label does not take the matter any further. What the defendant alleged was, in any event, a very clear (and dramatic) variation.'[53] However, the reasoning the Judge used to reach this conclusion is what captivated the minds of those in legal circles:

See Van der Merwe et al op cit note 27 at 133. Also, according to an obiter statement in *Impala Distributors* supra note 43, an oral cancellation of a contract does not fall foul of a non-variation clause, but the correctness of this view is doubtful: see Tager op cit note 30 at 432-3.

[47] See generally, for example, on the use of estoppel by representation as a possible defence against the application of *Shifren*: *HNR Properties* supra note 21 at 479J-480A; *Impala Distributors* supra note 43 at 278; *Van As* supra note 37 at 766; *Phillips* supra note 41; *Miller* supra note 44; *Palmer* supra note 43; *Volker v Maree* 1981 (4) SA 651 (N); *Barnett v Van der Merwe* 1980 (3) SA 606 (T) at 612 (obiter).

[48] Van der Merwe op cit note 27 at 134-5.

[49] Dale Hutchison 'Non-variation clauses in contract: Any escape from the *Shifren* straitjacket?' (2001) 118 *SALJ* 720 at 722.

[50] See R Sharrock *Business Transactions Law* 8 ed (2011) 243 where the following example of such a broadly-phrased clause is given: 'No term of this contract shall be suspended, modified, cancelled or otherwise varied save by means of a further written agreement between the parties and no informal agreement, relaxation of the terms of this contract by the first party, or indulgence which the first party may concede to the second party shall in any way operate as an estoppel against the first party's rights hereunder, or in any other way limit, alter or prejudice such rights'.

[51] *Miller* supra note 44.

[52] Ibid at 934C-D.

[53] McLennan op cit note 6 at 579.

> 'Good faith…has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community […] In *casu* we would have to assume that good faith lay at the root of the oral agreement constituting the *pactum* […] The dictates of public policy and the views of the community would never be served by a slavish adherence to a non-variation clause in the face of an agreement in the form of the *pactum*.'[54]

The import of this decision was that the minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*[55] was taken as a 'green light' for the high courts to circumvent the long-established *Shifren* principle whenever they found its application to be unfair.[56] When the constitutionality of this principle was called into question in *Brisley*, the Appellate Division's successor therefore did not hesitate to overrule the *Miller* decision as being incorrect and an unwarranted subversion of *stare decisis* through the misplaced reliance on the view of a single judge with whom the rest of the bench did not agree.[57] The gradual move in the direction of good faith, as an independent basis for judicial intervention in private contractual relations, was thus effectively stumped. However, as a result, the doctrinal gateway of public policy became an immediately attractive alternative route to ensuring fairness and reasonableness in contract.

2.3 Brisley tightens the shackle?

Brisley v Drotsky concerned the validity of a non-variation clause in a standard-form lease agreement. Drotksy (the lessor) asserted *Shifren* and Brisley (the lessee) countered that Olivier JA's minority judgment in *Saayman* constituted authority for the proposition that reliance on a *Shifren* clause could be trumped by considerations of good faith, equity and the values underlying the Constitution. It therefore seemed history was to repeat itself, with the Supreme Court of Appeal having to reconsider the basis for the *Shifren* principle in our law, albeit through the lens of the Constitution and the courts' general duty to develop the common law in light of the values it enshrines. The majority of the court[58] seemed somewhat exasperated by having to re-open the proverbial can of worms: '[*d*]*ie Shifren-beginsel is 'trite' en die vraag ontstaan waarom dit, na bykans 40 jaar, omgerwerp moet word*?'[59] None of the lessee's arguments proved fruitful, however, and the Supreme Court of Appeal stood

[54] *Miller* supra note 44 at 934C-D. Emphasis added.
[55] 1997 (4) SA 302 (SCA).
[56] Brand op cit note 18 at 79.
[57] *Brisley* supra note 2 paras 13-16.
[58] The majority judgment was delivered by Harms, Streicher and Brand JJA.
[59] *Brisley* supra note 2 para 8.

by its policy decision of 40 years prior.

The majority of the court essentially held that to overturn *Shifren* would result in tremendous uncertainty in the law of contract, would suppress and perhaps even completely disrupt trade and would pose insurmountable evidentiary problems by unravelling *Shifren's* equitable commercial purpose of limiting factual disputes.[60] *Pacta sunt servanda* could not be circumvented by recourse to good faith, which does *not* constitute a freestanding and independent basis for refusing to apply the principles of contract law.[61] To allow as much, would unwarrantably subjectivise judicial decision-making in the law of contract.[62] The court emphasised that *Shifren* does not create an unreasonable 'straitjacket' for contracting parties, as the general principles of contract law still apply and have in the past enabled the courts to release a party from its strictures – even if on frequently questionable grounds.[63] Good faith is thus only relevant to the extent that it is mediated by these black-letter rules of contract law.[64] The court endorsed Hutchison's view that, '[g]ood faith thus has a creative, controlling and a legitimating or explanatory function. It is not, however the only value or principle that underlies the law of contract; nor, perhaps, even the most important one.'[65] To this extent, good faith has a role to play in so far as it is a mere variable to be weighed up in the balance in the public policy analysis,[66] as elucidated by the court in *Magna Alloys*.[67] This requires a consideration of various competing underlying values, and in this case, *pacta sunt servanda* had to trump good faith as Brisley had failed to satisfy the test of unconscionability as laid down in the case of *Sasfin (Pty) Ltd v Beukes*.[68] The non-variation clause had to be enforced and the court thus purported to reinforce and tighten the *Shifren* shackle.

To this day the Supreme Court of Appeal has been unyielding by consistently upholding the validity and importance of the *Shifren* principle in our law[69] and thus, viewed collectively, its

[60] Ibid paras 8, 10, 21 and 24.
[61] Ibid para 14.
[62] Ibid paras 15, 21, 22 and 24.
[63] Ibid para 9.
[64] Ibid para 22.
[65] Ibid.
[66] Ibid paras 22, 23 and 24.
[67] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).
[68] 1989 (1) SA 1 (A). See *Brisley* supra note 2 paras 32-3.
[69] See *HNR Properties* supra note 21; *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 (2) SA 570 (SCA); *Telecordia Technologies Inv v Telkom SA Ltd* 2007 (5) BCLR 503 (SCA); *Kovas Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA). In the *Telecordia* case, para 12, Harms JA succinctly summed up the seemingly watertight principles of the '*Shifren* doctrine' as follows: 'A non-variation clause is in principle valid; it takes effect so as to effectively entrench both itself and all the other provisions of the contract against oral

jurisprudence dealing with non-variation clauses on the face of it seems to leave little room for manoeuvre. All past attempts on the part of the lower courts to develop the common law where *Shifren's* application has had harsh and inequitable consequences have been unsuccessful and met with 'definitive judgments from the Supreme Court of Appeal reaffirming its status and its scope and ambit of operation…coupled with reminders to the lower courts to observe the *stare decisis* rule.'[70] Despite this somewhat dismal track record for fairness and equity, recent high court decisions have proven the *Shifren* principle to be less than immutable. This is perhaps because although the majority of the court in *Brisley* spoke out strongly against 'attacking and overthrowing principles of common law from within the shadows of the Constitution,'[71] Cameron JA's concurring judgment – which has been hailed as a welcome departure from the 'blind positivism'[72] generally displayed by the Supreme Court of Appeal – opened the door for these constitutional values to infiltrate the common-law of contract through the doctrine of public policy.[73] He stated:

> 'The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. It its modern guise, "public policy" is now rooted in our Constitution and the fundamental values it enshrines.'[74]

2.4 The appropriate role of good faith and the use of public policy to infuse the law of contract with constitutional values

By virtue of Cameron JA's dicta in *Brisley*, and following the Constitutional Court's decision in *Carmichele v Minister of Safety and Security*[75] – which emphasised the courts' obligation to develop the common law, in the context of the section 39(2) objectives[76] – the Supreme Court of Appeal employed public policy as the 'doctrinal gateway for the importation of

variation; *courts do not have a general discretion to ignore it in favour of an oral amendment on the ground of some over-arching notion of bona fides*; and the principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply and these may release a party from its workings.' (Emphasis added).

[70] *Nyandeni* supra note 4 para 1.

[71] *Brisley* supra note 2 para 24.

[72] Lewis op cit note 5 at 337.

[73] See Deeksha Bhana & Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 865 at 882, where the authors commend the judgment of Cameron JA for showing, 'that the common law of contract is not immune to constitutional influence and that constitutional values, may in appropriate circumstances, dictate a departure from common-law doctrine.'

[74] *Brisley* supra note 2 para 91.

[75] 2001 (4) SA 938 (CC).

[76] Ibid para 33 et seq.

constitutional values into the law of contract'[77] in *Afrox Health Care Bpk v Strydom*[78] and again in *Napier v Barkhuizen*.[79] On appeal in *Barkhuizen*,[80] the Constitutional Court endorsed this approach with Ngcobo J for the majority holding that constitutional challenges to contractual terms will generally require a consideration of whether the provision in question is contrary to public policy as determined with reference to 'the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights'.[81] If a contractual term offends these values and is thus contrary to the dictates of public policy, it will be unenforceable.[82] There is nothing novel in this assertion: public policy has long been recognised as a ground on which a court may refuse to enforce contractual terms.[83] As early as 1902 our courts have stressed the importance of this inherent judicial power:

> '[The courts have the power] to treat as void and to refuse to in any way 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 arrangement void.'[84]

This power has been bolstered by the Constitution which affords the courts greater scope and legitimacy in declaring contractual terms to be contrary to public policy in line with the need to ensure the 'constitutional colonization of the common law'.[85] Despite the inherent flexibility in this age-old doctrine which can be used to strike the delicate balance between the competing ideals of our law of contract,[86] such as certainty versus fairness, and despite the fact that, 'notions of fairness, justice and equity, and reasonableness cannot be separated from public policy',[87] there are those who cling to the lone notion of good faith – with its twin ideals of fairness and reasonableness[88] – and argue for its place in our law of contract as

[77] Brand op cit note 18 at 84.
[78] 2002 (6) SA 21 (SCA).
[79] 2006 (4) SA 1 (SCA).
[80] *Barkhuizen* supra note 24.
[81] Ibid para 28-9. For a criticism of the adoption of this approach to constitutional challenges to contractual terms see for example, Woolman op cit note 23 and I M Rautenbach 'Constitution and contract – exploring the possibility that certain rights may apply directly to contractual terms of the common law that underlies them' 2009 *TSAR* 613. Both authors argue strongly in favour of testing the constitutionality of contractual terms directly against a provision in the Bill of Rights.
[82] *Barkhuizen* supra note 24 para 29.
[83] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 172, per Innes CJ, who analyses the Roman and Roman-Dutch authorities at 204-5.
[84] *Eastwood v Shepstone* 1902 TS 294 at 302.
[85] Bhana & Pieterse op cit note 73 at 893.
[86] See Chris-James Pretorius 'The basis of contractual liability (1): ideologies and approaches' (2005) 68 *THRHR* 253 for a lucid analysis of these competing ideals.
[87] *Barkhuizen* supra note 24 para 51.
[88] Van der Merwe et al op cit note 27 at 278.

an independent substantive rule that courts may employ to intervene in contractual relationships.

This seems to have been spurred on by somewhat confusing obiter statements in Ngcobo J's judgment in *Barkhuizen* to the effect that the 'limited role' of good faith as an underlying and legitimating value of the law of contract, may not be 'appropriate' under the Constitution, but that this question could be left open for another day.[89] Apparently not prepared to wait for that day – and arguably we are still waiting – some authors[90] attempted to rely on such dicta in *Barkhuizen*, read with an obiter footnote in the case of *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd*,[91] to question whether the equitable defence of the *exceptio doli generalis* – a remedy against the enforcement of unfair contract terms – had been resurrected despite its dramatic burial in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[92] These 'impressions' were however hastily dispelled by Harms JA, in the decision of *Bredenkamp v Standard Bank of South Africa*,[93] who emphasised that the Constitutional Court judgment in *Barkhuizen* should not be misconstrued as opening the door to a general requirement of fairness in contract.[94] The prescripts of public policy have always been, and remain, the lodestar to guide the courts in balancing the inherent tensions in our common-law of contract and the notion of fairness is but one consideration to be weighed in the balance:

> 'With all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated […] It is also not without significance that there is no indication in either of the minority judgments […] of an overarching requirement of fairness. Instead, both judgments dealt with the matter as one of public policy, as found in the Constitution [...].'[95]

Despite the clarity and force in the Supreme Court of Appeal's reasoning regarding the appropriate role of good faith, dicta in two recent Constitutional Court judgments have not done much to resolve the confusion. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*

[89] *Barkhuizen* supra note 24 para 81. See also Brand op cit note 18 at 86, who argues that the 'unpredictability' regarding the appropriate role of fairness results from these confusing and open-ended obiter statements by Ngcobo J.
[90] See Graham Glover 'Lazarus in the Constitutional Court: An exhumation of the *exceptio dolis generalis*?' (2007) 124 *SALJ* 449 and A J Kerr 'The defence of unfair conduct on the part of the plaintiff at the time the action is brought: the *exceptio doli generalis* and the *relicatio doli* in modern law' (2008) 125 *SALJ* 241.
[91] *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC) fn 1.
[92] 1988 (3) SA 580 (A).
[93] 2010 (4) SA 468 (SCA).
[94] Ibid para 32.
[95] Ibid paras 50-1.

(Pty) Ltd[96] dealt with the question whether a duty to negotiate in good faith ought to be recognised in our law. Although the court did not have to decide the issue, dicta in the judgment suggest that the Constitutional Court is not necessarily going to accept Harms JA's attempt to reign in the spill-off effects of *Barkhuizen*. Yacoob J, writing for the minority,[97] refers to 'the backdrop of an understanding that *good faith should be encouraged* in contracts and a party should be held to its bargain.'[98] The majority of the court makes explicit reference to 'the *underlying* notion of good faith',[99] yet does so in the context of statements to the effect that it is '*highly desirable* […] to infuse the law of contract with constitutional values, including values of *ubuntu* [which] emphasise the communal nature of society and "carries in it the ideas of humaneness, social justice and *fairness*"'.[100] Read together, these dicta seem to suggest that the court may be hinting at the possibility of elevating this latter principle to a higher status in our law of contract. The last words in the most recent applicable Constitutional Court judgment of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*,[101] (albeit dicta in the separate concurring Judgment of Foneman J) seem to leave an even bigger question mark over the matter: '[d]etermining the true ambit of *Barkhuizen* must wait for another day.'[102] This statement relates directly to the Supreme Court of Appeal's firm refutation of the tenants' argument *a quo* that by virtue of dicta in *Barkhuizen*, reasonableness and fairness are 'freestanding requirements for the exercise of a contractual right'.[103]

The Constitutional Court may appear to be anticipating the development of a more expansive role for good faith in our law of contract, but until this is done, its role is that as delineated in *Barkhuizen* and as clarified by the Supreme Court of Appeal in the subsequent string of cases: *Bredenkamp, Maphango*,[104] *African Dawn Property Finance 2 (Pty) Ltd*[105] and *Potgieter*.[106] In the latter case – the most recent of the four – the Supreme Court of Appeal forcefully reiterated that,

[96] 2012 (3) BCLR 219 (CC).
[97] Froneman, Mogoeng JJ and Mthiyane AJ concurring.
[98] *Everfresh* supra note 96 para 37. Emphasis added.
[99] Ibid para 72.
[100] Ibid para 71. Emphasis added.
[101] 2012 (3) SA 531 (CC).
[102] Ibid para 158.
[103] Ibid para 22.
[104] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA).
[105] *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) A.
[106] *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA).

> '[r]easonableness and fairness are not freestanding requirements for the exercise of a contractual right […] Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example in the cases of *South African Forestry;*[107] *Brisley; Bredenkamp; and Maphango* […].'[108]

To this extent, good faith remains what it has essentially always been: an 'overarching principle'[109] that gives expression in the law of contract to a community's sense of what is fair, just and reasonable.[110] It is thus a mere aspect of the broader notion of public policy,[111] which is *informed* by notions of fairness, justice and reasonableness.[112] Thus, in the context of the frequently inequitable results of the application of the *Shifren* principle, considerations of fairness must 'be accommodated under the rubric of public policy which has by now become firmly established as a mechanism of judicial control over contractual enforcement.'[113]

The precise prescripts of public policy and how exactly they ought to be weighed in the balance in a given case are matters that have not proven that easy to grapple with, despite the apparent simplicity of this doctrine. This has particularly proven to be so for our apex courts.[114] In a recent article entitled 'The role of public policy in the law of contract, revisited',[115] Kruger laments the Constitutional Court's 'failure' in *Barkhuizen* to 'go beyond the high-level rhetoric which marks the case law on public policy since the advent of the Constitution'[116] and the 'unfortunate lack of clarity'[117] that has ensued.[118] He criticises Ngcobo J's formulation of the two-pronged public policy test[119] as one which 'appears to

[107] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).
[108] *Potgieter* supra note 106 para 34.
[109] *Bredenkamp* supra note 93 para 30.
[110] See Hutchinson op cit note 49 at 742. See also Dale Hutchison 'Good faith in the South African law of contract' in Roger Brownsword, Norma J Hird and Geraint Howells (eds) *Good Faith in Contract, Concept and Context* (1999) 236.
[111] Hutchison op cit note 49 at 742.
[112] *Barkhuizen* supra note 24 para 52.
[113] Brand op cit note 18 at 87.
[114] See, for example, in respect of the failings of the Supreme Court of Appeal, Lubbe op cit note 22 at 420, who criticises the court for its conservative judgments and weak public policy analysis in both *Afrox* and *Brisley* (the majority decision), which he notes are 'characterized by a failure to elaborate the tenor and thrust of the rights under consideration, the possible interplay between them and the need to weigh up completing considerations implicit in them.'
[115] Matthew Kruger 'The role of public policy in the law of contract, revisited' (2011) 128 *SALJ* 712.
[116] Ibid at 718.
[117] Ibid at 719.
[118] Kruger cites, as examples of this 'high-level rhetoric' in our apex courts: *Carmichele* supra note 75 paras 54-6; *Brisley* supra note 2 para 91; *Afrox* supra note 78 para 24; *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) and *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) para 11.
[119] See below for a discussion of this test. Broadly, this test requires that two enquiries be addressed, both of which necessitate a balancing of the competing public policy considerations such as pacta sunt servanda (which gives effect to the values of freedom and dignity) and any other implicated constitutional values and / or public

restrict the analysis to only two considerations, namely reasonableness and fairness'[120] when really what the test has always, and continues to demand, is a weighing up of a 'litany of policy considerations' that have over time been identified as forming part of the public policy 'basket'.[121] Harms DP, in attempting to clarify the test laid down in *Barkhuizen*, appears to endorse this approach in *Bredenkamp* and, although he too arguably does not go beyond the usual 'high-level rhetoric', his judgment provides a useful summary of the 'first principles':

> 'Determining whether or not an agreement… [is] contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values…. Public policy considerations are also not static and their weight may change as circumstances change…. Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values. This does not mean that public policy values cannot be found elsewhere.'[122]

Harms DP goes on to dismiss the appellants' arguments in so far as, *inter alia*, they were 'unable to find a constitutional niche or other public policy consideration justifying their demand.'[123] Any attempt to circumvent *Shifren* via public policy must thus be pegged onto a constitutional value and / or one of the 'traditional policy considerations' in the 'basket.'[124] The cases make it clear that the identification of a 'constitutional peg' for the requisites of public policy is particularly important at the 'enforcement stage' of the enquiry. Thus, Harms DP notes that, 'enforcement of a prima facie innocent contract may [nonetheless] implicate an identified constitutional value [and] [i]f the value is unjustifiably affected, the term will not be enforced.'[125] The 'pegging' of public policy is, however, not necessarily an easy task and as Justice Brand recently remarked, 'the fine tuning of "public policy" may […] require greater activism and ingenuity on the part of the judiciary than they have hitherto

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policy considerations. The first question is whether the clause *itself* is unreasonable per se and thus void. For the purposes of this enquiry, the tendency of the clause to offend public policy is examined as at the time the contract is concluded. Most clauses will appear inoffensive at this stage of the enquiry and thus pass muster. This was precisely the case with non-variation clauses which were generally considered in the abstract by our courts. Thankfully, the Constitutional Court in *Barkhuizen* – if perhaps somewhat confusingly – laid the foundations for the second enquiry; namely whether, notwithstanding the clause itself being prima facie inoffensive, its *effects* in a particular case are an affront to a particular constitutional value and thus it would be contrary to public policy to *enforce* the clause in question 'in light of the relative situation of the contracting parties' at the time the court is asked to enforce the term. If this is found to be the case, the clause will be voidable on the ground of unfairness. See *Barkhuizen* supra note 24 paras 56-60, read with *Bredenkamp* supra note 93 paras 44-8 and *Nyandeni* supra note 4 paras 81-90.

[120] Kruger op cit note 115 at 722.

[121] Ibid at 719.

[122] *Bredenkamp* supra note 93 paras 38-9.

[123] Ibid para 60.

[124] Kruger op cit note 115 at 727.

[125] *Bredenkamp* supra note 93 para 47.

displayed.'[126] The Eastern Cape High Court decision in *Nyandeni* provides an apt illustration of such ingenuity in employing the second leg of the public policy test to defeat *Shifren* where justice and fairness so obviously called for it.

3 RECENT CASE LAW THAT ILLUSTRATES THE INNOVATIVE USE OF PUBLIC POLICY TO MITIGATE THE HARSH EFFECTS OF THE *SHIFREN* PRINCIPLE

3.1 Nyandeni Local Municipality v Hlazo

Our Constitutional Court has noted that the high courts (and the Supreme Court of Appeal) are the primary vehicles for developing the common law.[127] The full-bench judgment delivered by Alkema J in *Nyandeni*[128] shows that they can meaningfully fulfil this duty. This judgment is an answer to the academic calls for judicial imagination in giving a constitutional flavour to our common law of contract[129] while at the same time remaining respectful of the principle of *stare decisis* and the sound legal doctrines carefully crafted by our courts since time immemorial. It is precisely the kind of 'revolutionary intervention'[130] required to illustrate how *Shifren* ought sensibly to be avoided without strained reliance on labels and 'dogmatic adherence to legal rules.'[131] The salient facts of this case are briefly as follows: Mr Hlazo (the first respondent) was employed as the municipal manager of the appellant municipality in terms of a written employment agreement. His conduct in this role was less than exemplary. A forensic accounting report ('the report') revealed his involvement in various irregularities, most notably the mismanagement of municipal funds, as a result of which, *inter alia*, he pocketed more than he had earned, unlawfully increasing his own salary (and that of several other managers). Faced with this information, the municipality suspended Mr Hlazo pending the outcome of an investigation of the contents of the report and gave him timeous notice of a disciplinary hearing in which he would have an opportunity to respond to four clear charges of serious misconduct. At all material times, including at the hearing itself, Mr Hlazo was legally represented. The entire process complied with the tenets of natural justice and it was common cause that it was conducted without any procedural irregularities.

[126] Brand op cit note 18 at 89.
[127] *Everfresh* supra note 96 para 41.
[128] *Nyandeni* supra note 4. Full-bench judgment delivered by Alkema J and concurred in by Pillay and Ndengezi JJ.
[129] See, for example, Lubbe op cit note 22; Woolman op cit note 23; Bhana & Pieterse op cit note 73; Kruger op cit note 115.
[130] Bhana & Pieterse op cit note 73 at 894.
[131] Ibid.

The outcome of the hearing was a 'guilty' verdict handed down by the chairperson. Mr Hlazo was then invited to make written representations as to why a recommendation should not be made to the municipal council for his permanent dismissal. He duly did so, they were considered and he was nonetheless dismissed by resolution of the council. On the same day that this unfavourable decision was communicated to him, he attempted to tender his resignation in an effort to 'protect his future career path … [and] escape the financial disadvantages of being dismissed rather than resigning.'[132] The municipality did not accept his resignation. He then devised a strategy to push the municipality into a legal corner, secure financial benefits for himself at the municipality's expense and in addition get extra time and the opportunity to seek alternative employment. He sought to take this 'second bite at the cherry'[133] by relying on a provision in the employment agreement which prescribed arbitration as a mandatory procedure for the resolution of all disputes,[134] read with an expansive 'entrenchment clause.'[135] The latter clause provided that 'no variation, modification or waiver of any provision of this agreement […] shall in anyway be of any force or effect unless confirmed in writing and signed by the parties […].' This non-variation clause thus entrenched both itself and all other provisions of the agreement against oral variation. Mr Hlazo, in attacking the acceptance by the council of the recommendations made pursuant to the disciplinary enquiry, therefore argued that the dismissal procedure followed by the municipality, albeit fair in all respects, was nonetheless defective in so far as it did not comply with clause 16 of the agreement and even if the parties had tacitly agreed to a different procedure, the entrenchment clause precluded the municipality from relying thereon. The *Shifren* principle of 'the effectiveness of contractual entrenchment'[136] was thus invoked as a shield to his patent abuse of process. This argument passed muster in the court *a quo* which was not prepared to make any chinks in the seemingly impenetrable *Shifren* armour. On appeal, Alkema J was, however, ready to rise to the occasion.[137] He stated:

[132] *Nyandeni* supra note 4 para 101.
[133] Ibid para 26.
[134] The salient provisions of clause 16, 'Arbitration', are contained in term 16.2 of the agreement: 'All disputes emanating from, but not limited to, the interpretation of this contract and / or any part of conditions of service and /or any municipal policy and / or code of conduct shall be resolved by means of arbitration. *It is therefore specifically recorded that where disciplinary proceedings are initiated against the Municipal Manager such disputes shall be resolved through pre-dismissal Arbitration under the auspices of the Commission for Conciliation Mediation and Arbitration*.' (Court's emphasis).
[135] Contained in clause 14, 'Variations not effective unless in writing'.
[136] *Nyandeni* supra note 4 at para 52, quoting with approval from *Van As*.
[137] Note that the court could have dismissed the appeal outright on the basis that Mr Hlazo misconceived his remedy in that he should have rather instituted review proceedings and sought the setting aside of the disciplinary enquiry on the basis that it was ultra vires the employment contract. Alkema J nonetheless reasoned that, 'such a result will only further delay proceedings and will result in further legal action and costs. This will

> 'On appeal, this court is again invited by the appellant to embark on the perilous journey of developing the common law by escaping the *Shifren* shackle. Our only beacons are judgments from the Supreme Court of Appeal pointing the direction where not to go. As the law stands at present, there are no exceptions to the application of the *Shifren* principle, and there are no decided cases not overturned on appeal where the *Shifren* principle was relaxed. This then is the issue on appeal.'[138]

More specifically, the legal issue Alkema J had to address was framed as follows: 'does the *enforcement* of the entrenchment clause, as required by *Shifren*, in the circumstances of this case offend public policy.'[139] The Judge sought to address this question – which encapsulates the second leg of the public policy test – as all the usual doctrinal devices employed to avoid *Shifren*, as well as the municipality's bald assertion of good faith (albeit framed as a prerequisite of public policy), proved fruitless. Essentially, the municipality argued that by his conduct, Mr Hlazo had agreed to the disciplinary procedure which was followed and therefore, by implication, consented to a variation of the clause in the agreement which prescribed pre-dismissal arbitration for the purposes of dispute resolution.[140] Both the court *a quo* and Alkema J on appeal held that the facts supported a finding that by his conduct, Mr Hlazo had agreed to this variation.[141] But this variation was not reduced to writing and signed by the parties in compliance with the non-variation clause. Thus, as the judge noted, it did not necessarily follow 'that, in law, his implied agreement to vary the terms had the lawful result of a variation.'[142] The *Shifren* principle is black-letter law and may thus prohibit such agreement by conduct. In order to defeat *Shifren*, counsel for the municipality therefore raised all the usual technical arguments, each of which was in turn dismissed by the court. The municipality's final contention – 'more in the nature of a sigh of despair than a submission of law'[143] – was that the strict application of *Shifren* on the facts of the case 'would amount to allowing the municipal manager to go back on his word, which is a breach of bona fides and is therefore offensive to public policy.'[144] This question, if perhaps incorrectly framed by counsel, was what the court felt deserved attention. Before proceeding with a lucid analysis of the prescripts of the public policy assessment against a thorough

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not be in the interest of justice if this appeal can be dealt with on the real issue, namely the applicability of the entrenchment clause and the *Shifren* principle.' Ibid at paras 38-9.

[138] Ibid para 2.

[139] Ibid para 73. Emphasis added.

[140] Ibid para 23.

[141] Ibid para 34.

[142] Ibid.

[143] Ibid para 56.

[144] Ibid.

historical discussion of *Shifren's* roots and the benefits of this principle,[145] Alkema J proceeded to refute the attempt to peg public policy on *pacta sunt servanda* and *bona fides* in turn.

Regarding the first argument that public policy calls for a relaxation of *Shifren* where it allows a party to go back on his word, Alkema J remarked that this 'circuitous reasoning'[146] is 'fundamentally flawed in both logic and in law'.[147] This is because, the *Shifren* principle as formulated by the Appellate Division represents a policy choice in favour of the school of thought which advocated that in terms of *pacta sunt servanda* contracting parties should be held to their *original* terms and where they originally agreed that no subsequent oral variation would be permissible under the contract, the public interest demands that this original agreement be given effect to.[148] Thus: '[i]n terms of *Shifren*, it is the original, written contract which must be protected and enforced, not the subsequent oral one which effectively ignores the first.'[149] The reliance on good faith to escape the *Shifren* shackle was held to be equally misconceived.[150] Alkema J did not hesitate to dismiss this argument on the basis that *Brisley* clearly confirmed that 'bona fides does not constitute a general legal principle on the strength of which a court may refuse to enforce contractual rights and / or obligations.'[151] The judge reiterated that, '[a] court has no general discretion, with reference to considerations of fairness and equity, to decide whether or not to enforce contractual rights.'[152] The result that the municipality could not rely on good faith to escape the *Shifren* principle on public policy grounds did not, however, put an end to the enquiry. Alkema J noted that, '[b]ona fides may not be the peg on which to hang public policy, but there may be another valid rule of law protected by the public interest which may legally justify a departure from the *Shifren* principle.'[153] In addressing *this* issue, the court develops the common law by employing the second leg of the public policy test, as formulated in *Barkhuizen* and clarified in *Bredenkamp* (the 'enforcement stage' of the enquiry), to circumvent *Shifren* in light of facts that so clearly called out for this development.

[145] Ibid paras 41-5.
[146] Ibid para 59.
[147] Ibid para 58.
[148] Ibid.
[149] Ibid para 59.
[150] Ibid para 62.
[151] Ibid para 61.
[152] Ibid.
[153] Ibid para 63.

The analysis begins with the court providing a summary of the first principles of public policy. The 'general rule' which 'has its roots in antiquity' is that, in addition to instances of fraud or deceit, 'there may be circumstances under which a contract will not be enforced because it offends public policy'.[154] This is the law as clearly evinced by our jurisprudence over the decades in which this principle has been applied.[155] Alkema J provides a useful overview of the salient case law and in so doing summarises the key public policy considerations which have emerged therefrom.[156] Pre-1994 case law filled the 'basket'[157] with considerations such as:

> 'Performance (which) will detrimentally affect the interest of the community; contracts which are *contra bonos mores*, illegal or immoral; contracts which run counter to social or economic expedience; contracts which are "inimical to the interests of the community"; contracts implemented in a manner which is unconscionable, and so forth.'[158]

The determination of these requirements and their application in a given case has not always been an easy exercise as our living system of law has had to evolve contemporaneously with our constantly changing 'diverse, multisocial and multicultural society.'[159] As the public interest changes, the tenets of public policy have to change with it. However, since 1994, this task has become easier as public policy has obtained new conceptual and contextual dimensions: '[t]he values and norms which underpin the Bill of Rights are universal and cumulatively express public policy and the interest of society.'[160] Public policy is today rooted in our Constitution and the fundamental values it enshrines.[161] This does not however change the fact that it remains a common law doctrine and as such, when *it* is invoked to challenge the validity or enforceability of a contractual term, this does not necessitate a 'direct constitutional attack'[162] but rather indirect recourse must be had to the underlying values and principles of the Constitution in so far as they are *informative* of what public policy demands in a given case. Alkema J notes that this is the correct approach to be adopted as propounded by the majority of the Constitutional Court in *Barkhuizen*.

[154] Ibid paras 64 and 71.
[155] Ibid para 66
[156] Ibid paras 65-72.
[157] Aptly dubbed by Kruger op cit note 115 at 719, where he refers to 'the "basket" of policy considerations'.
[158] *Nyandeni* supra note 4 para 74.
[159] *Nyandeni* supra note 4 para 75.
[160] *Nyandeni* supra note 4 para 76.
[161] Ibid para 77.
[162] Ibid para 72.

On the subject of *Barkhuizen*, Alkema J is quick to tackle the task of clearing up some of the confusion left in its wake. The first question he addresses is whether the effect of this judgment is that, 'public policy is henceforth to be determined with reference only to those norms and values enshrined in the Constitution.'[163] The judge does not hesitate to answer that, although he need not decide the issue, he does not think this to be the case: 'I believe the constitutional values have brought uniformity and more sensitivity to the values and norms of the concept of public policy, and may have broadened its impact, but they are not exhaustive of public policy in general.'[164] Secondly, and in an almost prophetic manner – in that it so aptly anticipates the Supreme Court of Appeal's repeated reiteration of the minimal role of good faith in the series of cases that came after *Nyandeni*[165] – Alkema J clarifies the proper role of fairness in contract. He notes that although this concept 'runs like a golden thread throughout the Bill of Rights' it is used merely as an adverb or adjective and 'is not an independent or substantive constitutional right.'[166] Like its twin concept of good faith, fairness is merely an underlying informative and ethical value of the law of contract, but not 'an independent constitutional or contractual principle in terms of which contracting parties may escape their obligations, including obligations arising from the *Shifren* principle.'[167]

Alkema J then elucidates what he understands to be four key guidelines that have been developed by the courts over the years in addressing the question whether a contractual term offends public policy. First, what has to be determined is whether the term or contract is contrary to public policy *per se* or whether its *enforcement* 'in the prevailing circumstances and facts of the case' renders it contrary to public policy.[168] This distinction – between the first and second legs of the public policy test – is important for the term itself may appear 'innocuous' but its effects in a given case may well be an affront to the public interest.[169] These two distinct enquiries in turn invoke two distinct tests: in the case of the former, the 'tendency' of the clause to offend public policy must be examined at the time the contract is concluded;[170] and in the case of the latter enquiry, which was apposite in this case, public

[163] Ibid para 79.
[164] Ibid.
[165] *Bredenkamp* supra note 93; *Maphango* supra note 104, *African Dawn Property Finance 2 (Pty) Ltd* supra note 105 and *Potgieter* supra note 106.
[166] *Nyandeni* supra note 4 para 78.
[167] Ibid paras 79 and 90.
[168] Ibid para 81.
[169] Ibid.
[170] Ibid para 82.

policy must be determined at time the court is asked to enforce the term 'having regard to the prevailing circumstances and the *effect* of the order at *that* time.'[171]

Secondly, and by virtue of *Barkhuizen*, both these enquiries necessitate a determination of fairness 'under the constitutional setting.'[172] Alkema J reiterates that this enquiry is divorced from the personal views of both the judge and the contractants. To this extent, he reconciles the majority and minority (per Moseneke DCJ) approaches in *Barkhuizen* by reading Ngcobo J's judgment in such a way to advocate an 'objective approach' not a subjective one as suggested by the minority: '[t]he reference to public policy to be assessed, having regard to the "circumstances and conduct of the parties", in the majority judgment was intended to refer to the effect of the clause on the parties at the time the court was asked to enforce the clause, and not to their state of mind.'[173] Alkema J then notes that both the majority and minority judgments in *Barkhuizen* link the concept of fairness to that of reasonableness. The test is an objective one and he frames it as follows: if the operation of the clause in the prevailing circumstances and on the facts of the case, at the time the court is asked to enforce it, 'is so manifestly unreasonable that it offends public policy, then it is voidable on the ground of unfairness.'[174]

The third guideline flows from the maxim *pacta sunt servanda*: public policy requires that contracts concluded freely and with serious intent should be enforced. This gives effect to the constitutional values of dignity and freedom in the form of contractual autonomy. In addition, the judge adds that it 'gives effect to freedom of trade, occupation and profession … [and] ensures commercial certainty and plays a vital role in a stable economic environment.'[175] As such, a court should exercise its power to refuse to enforce contractual provisions contrary to public policy in an attenuated way and in only the 'clearest of cases […] "when the harm to the public is substantively incontestable"'.[176] Finally, in considering whether a contractual term is 'at variance with public policy' it is useful to identify a constitutional niche for the requisites of public policy in a given case. Alkema J puts it thus: 'it helps to identify the

[171] Ibid para 83.
[172] Ibid para 85.
[173] Ibid para 87.
[174] Ibid para 89.
[175] Ibid para 92.
[176] Ibid para 93.

constitutional principle which informs public policy and which is said to be offended … [and which] is then balanced and measured against the contractual term.'[177]

Having delineated these four guidelines, the court then addresses the following question: 'is it in the public interest on the particular facts of this case that the *Shifren* principle be enforced?'[178] To address this issue, the impact of enforcement on both parties had to be assessed and the competing policy considerations weighed in the balance. On the one hand, giving effect to *Shifren* and enforcing the entrenchment clause would give effect to the values of *pacta sunt servanda,* commercial certainty, predictability and expedience, as well as the values of freedom and dignity.[179] However these considerations could not be divorced from the facts: the consequence of implementation of the clause from Mr Hlazo's perspective would be to enable him to get a second bite of the cherry in the hope that, pursuant to a new process conducted by way of arbitration, he might *not* be found guilty – a doubtful outcome indeed on the facts.[180] He would enjoy substantial financial benefits with the added benefit of an opportunity to seek alternative employment without the black mark of a dismissal to his name.[181] On the other hand, from the municipality's perspective, the enforcement of the entrenchment clause would result in great inconvenience and expense, which would ultimately be borne by the public.[182] Given these facts, the court turned to determine the competing public policy considerations that would be implicated if *Shifren* were to be strictly given effect to. And it is in determining these considerations that the court shows particular ingenuity.[183]

[177] Ibid para 94.
[178] Ibid para 102.
[179] Ibid para 95.
[180] Ibid para 104.
[181] Ibid.
[182] See *ABSA Bank Ltd v Malherbe* unreported case no 5077/2012 [2013] ZAFSHC 78 (16 May 2013) where at para 37, in discussing the *Nyandeni* judgment and distinguishing the facts thereof from the facts before him, Rampai J notes that Mr Hlazo, 'was undoubtedly actuated by bad faith to prolong his disciplinary hearing so that he could continue milking the public cow – the fiscus – for as long as possible. Cleary that was an abuse of a due process of law for an ulterior motive and inequitable purpose.'
[183] Note that while I find the court's reasoning on this issue both creative and compelling given the facts of the case, Alkema J's line of argument has been met with some criticism. In *Bahre v Royale Energy Ltd* unreported case no 73663/2010 [2012] ZAGPPHC 304 (23 November 2012) para 6, Fabricius J states, obiter, the following: '[i]n my view...[the *Nyandeni*] case ought to have been decided on a non-constitutional basis, and with great respect, its reliance on section 34 of the Constitution is too strained on the facts of the case.' I disagree with this view. Firstly, I think that the facts of *Nyandeni* cried out for precisely the kind of legal reasoning Alkema J advances, and secondly, this reasoning is legally sound: the principle of avoidance was not breached by the court as Fabricius J seems to suggest. The case was *not* 'decided on a constitutional basis' but rather the relevant constitutional rights and their underlying norms and values *informed* the court's public policy analysis. The Constitution was thus invoked indirectly and not directly, as Fabricius J seems to suggest.

Alkema J finds a constitutional peg on which to hang public policy in section 34 of the Constitution which governs 'access to courts', read with the administrative justice right in section 33 which requires, *inter alia*, procedural fairness.[184] Quoting from the *Beinash* case,[185] he notes that the section 34 right is fundamental to our democracy and requires active protection on the part of the courts who are 'under a constitutional duty to protect bona fide litigants, the due process of courts and the administration of justice.'[186] This duty extends also to 'all processes of law, including hearings before an informal tribunal'[187] and the necessary corollary of this duty to ensure due process of law is a duty to ensure protection against an *abuse* of the process of law.[188] The section 34 right may have been open to both the municipality and Mr Hlazo, but 'it is axiomatic that s 34 is *not* available to a litigant whose exercise of the right will result in an abuse of the process of law.'[189] This would be destructive of the right to a fair hearing, and the rule of law – a founding value of our democracy – which prohibits such abuse of due process.[190] By asserting *Shifren*, this is precisely what Mr Hlazo sought to achieve: he invoked it for the ulterior purpose of, *inter alia*, delaying his dismissal by requiring a rehearing of his case before another tribunal.[191] This, Alkema J remarked, would serve no legitimate purpose and would result in an abuse of legal process and thus a breach of the municipality's rights under section 34.[192] Public policy, as informed by these constitutional norms and values, does not condone such abuse of the process of law and therefore, these considerations had to outweigh the principle of *pacta sunt servanda* as expressed in *Shifren*.[193] The court thus refused to enforce the non-variation clause and concluded that, 'the facts and circumstances of this case justify the departure from the *Shifren* principle'.[194] And so, the common law was developed in a trailblazing effort by Alkema J. Other high courts took heed of this development and so it would seem the trend was set in *Nyandeni* for the use of public policy to circumvent *Shifren*. I turn now to briefly discuss the findings in two subsequent cases that illustrate this trend.[195]

[184] *Nyandeni* supra note 4 para 96.
[185] *Beinash v Ernst and Young* 1999 (2) SA 116 (CC).
[186] *Nyandeni* supra note 4 para 115.
[187] Ibid para 116.
[188] Ibid para 117.
[189] Ibid para 122. Emphasis added.
[190] Ibid paras 122-4.
[191] Ibid para 108.
[192] Ibid.
[193] Ibid para 125-6.
[194] Ibid para 126.
[195] Note that *Nyandeni* has also been subsequently cited with approval in a decision of the Labour Court in which a non-variation clause was held not to be a bar to the conclusion of a third employment contract notwithstanding the fact that it was not reduced to writing. See *Southgate v Blue IQ Investment Holdings*

3.2 GF v SH

Following *Nyandeni*, the facts of *GF*[196] provided the Gauteng Northern Province High Court with an (apparently)[197] open-and-shut case for the use of public policy to relax *Shifren*: they arose in the context of family law and necessitated a consideration of the 'best interests of the child' criterion. This case concerned a written maintenance agreement which had been made an order of court pursuant to the parties' divorce in 2002. In terms of this settlement agreement, the custody of the two minor children born of the marriage was awarded to the first respondent (S), subject to the applicant's (G) right of reasonable access. G was furthermore required to make monthly maintenance payments in respect of each child and in addition pay for all their medical and educational expenses. Following the divorce matters remained acrimonious between the parties who continued to disagree about the timeousness and adequacy of the maintenance payments as well as issues relating to the children's wellbeing and upbringing. S then proceeded to court and obtained a writ of execution against G in order to settle the alleged amount of outstanding maintenance under the divorce order. G then in turn applied to court for, *inter alia*, the setting aside of the writ. One of the arguments he raised before Kollapen AJ was that changes in the residency and maintenance arrangements were made pursuant to a subsequent agreement between the parties. This agreement was reached with the help of a meditator with expertise in family law and it was concluded in order to give effect to the best interests of the minor children. In terms of this subsequent agreement, the parties agreed, *inter alia*, to have the children stay with them on alternate weeks and G would no longer have to pay maintenance to S but would instead make

unreported case no. J 1788/09 [2012] ZALCJHB 39 (4 May 2012) para 52. I have not discussed this case in this article, however, as it does not deal with the use of public policy to relax *Shifren* and it is respectfully submitted that the court's reasoning regarding the application of the non-variation clause is open to question.

[196] *GF v SH* supra note 16.

[197] Note that subsequent to the finalisation of this article, the Supreme Court of Appeal handed down judgment in the appeal of this matter in *De Haas v Fromentin* 2013 (6) SA 621 (SCA) (30 September 2013) and although the appeal was dismissed, the court held at para 15 that 'the court a quo erred in concluding that the maintenance order was in fact varied'. This was because extracts from the letter directed by the mediator to the parties on 13 August 2008 (which are quoted in the judgment on appeal) made it clear that the new financial arrangement would be in place on a 'trial basis' only. Given this fact, the Supreme Court of Appeal held that '[w]hat was envisaged was clearly that if the trial period should prove to be successful, a formal variation would be brought about and until that takes place, there is no variation of the maintenance order.' Given the definition of a variation, this reasoning appears to be correct – although it does beg the question whether, given that the arrangement fell short of a variation, it should not have been shackled by *Shifren* anyway and should thus have been given effect to on this basis (rather than on the basis of a public policy argument a quo). While it is unfortunate that the court a quo seems to have misdirected itself on the facts, the *GF* judgment is nonetheless an important one – notably for its use of the 'best interests of the child' criterion as the key public policy criterion justifying the relaxation of *Shifren* where the circumstances necessitate as much. The case has thus also been met with commendation. For example, in *ER v LB* unreported case no 2237/2013 [2013] ZAWCHC 161 (11 September 2013) para 27 , which was handed down shortly before *De Haas*, the court quoted with approval from *GF* and thereby highlighted the importance of the 'best interests of the child' criterion in tipping the public policy scales in favour of a departure from *Shifren* in the family law context.

all relevant payments directly to the third parties concerned. S countered by asserting *Shifren*: she relied on the expansive non-variation clause[198] in the settlement agreement and argued that although there may have been changes in the residency arrangements in so far as they related to the children, G was, by virtue of *Shifren*, not absolved from his original maintenance obligations.

One of the questions the court thus had to address was whether these original obligations were capable of being varied by the 'purported mediated agreement' and if so, whether they were indeed varied.[199] This question necessitated a consideration of whether the *Shifren* principle applies without exception, and if not, under what circumstances a departure from it is warranted.[200] Against the backdrop of the *Shifren* case and Cameron JA's dicta in *Brisley*, the court – encouraged by the trend set in *Nyandeni* – emphasised that even though *Shifren* is well-entrenched in our law, in appropriate cases public policy may permit 'or indeed justify a departure' from this principle.[201] This case called for such a departure. Kollapen AJ distinguished it from the quintessential setting in which *Shifren* normally rears its head: this was not a commercial dispute but one arising within the domain of family law and in this context different considerations, 'distinguishable from those applying in the world of commercial contracts,' warrant consideration.[202]

The guiding consideration in this context is that of the best interests of the child.[203] This entails, *inter alia*, that parents maintain their children in light of their needs and in accordance with the parents' abilities. Public policy requires that these reciprocal obligations are honoured and 'not sacrificed […] at the altar of ensuring certainty at all times.'[204] Furthermore, these responsibilities must not be considered in the abstract but rather in light of the fact that, 'in the real world parents […] must invariably make decisions that may warrant

[198] *GF v SH* supra note 16 para 9. This clauses provided as follows: 'save for the above, the provisions of this agreement shall not be capable of being varied (save by a court of competent jurisdiction), amended, added to, supplemented, novated or cancelled unless this is contained in writing and signed by both parties'.
[199] Ibid para 10.
[200] Ibid para 12.
[201] Ibid para 13.
[202] Ibid para 18.
[203] Ibid para 19.1 Note that, interestingly, although the court makes explicit reference to the paramount importance of the 'best interests of the child' standard, no reference is made to section 28(2) of the Constitution which explicitly provides for this standard. This failure to peg the applicable public policy consideration to a fundamental constitutional value is an odd omission on the part of the court as it certainly would have strengthened the public policy analysis.
[204] Ibid para 19.2.

a departure from, or variation of, the express terms of a settlement agreement.'[205] Insistence on *Shifren* in this context may thus be both 'impractical' and inappropriate in that the best interests and wellbeing of minor children may demand otherwise.[206] The court thus sought to peg public policy – as informed by and developed in the image of the Constitution – on the 'best interests of the child criterion', which in appropriate cases would certainly justify a departure from *Shifren*.[207] In particular, the judge pointed out that to saddle a parent with a disproportionate share of responsibility pertaining to the maintenance and upbringing of a child may well have the concomitant effect of 'restricting the ability of parents to do that which the best interests of the child demand' as opposed to that which they are obliged to do under a settlement agreement.[208] This was such a case, according to Kollapen AJ.

The facts (as relayed by Kollapen AJ) indicated a variation[209] of the residency and maintenance arrangements[210] which were illustrative of 'attempts by the parties over time […] to take into account the current context, and the difficulties they were respectively experiencing and to find ways of resolving those in both their interests, as well as the interests of the children.'[211] These efforts could not simply be ignored because they fell outside the purview of the settlement agreement and were not reduced to writing and signed in compliance with the entrenchment clause. Public policy thus demanded that *Shifren* not be applied.[212] However, despite initially pegging public policy to the 'best interest of the child standard', as Van der Merwe et al point out,[213] the court ultimately seems to warrant a deviation from *Shifren* on the more general basis that equity demands that S, having acquiesced in the informal agreement, be held to its terms.[214] Kollapen AJ held that:

> 'It would indeed be inequitable to require of the applicant to continue complying with his maintenance obligations in terms of the court order, while at the same time having the expectation that he would have to comply with his obligations in terms of the mediated agreement. Exposing the applicant to such

[205] Ibid para 19.3.
[206] Ibid.
[207] Ibid para 20.
[208] Ibid para 22.
[209] Note that at para 28, Kollapen AJ states that, 'the letter of Charles Cohen of 13 August 2008 evidences a new (albeit) *temporary* financial arrangement'. (Emphasis added) It is unfortunate that despite acknowledging the transitory nature of the new arrangement, Kollapen AJ fails to deal with how this affects the determination of whether a variation (in the technical sense) in fact took place.
[210] Ibid para 29.
[211] Ibid para 27.
[212] Ibid paras 20 and 28.
[213] Van der Merwe et al op cit note 27 at 137 fn 69.
[214] *GF* supra note 16 paras 28-30.

> double jeopardy would certainly offend against considerations of public policy and … fairness and equality.'[215]

This finding is incongruent with the court's initial public policy analysis and it is submitted that the judgment falls short in this respect.[216] It is also unfortunate that the judgment does not take note of a significant distinguishing feature of the original maintenance agreement: it was made an order of court and, in light of this fact, it is a pity that Kollapen AJ did not grapple with the implications of allowing a variation of it; let alone consider whether, in the circumstances, such a variation of a court order is in fact possible. These shortcomings aside, *GF* is a noteworthy judgment for its interesting – and possibly trend-setting – application of the second leg of the public policy test to disallow the enforcement of a non-variation clause in the family law context where the best interests of child demand as much. Finally, it is interesting that Kollapen AJ seems quite intent in the judgment on distinguishing the case from the typical commercial context in which, so he seems to imply, a court will be less inclined to relax *Shifren*.[217] The most recent case in the trilogy, however, proves otherwise.

3.3 Steyn v Karee Kloof Melkery (Pty) Ltd

This case[218] is the most recent in the trilogy of cases which illustrate how the *Shifren* shackle can be escaped where public policy so demands and it is the first case in which this has been done in a commercial setting. Peter AJ, writing for the South Gauteng High Court, Johannesburg, explicitly notes that, '[t]he principled basis for not enforcing an entrenched formalities clause, set out in *Nyandeni*, has been followed in *GF v SH*.'[219] Alkema J's effort in *Nyandeni* – which Peter AJ praises as 'a carefully reasoned judgment'[220] has thus had spill-off effects in the commercial contractual domain. The relevant contract in this case was a sale of business agreement – a quintessential commercial contract.

The plaintiffs – a father and son team (the Steyns) – lived on a farm on which they conducted a dairy farming business in partnership. The land in question was owned by Mr Steyn Snr and his wife. In 2007, Mr Visser who represented the first defendant company ('Karee Kloof')

[215] Ibid para 30.
[216] My criticism in this regard resonates with the reasoning of Van der Merwe AJA for the Supreme Court of Appeal in *De Haas* supra note 197 where at para 16, he notes that despite Kollapen AJ's 'disavowel' of *Shifren*, 'the policy considerations that he [actually] relied upon are precisely those that were weighed up in *Shifren*.'
[217] Ibid para 18 and 20.
[218] *Steyn* supra note 17.
[219] Ibid para 50.
[220] Ibid para 48.

began negotiating with the Steyns for the purchase of both the land and the business. The sale of business agreement ('the agreement') formed the subject of the dispute at trial. It contained a non-variation clause framed such that 'no agreement in conflict with … [it] was to be binding on the parties unless it was reduced to writing and signed by all the parties.'[221] The transaction was riddled with complications from the beginning: payments to the Steyns to discharge the purchase price obligations were not made in accordance with the strict terms of the agreement and prior to the effective date Mr Visser delivered 200 dairy cows onto the farm which resulted in additional maintenance and upkeep responsibilities for the Steyns.[222]

In August 2007 Mr Visser, apparently dissatisfied with the general condition of the dairy farming operation and having discovered that he had purchased the land for almost twice the market value per hectare in the area, wrote to the Steyns enumerating various complaints. They responded by countering that the additional cows had been a drain on their resources and an extra expense.[223] Matters were supposedly resolved by way of a written settlement agreement ('the first settlement') concluded in September 2007, however later in the year, Mr Steyn Jnr discovered that Mr Visser had sold 23 animals and was attempting to sell further livestock in breach of the retention of ownership clause in the agreement. Urgent proceedings were initiated in the Vereeniging Magistrates' Court pursuant to which a payment of R142 000 was made in purported settlement of the sold livestock.[224] This did not, however, dispose of the matter as various disputes between the parties perpetuated. Then in December 2007, the Steyns' attorneys sent a letter to Karee Kloof's attorneys detailing a second settlement proposal which the latter communicated acceptance of a few days later. As a result of this 'second settlement agreement', Karee Kloof made various further payments to the Steyns totalling R310 000.[225] Further correspondence indicated that both parties considered the matter finalised. Then nearly a year and a half later the Steyns sought to claim R410 820.72 as the 'outstanding balance in respect of the sale of business agreement.'[226] This claim entirely ignored the two settlement agreements, which Karee Kloof pleaded as a defence.[227] The Steyns, relying on *Shifren*, countered that they did not comply with the

[221] Ibid. The non-variation clause was contained in clause 15.1 of the agreement.
[222] Ibid para 5.
[223] Ibid para 7.
[224] Ibid para 10.
[225] Ibid para 15.
[226] Ibid para 17.
[227] Ibid.

formalities clause in the agreement.[228] The court was able to dispose of this question readily in relation to the first settlement as it had been reduced to writing and the signature of one partner sufficed to ensure compliance with the formalities clause.[229] The real issue that engaged the court was 'whether or not the second settlement agreement should enjoy efficacy and primacy over the original agreement and defeat the claim.'[230] This in turn necessitated an assessment of the limits to the enforcement of the *Shifren* principle.

Peter AJ begins this analysis by noting how the courts have in the past, on 'dubious grounds', attempted to avoid hardship caused by *Shifren's* application by resorting to 'all sorts of ingenious stratagems'[231] and in addressing the first question whether the settlement agreement was a variation within the scope of the entrenchment clause,[232] the judge refuses to do the same. He states that, 'it is of little profit to attempt to characterise the settlement agreement either as a waiver, an agreement to release [...]' and so forth.[233] Showing an aversion to such artificial use of labels to avoid the characterisation of a variation, he notes that:

> '[t]he first question is answered by determining whether or not the second settlement is an agreement which conflicts with the provisions of the original sale of business agreement. This is so irrespective of whatever label is given to the second settlement agreement.'[234]

The facts showed this conflict to be evident: the legal effect of the terms of the second settlement were 'simply inconsistent with the terms of the original agreement.'[235] It thus clearly amounted to a variation within the purview of the entrenchment clause. The second question the court sought to address required a consideration of whether this variation was effected in accordance with the prescribed formalities. This was clearly not done given the absence of the necessary signatures.[236] The court thus had to address a third question: could *Shifren* nonetheless be relaxed on the basis that the enforcement of the entrenchment clause

[228] Ibid para 20.
[229] Ibid paras 26-9.
[230] Ibid para 42.
[231] Ibid para 24.
[232] Ibid para 25.
[233] Ibid para 35. Note that, to this extent, he disagrees with the decision in *Buffet Investments Services (Pty) Ltd v Band* [2009] JOL 24368 KZD in which, according to Peter AJ, the court incorrectly characterised an oral agreement of compromise as a waiver rather than a variation in order to avoid the strictures of the non-variation clause. See paras 32-3. Given the artificiality and resultant incorrectness that can result from the use of such labels, Peter AJ displays a clear aversion for their use.
[234] Ibid para 35.
[235] Ibid para 38.
[236] Ibid para 41.

would be contrary to public policy *at the time of enforcement*.[237] In addressing this key question, and fulfilling its duty to develop the common law,[238] the court held that this had to be the case. The salient facts necessitated as much: the second settlement, if enforced, would have legal consequences which would go beyond the original agreement: it would also lead to the conclusion of the litigation in the Magistrates' Court and would result in other disputes arising from collateral agreements being settled.[239] These collateral agreements fell outside the purview of the original agreement and were not subject to the entrenchment clause. In this respect, the second settlement was a *composite* agreement which disposed of all of the disputes – it was 'not confined only to the sale of business agreement.'[240] Given these facts, the court formulated three public policy considerations – none of which was pegged to a constitutional value[241] – that warranted the relaxation of *Shifren*.

First, Peter AJ states – essentially without more – that the public interest demands that there be an end to litigation and by ignoring the second settlement, the Magistrates' Court proceedings would not finally be disposed of.[242] The judge does not elaborate on why public policy requires as much and this thinness of reasoning is disappointing. Secondly, the court notes that public policy demands that parties to disputes ought to avoid litigation with its inherent costs and delays and rather seek to resolve their differences amicably. Giving effect to *Shifren* in this case would discourage the settlement of disputes and reopen litigation in the Magistrates' Court.[243] Finally, *pacta sunt servanda* would be violated if the second settlement was to be ignored for it related *not only* to the original agreement but also to disputes outside of it and in respect of the latter collateral agreements the parties did not require compliance with formalities.[244] The court thus concluded that, 'the *Shifren* principle must yield to the

[237] Ibid para 46.
[238] Ibid para 49.
[239] Ibid para 51.
[240] Ibid.
[241] Note that at para 48, Peter AJ, in purporting to supplement the reasoning in *Nyandeni* states the following: 'I agree with the reasoning therein…save that I would add that whether or not a contractual term offends public policy is not to be determined solely by the identification of a constitutional principle which informs public policy and which is offended.' It is submitted that this statement misconstrues Alkema J's reasoning in *Nyandeni*: at para 79 of this latter case, the learned judge clearly states that he does not think that 'public policy is henceforth to be determined with reference only to those norms and values enshrined in the Constitution… [they] may have broadened its impact, but they are not exhaustive of public policy in general.' Peter AJ's interpretation of *Nyandeni* in the *Steyn* case is thus not entirely correct.
[242] *Steyn* supra note 17 para 54.
[243] Ibid paras 55-6.
[244] Ibid para 57.

public policy considerations requiring the enforcement of the second settlement agreement.'[245]

4 CONCLUSION

Writing in 2001, Hutchison remarked that, '[t]he principle in *Shifren's* case, that a non-variation clause is binding on the parties, still forms part of our law, but is productive of injustice in contractual relations. If it is not scrapped, therefore, it must be limited.'[246] In this article I have sought to illustrate how the recent efforts of our high courts reveal that although *Shifren* remains part of our law, it is no longer an insuperable obstacle to ensuring equity in contractual relations. The trilogy of cases I have discussed shows how recourse to the flexible and evolving doctrine of public policy – particularly through the second leg of the public policy test – can, through a nuanced and reflective analysis, ensure that *Shifren* is relaxed where the circumstances so demand and in a manner which strikes the right balance between the interests of the parties. The approach adopted in these cases is a welcome movement away from the strained attempts of our courts in the past to escape the *Shifren* shackle through recourse to labels and tenuous distinctions. 'Sophistry'[247] is not the solution to *Shifren's* failings. As Davis J remarked, obiter, in *Mort NO v Henry Shield-Chiat*:[248] '[t]he task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.'[249] This can best be achieved through the instrumentality of public policy and the *Nyandeni* judgment, in particular, evidences a superb effort at fulfilling this task. The *Shifren* principle of effective contractual entrenchment may not yet have been scrapped, but it has certainly been limited – most recently in the commercial context – and so it would indeed seem that *Shifren* is *not* so immutable after all.

[245] Ibid para 58.
[246] Hutchison op cit note 49 at 745.
[247] See, for example, *Industrial Development* supra note 8 para 5.3 where the court held the attempt to distinguish between a variation, a settlement and a compromise amounted to 'pure fallacy and sophistry'. McLennan op cit note 6 at 578 argued in 2001 that such distinctions – particularly between variations and waivers – amounts to 'sophistry'.
[248] 2001 (1) SA 464 (C).
[249] Ibid at 474J-475F.