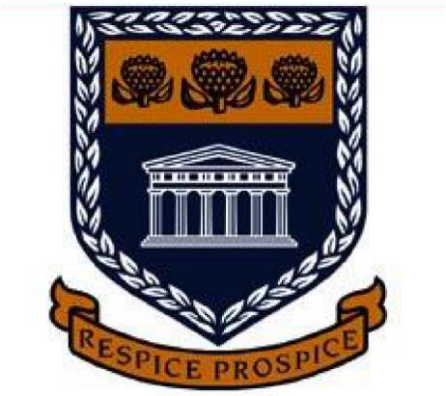

UNIVERSITY *of the*
WESTERN CAPE

Ubuntu and the South African Law of Contract With Particular Reference to the Common Law Contract of Employment

Thesis submitted in fulfilment of the requirements for the Doctor of Laws degree in the department of private law at the University of the Western Cape

By

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CO-SUPERVISOR: PROFESSOR Y MUPANGAVANHU

JANUARY 2022

DECLARATION 1: PLAGIARISM

I, Sipho Stephen Nkosi, do hereby declare that:

1. The research reported in this dissertation, except where otherwise indicated, is my original work.

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As the candidate's supervisors, we certify the statement made herein above, and approve this thesis for submission.

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DECLARATION 2: PREVIOUS PUBLICATIONS

Immediately below are two of my previous publications on which some parts of this thesis are based:

1. 'Ubuntu: Its transformative impact' (2018) *South African Public Law Journal* (2018) (Vol 33) 1.
2. 'The Sub-Saharan ethic of Ubuntu and its impact on the South African Labour Dispensation' *International Journal of Law and Politics* (2017) (Vol 3) 80.

DEDICATION

This work is dedicated to my mother, **Octavia Hluphekile Gladys Mtshali**, my children, grandchildren and all the students I have taught over the years, for having been the bottomless reservoir of strength and inspiration.

ACKNOWLEDGEMENTS

I would like to thank God Almighty for the gift of life that He has blessed me with, and for the physical and mental wellness that has sustained me throughout my career as a lawyer and teacher.

I also wish to express gratitude to my wife, Lerato, for her love, care and support. The task of completing this project would have been much more onerous without her constant encouragement. She helped to propel me throughout the process, even when her own reserves were almost depleted.

I would also like to thank my supervisors, Professor L Mwambene and Professor Y Mupangavanhu, for their sound advice and wise counsel without which I would not have been able to maintain the tempo and timbre that is required for this purpose. The schedules and timelines they set for me were as exacting as they were reasonable. I would also like to thank them for their generosity of spirit; and for commencing to work with me, towards the end of 2018, quite a while before I was officially registered and enrolled for the LLD programme with the University.

Another word of gratitude should go to the academic staff in the Faculty of Law at the University of the Western Cape, particularly Professors W Le Roux, A Malherbe, A Diala and N Sibanda, for their constructive critique of the drafts which I presented during the much educative and enriching colloquia, at various stages of this project. The administrative staff, particularly Ms D Gordon, helped me through the technical hoops and loops of it all, and made me feel at 'home away from home' during my sojourns to the Western Cape.

It would be remiss of me not to mention Professor D Bilchitz, the Director of the South African Centre for Constitutional, Public, Human Rights and International Law (SAIFAC), at the University of Johannesburg, for starting me up on this arduous but exciting journey. He particularly rekindled my interest in the philosophical and esoteric side of the law.

Also deserving of my gratitude is the entire staff and student assistants at the Library of the University of Johannesburg, especially those in the Law Section. They really gave meaning to the saying that 'many hands make light work'.

I also wish to thank all the younger colleagues whom I have had the pleasure and privilege of sharing an office or corridor with at the University of Johannesburg, particularly R Kapindu (now a judge) and B Winks (now an advocate), who kept my mind young and agile through constant intellectual sparring.

ABSTRACT

The concept of *ubuntu* has exercised the minds of many philosophers and jurists in recent times. This arises from the fact that the concept has many facets to it – etymological, linguistic, ethical and juridical – all of which demand attention and comprehension. Some commentators and jurists seem to assume that *ubuntu* is a new, parochial, unnecessary addition to the South African constitutional and legal lexicon. Their view is that *ubuntu* was introduced for the first time in 1994, by the postamble to the Constitution of the Republic of South Africa Act 98 of 1993 ('the interim Constitution'). Another group opine that, not only is *ubuntu* a sub-Saharan African concept, but that it is also the foundational value of the country's constitutional framework.

The source of this conundrum difficulty is that, like many other concepts and principles of African customary law, *ubuntu* was deliberately stunted and left undeveloped under the different colonial and apartheid governments. Many of its subsidiary maxims (which could have helped to give it meaning and content) were, and still remain, largely unknown. Instead, the common law was recognised as the only source of South Africa's (unwritten) law. Moreover, it was the distorted and ideologised version of this body of law which the courts relied on to resolve disputes.

As the thesis will demonstrate, these distortions were intended to serve narrow and sectarian interests, in accordance with the political dictates of the time. The thesis also shows that, just like *ubuntu* in pre-colonial times, an unblemished version of the common law could have served as an unwritten Bill of Rights for pre-democracy South Africa; and as a bulwark for all citizens against oppression, repression and exploitation. The thesis also indicates that there has been a palpable move away from the theory and semantics of the concept, to its juridical and practical value. It is demonstrated in this study that *ubuntu* has not only found its way into the pleadings prepared by attorneys and counsel in court, but it has also become the basis on which most of the contentions and arguments they make in court are founded.

The ultimate purpose of the thesis, therefore, is to demonstrate how *ubuntu* can be used, and is being used already, to create new rights and procedures, develop and enhance existing ones, or to discard the old ones that do not resonate with the letter and spirit of the Constitution. The thesis also indicates how *ubuntu* can be used to resuscitate some of the old common law remedies (that are coterminous with the spirit of *ubuntu*), which were abolished for political and ideological reasons. Even though various sources, and case law, are relied on, the South African law of contract, particularly the common law contract of employment, will be used as an example to illustrate this development. The thesis also seeks to show that there is, in reality, no impediment to the Bill of Rights applying in the private law sphere – directly or horizontally.

Keywords: Common law, contract, constitution, customary law, equality, equity, fairness, judges, justice and ubuntu.

ACRONYMS

AHRLJ	African Human Rights Law Journal
CC	Constitutional Court
CCR	Constitutional Court Review
GNP	North Gauteng High Court, Pretoria
GSJ	South Gauteng High Court, Johannesburg Local Division
JJS	Journal of Juridical Science
PELJ	Potchefstroom Electronic Law Journal (Potchefstroom Elektroniese Regstydskrif)
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law Journal
SCA	Supreme Court of Appeal
Stell Law Review	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman Dutch Law)
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
ZACC	Constitutional Court (South Africa)
ZASCA	Supreme Court of Appeal (South Africa)
ZAWCHC	Western Cape High Court (South Africa)

DEFINITIONS

Unless the context of the thesis indicates otherwise, the following terms mean:

1. *African humanism*: a philosophy intended to instill pride and teach African people about their origin, culture and traditions in relation to other nations.

2. *African maxims*: all relevant African idioms and proverbs that have, over the centuries, acquired juridical normative value, and the force of law.

3. *Apartheid*: a politico-legal system that was preceded by colonialism in South Africa and was founded on segregation and economic exclusion based on race.

4. *Bill of Rights*: The Bill of Rights as contained in the Constitution of South Africa Act 108 of 1996 (chapter 2 - sections 7 to 39 thereof).

5. *Common law*: a combination of the principles of Roman, Dutch and English law, as developed by the South African courts from the middle of the seventeenth century to date (the term does not relate to the distinction between the various law families, such as the Common Law (Anglo-American) and the Romano-Germanic Law).

6. Common law contract of employment: an agreement (written or verbal) in terms of which the one party (the employee or worker), undertakes to place his or her labour at the disposal of another (the employer) for remuneration.

7. *Constitution*: the Constitution of the Republic of South Africa Act, 1996 (as amended).

8. *Customary law*: a set of laws, rules, customs and practices, as developed from time to time by the courts and modified by legislation, that have been observed by the indigenous peoples of South Africa since time immemorial.

9. *Grundnorm*: a founding value or principle that ensures the legitimacy, acceptability and validity of a Constitution.

10. *Law of contract*: the set of common-law principles that regulate the conclusion, enforcement and termination of contracts in South Africa.

11. *Transformation*: the gradual and concerted process of changing the South African constitutional jurisprudence in accordance with the prescripts of the Constitution and the Bill of Rights.

12. *Ubuntu*: the sub-Saharan ethic which, among other values, teaches and encourages sympathy, compassion, empathy, equity and justice among all human beings.

LIMITATIONS CLAUSE

The work that has been done in respect of this thesis, and the sources that have been cited in support thereof, reflect the law as at **30 September 2021.**

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Statement of the problem

South Africa is multicultural, multilingual country[1] whose moral fibre and social fabric have been deeply affected by colonisation and apartheid. These two systems of government resulted in racial segregation and economic exclusion.[2] For that reason, all post-Constitution government functionaries – and jurists – will have to contend with the residual effects of the policies and laws of that period. Customary law was left ossified and stunted.[3] *Ubuntu*, which is itself an integral component of customary law, suffered the same fate. And, as indicated below, some South Africans seem to think that the concept is a recent creation.[4]

A change in a country's politico-legal edifice is often precipitated by the need to ensure justice, fairness and equity. As in the case of South Africa, the process requires 'historical honesty'.[5] In other words, the process demands a critical examination of the history of the country, its institutions, laws, customs, practices and the resultant jurisprudence. In the context of South Africa, it has entailed investigating and expressing how the South African version of customary law was stunted, ossified and distorted.[6] Coupled with that development has been the need to decipher how *ubuntu* was relegated to the lowest rung, in terms of juridical significance and transformative impact, and how it could be extricated from that in

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1 See *Du Plessis & Others v De Klerk and Others* 1996 (3) SA 580 (CC) para 163.

2 See Van Wyk D 'Introduction to the South African Constitution' in Van Wyk D; Dugard J; De Villiers B & Davis D (eds) in *Rights and Constitutionalism: The South African Legal Order* (1993) 131-70.

3 *Gumede v President of the Republic of South Africa and Others* 209 (3) SA 152 (CC) 16-8.

4 See Bennett TW '*Ubuntu*: African Equity' (2011*) PER/PELJ* 30 and the authorities cited therein; see also Kroeze IJ 'Doing Things with Value: The Case of *ubuntu* Court' in Cornell D and Muvangua N (eds), *ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 333 341. However, cf. Ngcukaitobi, T *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 73-4. For further elaboration on this point, see 2.1 below.

5 An expression used by the former Deputy Chief Justice during a webinar organised by the University of Johannesburg for the promotion of his latest book, *All Rise*: *A Judicial Memoir* (2020). It also means that everyone concerned has to acknowledge that there are 'good' common-law gems to be found in the South African historical legal treasure trove.

6 See *Gumede v President of South Africa* para 14-8.

order to redress the country's past politico-legal wrongs.[7] *Ubuntu* is the matrix on which African jurisprudence was founded, and a source from which all societal, moral, religious, ethical and juridical values flowed.[8] The reason is that customary law – of which *ubuntu* is part – is embedded in the collective psyche of the different communities it is intended to regulate.[9]

It was no surprise, therefore, that the Founding Fathers – and Mothers of South Africa's constitutional democracy fashioned out a Constitution which was akin to a promissory note[10] that carried the hopes of all denizens (not just citizens)[11] for equality, fairness, justice and a better quality of life for everyone. The exercise required an organising principle that would weld together the different communities and race groups, thereby ensuring justice, social justice and industrial peace. For reasons fully explored below, *ubuntu* has rightfully assumed that mantle.[12] As will be indicated below,[13] the common law was obviously inadequate for this purpose. It will also be shown that, at a doctrinal and practical level, the concept 'common law' was a misnomer.[14] In addition to being an imposition by one small, powerful group on a bigger but vulnerable one, it was also very limited in its scope and

7 See *Gumede v President of South Africa* para 14-8.

8 According to Dlamini, indigenous law 'lays emphasis on social solidarity and it humanistic character'. He also says that justice is an essential element thereof; and ensures that people are treated humanely – see CRM Dlamini 'Indigenous Law' in C De Beer *Bill of Right Compendium* 6A-4. This characterisation is in accordance with what was said by Ngcobo J in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 163 and S v Makwanyane 1995 (3) SA 193 (CC) para 224. In other words, the reciprocal rights and duties of support among family members birthed a caring society. This phenomenon is even given international legal force by the African (Banjul) Charter on Human and Peoples' Rights CAB/LEG/67/3 rev.5,I.L.M. 58 (1982) particularly Article 27(1) and 29(1) thereof. It is important to note that the Charter came into operation on 21 October 1986.

9 Dlamini *Indigenous Law* 6A-3.

10 To paraphrase the immortal words of the late Dr Martin Luther King Jr in his inimitable 'I Have A Dream' speech delivered in August 1963 near the Lincoln Memorial Centre in Washington DC, United States of America – see Washington JM (ed) *I Have A Dream: Writings and Speeches that Changed the World* (1986) 102.

11 It is for that reason that almost all the provisions of the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa Act,1996 ('the Constitution'), and Chapter 3 of the Constitution of the Republic of South Africa Constitution Act 200 of 1993 (hereinafter referred to as "interim Constitution") begin with 'Everyone', as opposed to 'All South Africans'.

12 See the preamble and the postamble to the interim Constitution.

13 See (n 1) above.

14 Moseneke *All Rise* 6.

reach.[15] It did not develop organically among the indigenous communities of South Africa, and it served only the interests of one section of the South African society[16] at the expense of those of another. Additionally, because of the doctrine of parliamentary sovereignty, legislation only served to entrench this position.[17] Even the Bible (and its teachings) was interpreted in such a way as to justify racial segregation and political oppression of one race group by another.[18] For that reason, it is hoped that the thesis will contribute to demonstrating that *ubuntu* (together with the accompanying maxims) is the foundational value that can help introduce certainty where direct applicability of the Constitution insofar as the law of contract is concerned. It will also highlight the judicial-ideological fault lines where the adjudication of contractual competing interests is concerned.

As will be indicated in chapters 4 and 5, the South African law of contract in general, and the common-law contract of employment law in particular, is in need of the kind of redemptive transformation that only *ubuntu* could help bring about.[19] It was through the seminal judgment of *S v Makwanyane*[20] that *ubuntu* was thrust into the country's jurisprudence and collective psyche. Even though there are still doubts about its actual nature and efficacy,[21] *ubuntu* now constitutes an integral part of South Africa's post-apartheid constitutional jurisprudence and legal discourse.[22] All it requires is understanding, nurturing and incremental development.[23] All 11

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15 See Moseneke All Rise 6; see also Himonga & Nhlapo 76-8.

16 From which judges were appointed to the bench at that time – see Moseneke *All Rise* 62-4.

17 Moseneke *All Rise* 62-4.

18 That the Bible promotes brotherhood, togetherness and justice did not matter much to the ruling elite – see Du Plessis LM in 'Calvin and "Calvinism" in the Present-day South Africa' in Corder (ed) *Law and Social Practice in South Africa* (1989) 53-61.

19 See Lewis C 'The uneven journey to uncertainty in contract' (2013) 76 *THRHR* 80 94; see also *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2019 (4) SA 517 (SCA) para 38. However, see *Combined Developers v Arun Holdings* 2015 (3) SA 215 (WCC) 237-239, and *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* 2012 (1) 256 (CC) para 22, 71.

20 1995 (3) SA 591 (CC).

21 See *The Citizen (1978) (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) para 216-8; see also Ndulo M 'Widows under Zambian customary law and the response of the courts' (1985) *CILSA* 90 92.

22 See *McBride* 146-8, 216-8.

23 For instance, in *S v Makwanyane*, Langa J said:

> The concept (of *ubuntu*) is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises the status of a person as a human being, entitled to unconditional respect,

justices of the then newly established Constitutional Court, in their own ways, expressed themselves on why *ubuntu* was the foundational value that underpinned the interim Constitution.[24] This approach was to be the hallmark of the new approach to juridical interpretation, jurisprudence and practice, thereby ensuring a clean bill of health for the country's constitutional system.[25] However, it should be pointed out that the dicta of the justices in *Makwanyane* contain, in the main, an admixture of linguistic, cultural and sociological aspects of the phenomenon, and have very little juridical content.[26] It is for this reason that the discourse has largely been grounded on one maxim, *umuntu ngumuntu ngabantu* ('a human being is a human being because of other human beings'), to the exclusion of many other

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human dignity, value and acceptance from other members of the community – para 224.

Chaskalson P (as he then was) said that the laws of the land should protect the weakest and the worst in society; the social outcasts and the marginalised among us (para 88). Earlier on in his judgment, he described the founding document as a 'transitional constitution but one which itself establishes a new order in South Africa', and said that there was huge social and cultural divide between the judges and the accused or litigants (para 48). He also said that white male judges shared very little with the majority black people over whom they sat in judgment in the various courts of the country. Race, poverty and class influenced the judgments of the courts (para 48). There was a social and cultural distance – and it precipitated injustice (para 48).

24 See *Makwanyane* para 48, 88.

25 With regard to the new teleological approach to the interpretation of the Constitution, and legislation that implicated basic human right, see Moseneke DCJ in *Minister of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 196 (CC) para 51-52; see also *S v Makwanyane* (3) SA 391 (CC) para 9, and *S v Zuma and Others* 1995 (2) SA 642 (CC) para 15 where the Constitutional Court set a benchmark for instances where the interpretation of legislation is concerned: not only should the language of a statute be considered, but so should its historical background and the context in which it was made. The Court also emphasised the importance of adopting a 'purposive' and 'generous' approaches to statutory interpretation, thereby ensuring that values of the Constitution itself are taken into account. This is because apartheid was a form of affirmative action which was acutely biased in favour of one racial group; and injustice always occurs when equals are treated unequally, and vice-versa. It was an unfair and unjust version of affirmative action – see Dlamini, CRM 'Affirmative Action: A search for justice or reverse discrimination?' in Labuschagne JMT and De Kock PD (eds) *Festschrift: JC Bekker* (1995) 44-5.

26 The dictum of Mokgoro J in that case is an example of this approach. In the course of her judgment, she said: 'While it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation' – see para 308; see also Mokgoro JY '*Ubuntu* As A Legal Principle In An Ever-changing World' in F Diedrich (ed*) Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 1-2). At para 224, Langa J observed: 'The concept (of *ubuntu*) is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises the status of a person as a human being, entitled to unconditional respect, human dignity, value and acceptance from other members of the community.'

African maxims that could help give meaning and content to *ubuntu*.[27] As with customary law itself, this narrow interpretation created an incorrect perception about the phenomenon.

It was only in 2005, when the Constitution of the Republic of South Africa Act[28] was already in operation, in *PE Municipality v Various Occupiers*,[29] that the juridical aspects of *ubuntu* began to take shape and to be infused into South African jurisprudence and practice.[30] Up to that point, the concept had just been used merely as an interpretative tool, in conjunction with other well-established rules of interpretation, in order to supplement the generous[31] and purposive approaches.[32] There is another use to which *ubuntu* could be put: that of creating new rights,[33]

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27 Such as g*ofa ke go fega, ware go fa wafegolla* (in Sepedi) which means that 'by giving, and being charitable, one qualifies to receive from practically anyone in the world'; and *molomo otlhafunang oroga omongwe* (Setswana) *molomo otlhafunang oroga omongwe* (which literally means that a mouth that is chewing insults the one that is not chewing. Or as to paraphrase Idowu, it is better for many people to feed on crumbs, than for just one person to have the whole loaf – see Idowu W 'To Each a Crumb of Right, to Neither the Whole Loaf': The Metaphor of the Bread and the Jurinomics of Justice in African Thought' 2012 *JJS* 56-83). These maxims constitute the kernel of *ubuntu*: giving generously and sharing selflessly. There are many variations of it in other African languages. The elders used them, and still use them, as a verbal sword to eradicate selfishness among their communities and progeny. The Nguni greeting, '*Sawubona*', also has very strong humanitarian, communitarian connotations. It means, 'In you, I see myself, a human being (irrespective of race, background or gender).'

28 Act 108 of 1996 (hereinafter the Constitution).

29 *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC). This is a case that involved the eviction of illegal occupiers from a privately-owned piece of land within the jurisdiction of the Port Elizabeth Municipality. After considering the constitutional framework within which the Prevention Illegal Squatting and Eviction From and Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE), Sachs J, after stressing that the expression 'just and equitable', as it appears in the PIE Act, and the achievement of equality were not necessarily mutually exclusive concepts, encouraged the courts to 'go beyond their "normal function" and engage in 'active judicial management according to equitable principles'. He also emphasised 'good neighbourliness' and the need to 'infuse the values of grace and compassion into the formal structure of the law' – para 36-7 of the learned justice's judgment.

30 See para 34-7 of the judgment. This aspect is further dealt with in 4.3.2.

31 This interpretative approach is more about promoting the rights of the individual than restricting them. It allows for the widening of the boundaries of the rights as the language of the text may allow – see Curie I and De Waal J *The Bill of Rights Handbook* (2014) 134-48 and the authorities cited therein.

32 This approach is about drawing out the core values that undergird the Constitution, such as respect for human dignity, equality and freedom, and then preferring an interpretation that ensures optimum protection of these rights – see Currie and De Waal (2013) 136-40.

33 See *Joseph v Johannesburg City Council* 2010 (4) SA 55 (CC); see also Bilchitz D Bilchitz D 'Citizenship and Community: Exploring the right to receive basic municipal services' (2010) *CLR* 48-50.

procedures and processes.[34] The Constitutional Court has already given some inkling on how the process can be continued and taken to fruition.[35] The development has necessitated, and still requires, the juridicalisation and re-interpretation of all the relevant sub-Saharan maxims for constitutional and judicial posterity.[36] The outcome would be a carefully considered integration and incorporation of *ubuntu* into all laws of the country.

The purpose of the exercise is to ensure that both the language and idiom[37] are appropriate for the development of the jurisprudence in this regard. For instance, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[38] the majority stated, albeit *obiter*, that if a clear case is made (by counsel) for reliance on *ubuntu*, the courts would be prepared to use it in order to create rights or improve court procedures and processes.[39] For that reason, a mere mention of the word in the pleadings would not suffice: counsel would have to indicate how *ubuntu* or the *ubuntu* ethos has been violated or ignored[40] and how it can be used to supplement concepts such as good faith, and compel parties to a contract to negotiate, even in

34 As indicated in 4.3, this point relates to the process of delivering court process to a defendant or respondent by a plaintiff or applicant. The Rules allow for the summons to be affixed to the main gate of the premises where the defendant resides – see Rules 6 of the Magistrates Court Rules; see also Rule 4(1) (a) (iv) of the Uniform Rules of Court; see also *Absa Bank Ltd v Mare and Others* 2021 (2) SA 151 (GNP).

35 For instance, in *PE Municipality* Sachs J said that the courts should move away from a rigid, purely legalistic approach, and adopt a more sensitive one founded on the ethos of *ubuntu*. In addition, in eviction matters, the question should be more about equality, justice and equity than about the unlawful occupation of the property at a particular time – para 34-7.

36 In general, see Rautenbach C *Introduction to Legal Pluralism in South Africa* (2018) 27-30.

37 This is a term used by Lewis L 'Judicial "Translation" and Contextualisation of Values: Rethinking the development of Customary Law in Mayelane' (2015) *PER/PELJ* 1125, 1131-5.

38 2012 (1) SA 256 (CC). This is a case that involved an application for eviction based on the breach of a contract of lease which contained a deadlock-breaking mechanism in the event of a dispute pertaining to its renewal. The justices had occasion to pronounce themselves on *ubuntu*. For instance, the Moseneke DCJ said that if the case had been properly pleaded, the Constitutional Court would definitely have infused the applicable common law with the values of *ubuntu*, which are an 'integral part of our constitutional compact'. He then stated that where there is a contractual obligation on the parties to negotiate in good faith, 'it would be hardly imaginable that our constitutional values would not require that the negotiations be done reasonably with the view to reaching an agreement in good faith' – see para 72.

39 Para 72. However, cf. Kroeze *Ubuntu Court* 10 (fn 61).

40 The view expressed by Moseneke ACJ in *Everfresh* on para 69-72 were cited with approval in *Roazar CC v Falls Supermarket CC* 2018 (3) SA 76 (SCA) para 24; see also *Violetshelf Investment (Pty) Ltd v Chetty (Unreported:24858/18*: Gauteng, Johannesburg Local Division) para 8-9. For more on this point, see chapter 4.

instances where there is no deadlock-breaking mechanism.[41] It is no longer sufficient for the courts just to look at the terms of a contract to determine what the rights and duties of the parties are. It is now imperative that the impact of the conduct of either party on the other be evaluated for fairness and equitability.[42] In other words, *ubuntu* could be used in the same way that a drill is used on the mines to excavate the wealth that lies in the bowels of the earth. In this case, *ubuntu* is the drill or shovel in the hand of the jurist that he or she can use to find the legal riches and constitutional treasures – be they of African, British and European origin – that God has endowed South Africa with. These jewels – that lie dormant or buried in the old parchments – will help to adorn South Africa's already beautiful juridical tapestry.

It is also important for one to be mindful of the fact that there exist a raft of consumer protection laws in South Africa which are expressive of *ubuntu*, but that those laws have a limited sphere of application.[43] Where, for example, a common-law contract involving millions of rand is entered into, it is often the individual party's bargaining power that determines the consequences of that transaction.[44] In South Africa, where illiteracy is high and standard contracts are full of legal jargon,[45] 'bargaining power' remains a hollow and meaningless concept.[46] Also, with

41 *Roazar CC v Falls Supermarket CC* 2018 (3) SA 76 (SCA) para 24; see also *Violetshelf Investment (Pty) Ltd v Chetty* (Unreported:24858/18: Gauteng, Johannesburg Local Division) para 8-9.

42 See *PE Municipality* para 34-5.

43 Depending on the definition, type and size of the credit agreement involved. For instance, in terms of s 8 of the National Credit Act 34 of 2004, the transaction must be (1) a 'credit agreement' as defined therein; (2) the credit provider's annual turnover or asset value must not exceed R1m; (3) or when the turnover is less than R1m, and the credit provider enters into a credit agreement which is defined as a 'large agreement'. The example of such an agreement is a mortgage agreement, irrespective of the amount involved – s 4 (1) of the NCA.

44 See Van Huyssteen LF; Lubbe GF; Reinecke MFB, Du Plessis JE *Contract: General Principles* (2020) 145-9.

45 See 'South Africa: Literacy' (21 September 2021) available at http:www.indexmundi.com/south_africa/literacy.html (accessed 15 January 2022). This topic is dealt with further in chapter 4.

46 Corder H & Davis D 'Introduction' in Corder H (ed) *Law and Social Practice: An Introduction* 10-13; see also Kerr AJ *The Principles of the Law of Contract* (2002) 8 where the author says: 'When it is remembered that residual obligations and inescapable obligations imposed by law have been known throughout legal history it becomes clear that the fact that the terms of standardised contracts may be dictated by one of the parties in this as in earlier centuries does not mean that consent and agreement are no longer to be considered as basic to the formation of contracts.'

principles such as *laesio enormis* and *exceptio doli generalis*[47] having been abolished, the (distorted) common law has provided no similar or equivalent protection in cases where uneducated and vulnerable consumers are involved.[48] While public policy incorporates fairness, reasonableness and equity, the South African law of contract still emphasises freedom and sanctity of contract.[49] Whilst giving with the one hand, it is taking with the other.

That state of affairs is likely to perpetuate inequality, which *ubuntu* is intended to eliminate. In a place like South Africa, power relations are skewed, and the expression 'freedom and sanctity of contract' can only mean that economic relations will remain as they are, unequal, for a very long time.[50] There is a sense of comfort, however, that comes from the knowledge that our courts, which up until recently been conservative in their approach,[51] are now mindful of their duty to develop the common law in accordance with the spirit purport and objects of the Bill of Rights.[52]

The minority judgment in *Bato Star v Minister of Tourism and Environmental Affairs*[53] is an example of this phenomenon. The case was about the interpretation

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47 See Barnard J 'The unfairness of the price and the doctrine of *laesio enormis* in consumer sales' *THRHR* (2008) 521; see also Kerr AJ above (2002) 9 and all the authorities cited therein Kerr (2002) 638-640; see also Bradfield GB *Christie's Law of Contract in South Africa* (2016) 16-17. This was exacerbated by the fact that good faith was not, and still is not, a stand-alone requirement for validity in South Africa.

48 Even though, strictly speaking, the common law can no longer be used to create new rights, it can be developed by relying on *ubuntu* as the undergirding constitutional value, in terms of s 39 (2) of the Constitution, in order to ensure that it reflects the spirit, objects and purport of the Bill of Rights.

49 See *Barkhuizen v Napier* para 28-35; see also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 19-32. and Van Huyssteen *et al*. 366-70.

50 See Klare & Davis (2010) 412.

51 About the factors that influence the judges in the performance of their judicial function, see Margo CS 'Reflections on Some Aspects of Judicial Function' in Kahn E (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 282-4.

52 This development will certainly engender fairness and contractual justice in this branch of South African law.
– see PQR Boberg *Law of Person and the Family* (1977) 79 where says: 'The point is simply that, in the field of private law racial discrimination is superimposed piecemeal by legislative enactment upon a common-law framework that knows no distinctions of colour, class or creed.' For the limited remedies that the common law provided under those circumstances, see GB Bradfield *Christie's Law of Contract in South Africa* (2016) 16-17; see also *Magna Alloys & Research (SA) v Ellis* 1984 4 SA 874 (A) 891(A) 7-8, and Davis & Klare (2010) 405, 409 where the authors express concern about the potential of the South African legal (judicial) culture to 'hold back the Constitution's egalitarian aspirations.' However, cf. Van Huyssteen et al. 13-20, and *Safin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8-9.

53 2004 (4) SA 490 (CC).

of section 2 of the Marine Living Resources Act.[54] This is a piece of legislation whose objective it is 'to redress historical imbalances and to ensure equity within all the branches of the fishing industry' by ensuring a fair allocation of fishing rights to black people who were excluded under the old order. In the course of his judgment, Ngcobo J (as he then was) said:

> The Constitution is now the supreme law of our country. It is therefore the starting point. Indeed, every court must promote the spirit, purport and objects of the Bill of Rights in interpreting any legislation. That is the command of section 39(2). Implicit in this command are two provisions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least one identifiable value enshrined in the Bill of Rights [such as social justice or *ubuntu*], and second, the statute must be reasonably capable of such interpretation.[55]

Furthermore, public policy, which was for many years determined in accordance with European and Western standards,[56] now has to be infused with the values of the Constitution, which include *ubuntu*.[57] As will be demonstrated in chapters 3 and 4, reliance on public policy did not (and still does not) provide adequate protection to those people who were susceptible to the deceptive or false pre-contractual statements made by often more-educated businesspeople.[58] This is because, at the material time, public policy meant the legal convictions of a particular section of South Africa's racially divided society as perceived and articulated by the judges in resolving disputes brought before them.[59] Because the judges did not experience

54 Act 18 of 1998.

55 Paragraph 72.

56 See Bernard-Naude J '*Justice Moseneke and the* Emergence of a New Master-signifier in the South African Law of Contract' (2017) *Acta Juridica* 247 252, 255, where the learned author says good faith has always been measured against 'freedom of contract', which was, in turn, cast in the Western, individualistic, *laissez faire*, and largely acquisitive mould. For more on this topic, see 3.3 below.

57 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28-34.

58 See Ch 4; see also Otto JM & Otto R-L Otto *The National Credit Act Explained* (2016) 2-3.

59 See Moseneke *All Rise* 5-6, 234; see also Neethling et al. *Law of Delict* (1999) 37-8; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597. Many of the judges who were appointed before the advent of the current constitutional dispensation may not be able to completely detach themselves from the old matrices on which their work was based in the past. This might all be due to their subconsciously held 'inarticulate premise'.

the same difficulties as the litigants who appeared before them, they could not dispense justice in a manner that it had to be.[60]

It is for that reason that *ubuntu* has become the prism through which public policy should be viewed and articulated.[61] The courts can only work with and develop whatever version of the common law is at their disposal. This defect in the common law definitely points to *ubuntu* being the only preferable alternative to fill in the gaps in the unwritten component of South Africa law.[62] The law of contract, including the common-law contract of employment, is the one branch of South African law which is likely to benefit from this development. As indicated above, this is because the levels of illiteracy in South Africa are fairly high and the uneducated are prone to exploitation and being taken advantage of.[63]

1.2 Research question

The main question to be investigated by the study is: What practical application and benefit can the concept of *ubuntu* have on the South African common law of contract and employment? The subsidiary questions that arise from the main question are the following:

(a) What are the theoretical foundations of *ubuntu* and its meaning and content?
(b) What has been the interpretative and juridical value of *ubuntu* in the South African jurisprudence?
(c) Can the courts rely on *ubuntu* to resuscitate old common-law remedies which were abrogated or abolished before the constitutional dispensation?

60 See Moseneke *All Rise* 5-6, 234; see also Margo 282-4.

61 See *Barkhuizen v Napier* para 51; see also *RH v DE* 2014 (6) SA 436 (SCA) 17-18*; RH v DE* 2014 6 SA 436 (SCA) 13 para 3; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 87, and *Sarrahwitz v Maritz* NO 2015 (4) SA 491 (CC) para 29.

62 *Ubuntu*, like the customary law of which it is an integral part, is flexible; it allows for occasional bending of the law in order to ensure justice – see Dlamini (1999) 6A2; see Bennett TW *Customary Law in South Africa* (2004) 2.

63 See Moseneke 5-6, 234; see also Neethling *et al. Law of Delict* (1999) 37-8; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597, and Margo 282-4.

(d) What is the importance of *ubuntu* to the development and transformative impact on the South African law of contract in general, and the common-law contact of employment?

1.3 Research Methodology

Given the nature of the undertaking and research, primacy will be placed on studying and referring to: (a) **primary sources** such as (i) customs, (ii) legislation and (iii) court decisions; and (b) **secondary sources** like (i) relevant books and (ii) journal articles. Where necessary, and for completeness, various works that are available on the internet will be resorted to. Relevant sub-Saharan African maxims will also be made use of. The purpose of the exercise will be to demonstrate the juridical content of *ubuntu* and its importance to the development and transformative impact on the South African law of contract in general and the common-law contract of employment in particular.

1.4 Literature review

Broadly, available literature on the topic seems to display two strands of thought. The first one is that *ubuntu*, both as a philosophical and juridical concept, is an integral part of precolonial African jurisprudence and should play an important role in the development of South Africa's constitutional jurisprudence.[64] Except for tangential reference to African maxims,[65] the jurists in this group do not explain what the reach of the maxims is, or what their role is likely to be in this context. The other view is that *ubuntu* is a new, post-1994 phenomenon which is also not consonant with the core values of the Constitution (in that, among other problems, it seeks to impose African religious values on other population groups of South Africa).[66] As indicated below, the view is buttressed by the distorted and stunted

64 See *S v Makwanyane* 1995 (3) 391 (CC) para 204, 22. In para 88, Chaskalson P does not mention the word *ubuntu*, but the words he uses are very expressive of, and resonant with, the values of *ubuntu*.

65 Metz T 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in O Ananzi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) 131 134-5.

66 See also Bennett (2011) *African Equity* 30-2; see Keevy I 'Ethnophilosophy and core

view of customary law in general.[67] For instance, *ubuntu* has been described as 'a newcomer in a strange environment [that] must fit in with existing legal terms and concepts ...'.[68] There is also a suggestion that the concept and its ethos be limited to what the courts have already pronounced on in that regard, or to what some academics have been articulating in their treatises.[69]

The reasons for the writer's view in this regard are many and varied. First, *ubuntu* should not only be viewed as a static, finite concept whose artificial genesis is the Constitution,[70] but as a deep and infinite precolonial reservoir of African cultural values and juridical norms.[71] For this reason, there should be no impediment to the Bill of Rights' reach into all the nooks and crannies of the country's private-law and commercial-law spheres.[72] Put otherwise, the courts need not defer to the constitutional principle of subsidiarity or avoidance; it is 'not always the correct route'.[73]

Secondly, although it is an isiZulu concept in terms of etymology, *ubuntu* has been part of the different sub-Saharan African traditions, folklore and law since time immemorial.[74] The problem seems to have been the deliberate neglect, underdevelopment and non-recognition of customary law that occurred before the

constitutional value(s)' in F Diedrich (ed) *Ubuntu, good faith & equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 25, 33-40.

67 See *Gumede v President of South Africa* para 17.

68 Bennett (2011) *African Equity* 31.

69 See Kroeze *Ubuntu Court* 341; see also Keevy 33-40.

70 See Van Huyssteen *et al*. 21-22; see also Du Plessis M 'Harmonising Legal Values and *ubuntu*: A Quest for Social Justice in the South African Common Law of Contract' (2019) *PER/PELJ* 1 10-1.

71 Van Huyssteen et al. 21-22; see also Du Plessis M 10-1.

72 See *King NO v De Jager* para 163-171, 182-94; see also Bhana D & Meekotter A 'The Impact of the Constitution on the Common Law of Contract: Botha v Rich NO' (2015) *SALJ* 494 508-11.

73 Unless the statute requiring interpretation is intended to amplify the Constitution – see *King NO and Others v De Jager* para 151, 79. The factors to be taken into account in determining the vertical or horizontal application of the Constitution, in a particular case, are set out in chapter 4.

74 See Dent & Nyembezi English-Zulu Dictionary (1995) iv; see also Metz T '*Ubuntu* as a moral theory and human rights in South Africa' *African Human Rights Law Journal* (2011) 532 533-5; and Metz T 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in O Ananzi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) 131-5 where the author says that although the maxims 'may sound like descriptive banalities to English-speakers unfamiliar with the context, they are primarily evaluative claims'. However, the last-mentioned author does not emphasise their juridical content.

advent of democracy in 1994.[75] *Ubuntu* itself, as a concept, suffered the same fate.[76] For that reason, the literature does not indicate that the real origin, content and linguistic nuances of the concept can be traced back to the Nguni languages (and other related languages and related maxims).[77]

Thirdly, *ubuntu* is now the foundational value of the Constitution – the *Grundnorm*. Given South Africa's racial oppression, economic exclusion and exploitation, the founding document provides the country's constitutional order with legal acceptability and respectability. Therefore, there should no longer be any undue and rigid emphasis on the principle of subsidiarity (or avoidance), and the vertical applications of Bills of Rights (and an unjustified insistence on indirect application where the law of contract is concerned).[78] Moreover, many pre-1994 Acts of Parliament – and common-law rules – still need to be tested against the Constitution for validity and enforceability. Fourth, as Sachs J succinctly put it in in *Dikoko v Mokhatla*,[79] *ubuntu* is more than just a 'phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at'.[80]

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75 See s 11 (1) of the Black Administration Act 38 of 1927; see also s 1(3) of Law of Evidence Amendment Act 45 of 1988, s 211 (3) of the Constitution, Himonga C (ed) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 50-51; Bennett TW *Customary Law in South Africa* (2004) 1-33; Dlamini CRM 'Recognition of a Customary Marriage' (1982) *De Rebus* 593 594, and Idowu W 'Scepticism, Racism and African Jurisprudence: Questioning the problematique of relevance' (2003) *Quest* 63 74-9.

76 It was treated like a 'stepchild to common law', not an authentic source of law. Its flexibility and innate communitarian essence were distorted by legislation and the officialised version of it – see *Gumede v President of South Africa* 3009 (2) 152 (CC) 16-8; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 41 where Langa DCJ said that the 'Constitution itself envisages a place for customary law in our legal system [and puts] it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law…'; see also Ntlama N 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' [2012] *PER/PELJ* 1 2.

77 These are isiZulu, isiXhosa, isiSwati and isiNdebele (including the Zimbabwean dialect). It also important to note that these languages, particularly isiZulu, were exported to other parts of the sub-Saharan region during King Shaka Zulu's reign and the subsequent *Mfecane* (*Difaqane*) which brought destruction, and reconfiguration, to the region – Thompson, L *A History of South Africa* (2014) 80-7.

78 See *King NO v De Jager* para 170-91; see also Bhana D & Meekotter A 'The Impact of the Constitution on the Common Law of Contract: Botha NO v Rich CC' (2015) *SALJ* 494 500. For more on this point, see 4.4 below.

79 2006 (6) 235 (CC).

80 Para 113. The Constitutional Court justice further emphasised the point that the concept 'is intrinsic to and constitutive of our constitutional culture'.

There is hence a need for all the relevant African maxims – that reflect the ethos embodied in *ubuntu* – to be juridicalised. In this context, juridicalisation refers to a process by which these maxims are explained and gradually integrated into the law of contract in general. It is hoped that the process will ensure contractual justice, equity and fairness in all circumstances. All of this can be achieved only by the courts of the land developing the relevant common law and customary law principles in terms of section 39(2) of the Constitution.

The provisions of section 39(2) oblige the courts to take into account the tenets of the Constitution in interpreting legislation or developing the common law or customary law.[81] The Constitution of the Republic of South Africa, 1993[82] contained 34 Constitutional Principles in terms of which the Constitution of the Republic of South Africa, Act, 1996[83] – the 'final Constitution' - was to be drafted and adopted by the National Assembly. Even though the interim Constitution expressly declared *ubuntu* as its organising principle, there was no correlative constitutional principle making *ubuntu* part of the final Constitution in clear, articulate terms. It would seem the common-law presumption - that the legislature does not intend to change existing law more than is necessary – is applicable in this instance.[84] That approach would ensure legal certainty, and the words that have acquired a 'settled and well-recognised judicial interpretation'[85] under the interim Constitution, would continue to retain such meaning even under the final Constitution. Perhaps the answer lies in the provisions of section 211 (3) of the Constitution, which clearly accord full recognition to customary law (including *ubuntu*). *Ubuntu* is a concept of African

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81 In this regard, see section 39 (2) of the Constitution; see also the judgment of Ngcobo J (as he then was) in *Bato Star v Minister of Environmental Affairs & Environmental Affairs and Others* 2004 (4) 490 (CC) para 72 where he stated the mandate of the courts as follows:

> The Constitution is now the supreme law of our country. It is therefore the starting point. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" in interpreting any legislation. That is the command of section 39(2). Implicit in this command are two provisions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least one identifiable value enshrined in the Bill of Rights [such as social justice or *ubuntu*], and secondly, the statute must be reasonably capable of such interpretation.

82 Act 200 of 1993.

83 Act 108 of 1996.

84 See Du Plessis *Re-Interpretation of Statutes* (2002) 177-87.

85 See Du Plessis (2002)181.

jurisprudence, and is already being used as an interpretative tool by the courts,[86] in order to ensure the broadest possible protection to the citizens and residents of the country.[87] However, because of a lack of knowledge of the relevant maxims, on the part of the judges (and magistrates), only one of these maxims has enjoyed inordinate attention.[88] For that reason, the examination and understanding of other sub-Saharan African languages such as Sesotho, Setswana and Xitsonga, Shona, Igbo and Swahili – and their accompanying maxims – becomes paramount.[89] The literature also does not indicate that *ubuntu* - together with the different maxims - constituted the moral code for precolonial communities. It assumed the form of an unwritten Bill of Rights for them.[90]

As with customary law in general, existing literature seems to examine *ubuntu* from a Western perspective, treating it as a kind of foreign law whose existence and validity needs to be proved each time it is raised in court.[91] Also, the authority on whether *ubuntu* can be relied on to create new rights, procedures and processes is not as strong, yet.[92] The only relevant pointer in this regard is that *ubuntu* has now

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86 *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35- 8.

87 As part of the teleological or purposive method of interpretation – see Du Plessis (2002) 247-58.

88 Like *umuntu ngumuntu ngabantu* and but very little else – see Bennett (2011) 31.

89 According to an Igbo saying, 'until the lions learn how to write, the story will continue to favour the hunter'. This is because (the original) language is an important carrier and conveyor of meaning and nuances – see Bennett (2004) 2-3.

90 However, cf Bennett TW Human Rights and African Customary Law: Under the South African *Constitution* (1993) 4, where he argues that there is a 'lack of concern with rules an legalism' in Africa; and that the discourse about Africa ever having had a system of human rights confuses the end (human dignity) with the means (human rights). As indicated in 2.8below, human dignity has always been part of a collection of many different rights sought to be protected by *ubuntu* under African jurisprudence

91 Kroeze (2010) *Ubuntu court* 342-3. With regard to the need to develop and decolonise customary law, of which *ubuntu* is part, see *Mabuza v Mbatha* 2003 (4) SA 218 (CC) para 32; see also *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 55-56, Rautenbach C *Introduction to Legal Pluralism in South Africa* (2018) 48-59.

92 *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 36-39 is but one example of this phenomenon. In that case, the Constitutional Court appears to have fashioned a 'new' right: the right to 'basic municipal services'. For a thorough discussion of the principles enunciated therein, see Bilchitz D 'Citizenship and Community: Exploring the right to receive basic municipal services' *CCR* (2010) 48; see also Zulu v Minister of Works, KwaZulu and Others 1992 (1) SA 181 (D), where the Durban Local Division said that "the true purpose of the mandament van spolie is not the protection and vindication of rights in general, but rather the restoration of the status *quo ante* where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of". See also Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge and Others 2011 (1) NR 10 (SC) para see also Zulu v Minister of Works, KwaZulu and Others 1992 (1) SA

become a determinant of the content of public policy in the South African legal context.[93] This is because public policy is relevant in determining whether a particular contractual right exists and is enforceable[94] or whether such a right has been infringed.[95]

The third one is that *ubuntu* is merely a relational ethic that emphasises group rights instead of individual rights, which are consigned to the periphery.[96] This is one of the myths about African customs and practices that needs to be debunked. Existing literature does not explain how an individual gets to own personal weapons, clothes and artefacts.[97] It also creates the impression that, because customary marriages involve the groups to which the bridal couple belong, the individual spouses require the consent of the members of their respective groups each time they wish to engage in sexual intercourse. This misconception is fuelled by those writers who confuse African culture and traditions in general with *ubuntu*, which is a minute but significant component thereof.[98] They do not seem to realise that the latter is a subset of the former. In other words, *ubuntu* is a means to an end; it is not an end in itself. It was conceived and intended to be one of the many building blocks of sub-Saharan Africa and its jurisprudence.

Fourth, there is an erroneous view that there is really no place for *ubuntu* in South Africa's jurisprudence. The rationalisation for the view is that *ubuntu* is coterminous with other common-law values such as public policy, good faith, equity and

181 (D), and Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge and Others 2011 (1) NR 10 (SC) para 3-6. However, see *Eskom Holdings Ltd SOE v Masinda* 2019 (5) SA 386 (SCA) para 22 – where the Supreme Court of Appeal held that this view is incorrect. In that case, the SCA drew a distinction between contractual and personal rights, which can be enforced by specific performance on the one hand and possessory rights or incidental 'quasi-possessory' rights, which can be enforced by *mandament van spolie*, on the other. With due respect, this judgment does not accord with established common law principles on this point.

93 See *Barkhuizen v Napier* para 33-6.

94 This topic is discussed further in chapter 4.

95 *Barkhuizen v Napier* para 51.

96 Metz (2011) 533.

97 In terms of customary law, property is broadly divided into three categories: (a) family property, (b) house property, and (c) personal property – see Bennett (2003) 254-8; see also Bekker (1989) 124-6.

98 See Kroeze IJ 'Once More *ubuntu*: A Response to Radebe and Phooko' (2020) *PER/PELJ* 1 5-6, 15-6.

reasonableness.[99] However, the literature does not explain that these concepts were narrowly interpreted by the South African judiciary, particularly in order to promote the interests of a small section of the community.[100] As indicated below, this development has actually necessitated a re-examination of 'public policy' as a legal concept.[101]

Fifth, the law of contract (including the common law contract of employment) is resistant to transformation.[102] The justification in this regard seems to be that this branch of the law is founded on the sanctity and freedom contract which allows one of the parties to 'push a hard bargain'.[103] The literature ignores the fact that there are still many workers who, because of literacy levels in the country, the complex nature of statutory law and the prevailing economic power relations,[104] fall outside, or are unaware of, the protective net that is provided by legislation.[105] This problem results from the fact that this kind of legislation is limited in terms of its sphere of operation and application both in relation to the person and the transaction involved.[106] The other reason could be the nature of the work that these workers

99 See Kroeze (2020) *ubuntu* 11-2. This confusion seems to stem from the erroneous view that *ubuntu*, as a customary law concept, is subservient to the common law. In truth, and as is indicated in chapter 2 and subsequent chapters, *ubuntu* is the foundational value of the Constitution, which is the supreme law of the land – see Van Huyssteen et al. 13-9.

100 See *Makwanyane* para 48; see also Bennett (2011) 50-1 where he explains this unfortunate situation in the following terms: 'As it happened, the English doctrine of equity was not received into South African law. Purists engaged in the *bellum juridicum* [the conscious ideologisation of the law] argued that an alien concept such as this would pollute Roman-Dutch law. Those judicial skirmishes seem to be continuing. In that regard, see Lewis C *An Uneven Journey* 192-4; see also *Beadica v Oregon Trustees* (SCA) para 39. However, cf. *Combined Construction v Arum* 240, where Davis J, in reference to Lewis' views, said that courts should not 'step into a very contested economic debate which judges should seek to refrain from entering without clear evidence'.

101 See *Barkhuizen v Napier* para 28-34.

102 Davis D M & Klare K 'Transformative Constitutionalism and the Common and Customary Law' *SAJHR* (2010) 410-1; see also Bennett, who says that *ubuntu* has been 'far less welcome in the field of Private Law [of which the common-law contract of employment is part] than public law' – see Bennett (2011) 40.

103 Bradfield (2016) 16-7.

104 Davis & Klare (2010) 410-411; see also Moseneke (2016) 353-5.

105 See the provisions of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. However, there seems to be no obstacle to incorporating these provisions into any 'common law' contract, in order to ensure adequate protection.

106 See the National Credit Act 34 of 2005; see also the Consumer Protection Act 68 of 2008 Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998, and the Basic Conditions of Employment Act 75 of 1997.

are engaged in, the number of days they spend at work per month, or the quantity of the wage or salary they earn.[107]

Sixth, *ubuntu* should be relied on in interpreting legislation in line with the tenets of the Constitution.[108] However, the literature does not directly indicate how *ubuntu* could be infused into some of the common-law principles in order to, among other purposes, resuscitate some of its old remedies (such as the *exceptio doli generalis* and the *laesio enormis*) which, for political or ideological reasons, were abrogated or abolished.[109]

1.5 Significance of the study

The significance of the study derives from the mandate given to the judiciary by the Constitution to develop, interrogate and renovate – where applicable – customary law and the common law so as 'to promote the values expressed in the Bill of Rights'.[110] There is hence a need to explain that the values expressed in the Constitution, particularly in chapter 2 ('the Bill of Rights'), are founded on, and are reflective of, *ubuntu*. South Africa is a relatively nascent democracy whose nation is grappling with the need to transform itself, including its traditions, laws and practices.[111] It is, therefore, significant that the study examines the role and function that *ubuntu* could, and should, play in this regard, and transform the identitarian socio-economic substratum on which the law of contract (including the common law contract of employment) is founded.[112] In the quest for equity, fairness and social justice in some of the places of work, it is paramount that the legal and judicial culture (and literature) of the country does not escape judicial scrutiny, especially where the workplace is concerned.[113] As indicated above, the exercise is made more

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107 Such as those employees who work in shops; or those who sell artefacts, for others, on the side of the road, and those who are in the entertainment industry, such as actors, stuntmen, stuntwomen, drivers and make-up artists – this issue is dealt with in more detail in 5.2.1 below.

108 *Joseph v City of Johannesburg* para 36-9.

109 Bradfield 14-17.

110 See Davis & Klare (2010) 409; see also Van Huyssteen *et al*. 13-9.

111 Davis & Klare 402-8.

112 Most of the laws which were enacted during colonialism and apartheid have still not been tested to determine whether they pass constitutional muster.

113 See Davis & Klare 409.

significant by the plight of the category of workers that includes vendors who sell artefacts and jewellery (for other persons) on the pavements of the country, actors, singers, roadies, stuntmen (and women) and make-up artists. The study will also emphasise the need for a measure of judicial activism[114] – which is often accompanied by the teleological and purposive approaches to the interpretation of statute.[115]

1.6 Structure of the thesis (argument)

Chapter One is introductory in nature. It sets out the problem that the thesis seeks to provide some answers to. It also sets out the methodology; literature review; significance of the study, and the outline of each of the chapters.

Chapter Two examines the origin, theoretical foundations, meaning and content of *ubuntu*. It also discusses various African maxims (including some biblical teachings) in order to demonstrate their nuances in relation to *ubuntu*. This is intended to demonstrate the rich juridical and moral content that *ubuntu* might provide to the South African law of contract in general and the common-law contract of employment in particular.

Chapter Three examines the relationship between *ubuntu* and other legal phenomena and the impact these phenomena are likely to have on the transformation of the South African law of contract in the future. In this chapter, it is also demonstrated how *ubuntu* can be used to resuscitate those useful principles of the common law that were abrogated or abolished for political or ideological reasons.

Chapter Four deals with the practical impact that the infusion of *ubuntu* is likely to have on the development and transformation of the common-law principles of

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114 See Brand FDJ 'The Role of Good Faith Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) *SALJ* 71-6.

115 This because the country's courts have, until fairly recently, been rule-bound, and have tended to adhere inordinately to the written word of the text – See *Falls Supermarket CC v Roazar CC* para 24; see also Davis & Klare 403-11, and Du Plessis (2002) 247-58.

contract. It demonstrates how the courts and academics have been grappling with the concept and the resultant developments.

Chapter Five demonstrates how *ubuntu*, as already discussed, can be applied to resolve day-to-day legal problems that arise from the common-law contract of employment between workers and employers.

Chapter Six contains an evaluative analysis of the study and the conclusions that have been drawn from it. A set of recommendations is provided.

CHAPTER 2

THE ORIGINS, MEANING AND THEORETICAL FOUNDATIONS OF *UBUNTU*

2.1 Introduction

This chapter examines the origin, theoretical foundations, meaning and content of *ubuntu*. It also discusses the various African maxims and some biblical texts, in order to demonstrate their meaning and nuances, in relation to *ubuntu*. The purpose is to demonstrate the rich juridical and moral content that *ubuntu* might provide to the South African law of contract in general, and the common-law contract of employment in particular. The objective is to indicate how broad *ubuntu* is, and how it contributes to changing and enriching the South African constitutional jurisprudence. This will be done by demonstrating how public law – and court process and procedure – have been infused with *ubuntu*, insofar as that affects the individual's constitutional and common law or contractual rights.

The exercise is intended to show that *ubuntu* is a broad concept that is related to many other concepts, teachings and philosophies which are, however, parochial in nature.[116] It will also be demonstrated, at least in relation to this chapter, that the infusion of *ubuntu* into the constitutional framework is related to the broader quest for the 'decolonisation', 'Africanisation' or 'indigenisation' of virtually all the aspects of South African life, including most of its postcolonial and pre-democracy discriminatory laws.[117] Decolonisation, in part, stems from the recognition that South Africa is an integral part of the African continent and that that reality should be demonstrated in the culture, epistemology and languages of the peoples of

116 Christianity, Islam and Judaism - and the texts on which they are founded - are good examples of this phenomenon. This is also one of the questions that some writers have been grappling with in recent times – see Eshetu Y 'Understanding Cultural Relativism: An Appraisal of the Theory' (2017) *International Journal of Multireligious and Multicultural Understanding* 24.

117 It should be remembered that most of these laws are still in operation. This is because they are either consonant with the letter and spirit of the Constitution, or, although *prima facie* unconstitutional, have not been declared invalid in terms of section 172 of the Constitution.

Africa.[118] With particular reference to South Africa, it is also a conscious process whereby all the vestiges of its colonial and apartheid past are eradicated.[119]

There is another concept that is closely connected to decolonisation: cultural relativism.[120] Unlike ethnocentrism,[121] cultural relativism is a phenomenon that was conceived and developed in order to ensure that a person's cultural background and practices are taken into account in order to resolve legal disputes in a fair and equitable way.[122] In multicultural and multilingual communities, it is easy for injustice and unfairness to seep through the cracks in a particular branch of law when the culture of one section of the community is considered to be a better determinant or yardstick of justice or fairness, to the exclusion of all other norms. Only the kind of cultural relativism that is blended with *ubuntu* would provide an appropriate juridical antidote to South Africa's pre-Constitution experience.[123] It would help to counter the continued scourge of ethnocentrism, particularly where the development of the common law is concerned.

The concept of *ubuntu* has exercised the minds of many philosophers and jurists in recent times. This arises from the fact that the concept is multifarious. And, despite views to the contrary, *ubuntu* is not an unnecessary addition to the South African constitutional legal lexicon.[124] It, together with the maxims, is now the cornerstone of South Africa's current constitutional framework.[125] However, the difficulty is that, like many other concepts and principles of African customary law, *ubuntu* was

118 See Rautenbach C (ed) *Introduction to Legal Pluralism in South Africa* (2021) 58-64; see also Tshivhase AE 'Principles and Ideas for the Decolonisation and Africanisation of Legal Education in South Africa' in Tshivhase AE; Mpedi LG & Reddi M (eds) in *Decolonisation and Africanisation of Legal Education in South Africa* (2019) 3-7, and Osman A 'Indigenous Knowledge in Africa: Challenges and Opportunities', an Inaugural Lecture delivered on 4 November 2009 by Professor Osman A of the Centre for Africa Studies at the University of the Free State), available at *https://www.ufs.ac.za/docs/librariesprovider20/.../osman-lecture-1788-eng.pdf* (accessed 06.09.2018).

119 See Rautenbach 48-59; see also Tshivhase *et al*. 3-7.

120 See Eshetu 24.

121 This is an ideology which is based on the assumption that one's culture is superior to any other. That sense of superiority is often exacerbated by racial prejudice.

122 See Eshetu 24.

123 The reason is that *ubuntu* is one of those 'moral codes that are objective moral principles which transcend cultural circumstances, and are universally binding upon everyone at all times' – see Johannes 24.

124 See Kroeze *Ubuntu Court* 341; see also Keevy 33-40.

125 See Metz 134-5; see also Bennett (2011) *African Equity* 30-2.

deliberately stunted and left undeveloped under the different colonial and apartheid governments.[126] For that reason, customary law was a distorted and ideologised version of this body of law that only served narrow, sectarian interests.[127]

In this chapter, the importance of language (and accompanying African maxims) will be demonstrated. With *ubuntu,* as the *Grundnorm* of South Africa's politico-legal system, it is hoped that the exercise will help in fashioning out a fair set of contractual rules for posterity.[128] As indicated below,[129] South African commercial, mercantile or entrepreneurial law still has a heavy overlay of political history and ideology;[130] and for that reason, the language to be utilised in this context has to be appropriate and apposite.[131] It will not be difficult to understand the milieu in which the common-law principles of contract were developed, which was characterised by separate development and exploitation of the unlettered and vulnerable.[132] It is for that reason that, at the dawn of constitutional democracy, South Africans scoured their precolonial, epistemological and juridical reservoir to find an organising principle that would extricate the nation from the morass of injustice, unfairness and inequity.[133] *Ubuntu* emerged as that principle. However, before elaborating on the juridical significance of *ubuntu* within the current constitutional framework, it is important to demonstrate its historical and philosophical foundations.

2.2 The historical, philosophical and linguistic foundations of ubuntu

Like most timeless concepts, *ubuntu* is not capable of accurate definition or description. It is a word of Nguni origin, and includes humanity, humanness, humanism, social solidarity, and being human.[134] While some commentators and

126 *Gumede v President of South Africa* para 17.
127 *Gumede v President of South* Africa para 17.
128 See Davis D; Chaskalson M & De Waal J 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Van Wyk D; Dugard J; De Villiers B & Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1-6.
129 For a more detailed discussion on this point, see 4.3 below.
130 See Davis D et al. (1994) 1-6; see also Corder & Davis (1988) 7-15.
131 Davis D et al. (1994) 1-6; see also Corder & Davis (1988) 7-15.
132 Davis et al. 1-6.
133 Davis et al. 1-6. The negotiations that preceded the constitution-making process, and the documents that the process produced, are testimony to this quest for peace and justice.
134 It encompasses numerous meanings, connotations and nuances. It is actually a gerund or

judges are openly receptive to *ubuntu* as part of the South African constitutional edifice,[135] others regard it as an unnecessary, ill-fitting addition to the structure, one that even fosters patriarchy and the subjugation of women.[136] There is also no consensus among commentators as to the meaning, nuance and application of the concept.[137] This has led to its being used to mean practically anything, however remotely connected to its original ethos.[138]

It is important to remember that *ubuntu* has been part of sub-Saharan African culture, folklore and jurisprudence since time immemorial.[139] But, in the same way that customary law[140] itself was left underdeveloped and stunted by the respective colonial and apartheid governments,[141] *ubuntu* too was clouded by many misconceptions.[142] It was not provided the space within which to develop, hence

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verbal noun which belongs to the seventh declension of Zulu nouns – see Dent GR and Nyembezi CLS *Scholar's Zulu Dictionary* (1995) (3ed) iv; see also Devenish GE 'South Africa from precolonial time to democracy: A constitutional and jurisprudential odyssey' (2005) *TSAR* 547 549 where the author describes *ubuntu* as a 'social survival technique that developed from socio-economic and demographic circumstances in which African people had to cooperate to survive'. As will be indicated below, this latter statement alone reduces *ubuntu* to merely a relational ethic whose emphasis is exclusively on group rights.

135 As Devenish GE puts it: 'The moral basis of constitutionalism and human rights has its genesis in the ethical content of the teachings of the great religious traditions and philosophies of civilizations, both occidental and oriental, as well as indigenous values like *ubuntu*' – *A Commentary on the South African Bill of Rights* (1999) 623.

136 Bennett (2011) *African Equity* 30 and the authorities cited therein; see also Kroeze IJ 'Doing Things with Value: The Case of *ubuntu* Court' in Cornell D and Muvangua N (eds), *ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 333 341. For further discussion on this issue, see chapter 3 where it is demonstrated that *ubuntu* demands that all of humanity do what seems difficult, but is necessary and essential for its survival: recognising and acknowledging the worth of other fellow *human beings*.

See Bennett (2011) *African Equity* 30, where the author says that 'it is impossible to trace the exact denotation of the word in its vernacular origins'. In reality, the word belongs to the seventh declension of Zulu words and shares the same root as '*umuntu*' (a human being or a person).

138 For instance, Kroeze says that even though there is nothing wrong with *ubuntu* as a concept, there is definitely something wrong 'with the Constitutional Court's approach to constitutional values'. This is because, she opines, 'the court just invokes values (such as *ubuntu)* like "little divinities" whose validity and authenticity is not to be questioned by anyone' – see *Ubuntu Court* 341. However, if the 'little divinities' exist for the purposes of ousting 'devilish' injustices, of whatever kind, then, all the better for all of humanity.

139 Ngcukaitobi, T *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 73-4.

140 In this context, the term refers to a set of rules and practices which have been part of the aboriginal groups of South Africa – see Dlamini, CRM 'Indigenous Law and the Bill of Rights' in De Beer, C *Human Rights Compendium* para 6A1; see Rautenbach 28-30.

141 See *Gumede v President of South Africa* para 20-3; see also Shilubana and Others v Nwamitwa 2009 (2) 66 (CC) para 45.

142 For more in this regard, see 2.6 below.

the erroneous perception that it is an unknown, post-1994 invention.[143] For that reason, it has been characterised in narrow doctrinal and philosophical terms, as a purely relational ethic.[144] That characterisation seems to place undue emphasis on the need for the individual to be part of a group in order to find meaningful individual or personal expression. It is also important to mention that precolonial Africans were quite aware of the fact that, at a psychosocial level, human beings were susceptible to both selfishness and generosity – or virtue and vice – in equal measure.[145] *Ubuntu* was, therefore, a juridical corrective which was intended to infuse every human interaction and transaction with humanism.[146] It also served as a yardstick that ensured that there was fairness and equity when dispensing justice in the traditional courts.[147] Therefore, with *ubuntu* as the fundamental and constitutive normative value, any attempt to define its content in masculine and racial terms, as was the case during apartheid and colonial times, is bound to be stillborn.[148]

Thus, in order to understand and appreciate the historical and philosophical foundations of this constitutional norm and value, it is important for one to appreciate the linguistic substratum and cultural values on which it is founded. The inclusion of language, in this context, helps to communicate the need for fundamental socio-economic or normative change and transformation to take place in a particular community, nation or country.[149] Its ontology is traceable to the now

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143 The interim Constitution was the first instrument to introduce *ubuntu* into the South African legal lexicon.

144 Cornell D 'Is there a difference that makes a difference between *ubuntu* and dignity?' (2010) *SAPL* 382 396. As the study will demonstrate, this is not completely correct. African law, and *ubuntu*, which forms part of it, protected individual interests.

145 See Nkosi S '*Ubuntu* and the law: its juridical transformative impact' (2018) *SAPL* 1.

146 Ngcukaitobi (2018) 74; see also Dlamini 6A2 where the author says that one of the distinguishing features of customary law is its emphasis on social solidarity and its humanistic character. It seems as though African thinkers and philosophers were acutely aware of the fact that human beings are by nature susceptible to greed and selfishness. *Ubuntu*, therefore, was intended to serve as a constant reminder to all concerned as to what it means to be a human being, a yardstick against which to measure our own behaviour and that of others and determine whether it measures up to humanness.

147 Ngcukaitobi (2018) 74.

148 To paraphrase the views expressed by Professor Angela Davis, the American academic and human rights activist, during the *17th Steve Biko Memorial Lecture* delivered at the University of South Africa on 9 September 2016, available at https://www.us-africabridgebuilding.org/essays (accessed 10.09.2021).

149 This is more so because section 211(2) of the Constitution now grants all 'traditional' communities the right to change or amend their own laws, provided such developments are in accordance with the bill of Rights – see *Shilubana v Nwamitwa* 2007 (2) SA 432 (CC) para

anglicised adage: 'I am because we are, and since we are, therefore I am'.[150] *Ubuntu*, therefore, emphasises the interconnectedness of humanity irrespective of race, colour or creed.[151] As Mbiti puts it: 'The essence of African (positive) morality is that it is more "societary" than "spiritual"; it is a morality of conduct rather than a morality of being.'[152] It is about 'dynamic ethics', not 'static ethics'.[153] It enjoins members of the community to venture into the world and engage in activities that enhance the condition and dignity of other human beings, and to ensure that justice is served.[154] It is important to note that there are many South African maxims that, if properly translated and understood, could help to give valuable content to *ubuntu*. This is because these maxims were, for the precolonial black communities, the unwritten Bill of Rights that served as a bulwark against the abuse, cruelty and barbarity of their despotic rulers.[155] The maxims were (and still continue to be) an integral part of the living law and legal traditions[156] of the different communities, and were (and still are) firmly anchored in their daily experiences.[157] In the words of Ben Okri, the award-winning Nigerian author:[158] '[W]e are made for heroic realities. We have always known what to do. Our ancestors coded our choices for us in fables and legends. But we got deaf to what we needed to hear most.'[159]

54; see also Himonga C & Nhlapo T (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 28-33.

150 Mbiti 209.

151 See Mbiti 209, where he uses the term 'naked'. This is exactly what happened under colonialism and apartheid: the legal system was used to protect one section of the population, a minority, to the exclusion of another, the majority.

152 Mbiti 209.

153 Mbiti 209.

154 Mbiti 208–9.

155 For some of the criticism of *ubuntu*, see Bohler-Muller N 'Some Thoughts on the *ubuntu* Jurisprudence of the Constitutional Court' in D Cornell and N Muvangua (eds), *ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 367 367-368; see Bekker T, *'The Re-emergence of ubuntu Court'* in Cornell D & Muvangua N (eds) 377 378; see also Kroeze IJ, 'Doing Things With Value: The Case of *ubuntu* Court' in Cornell and Muvangua N *ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (eds) (2012) 333 334–8.

156 Himonga C, 'The Future of Living Customary Law in African Legal Systems and Beyond, with Special Reference to South Africa' in Fenrich J, Galizzi P & Higgins TE (eds), *The Future of African Customary Law* (2011) 44–6.

157 On the right of a community to develop its customary law, albeit in the context of the Constitution and the Bill of Rights, see *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 44-9.

158 See 'A new hunger for life' *Sunday Times* April 5 2000 13.

159 This is an indication that *ubuntu*, as a normative standard, caters for human frailties, and the possibility that human beings are likely to fall short of its exacting nature. Put otherwise, *ubuntu* caters for, and does not discount, the human instinct for self-preservation.

Hence, the need to retrieve and revive these maxims and the values they embody. One of the injunctions that the maxims espouse is that 'a child who is not embraced by his village will burn it down, in order to feel its warmth'.[160]

In the context of public law, such as it was, the social contract between the monarch and his subjects was founded on *inkosi yinkosi ngabantu bayo*.[161] At a practical level, the maxim meant that the monarch – including the great King Shaka Zulu himself – could only rule with the consent – expressed or implied – of his people.[162] At a social and personal level, relationships were governed by the maxim *umuntu ngumuntu ngabantu,* which means that 'I cannot be what I ought to be until you are what you ought to be'.[163] It emphasised, and still continues to emphasise, the interconnectedness of humanity.[164] There are other maxims that encourage giving and sharing. For instance, the BaPedi say that '*gofa ke go fega, ware go fa wafegolla*'.[165] The essence of the maxims is this: rather than give the whole loaf to one person in a group, give them each a crumb.[166] They also say '*Moeng etla kagaye reje kawena'*.[167] The Batswana have an equivalent, which teaches that *'molomo*

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160 Its opposite is that 'it takes a village to bring up a child'.

161 Its literal meaning is that 'a king is a king through his people'.

162 However, see DS Koyana, 'The Interaction between the Indigenous Constitutional System and Received Western Constitutional Law Principles' in PD de Kock and JMT Labuschagne (eds), *Festschrift: JC Bekker* 74 where the author expresses the view that the ruler's subordination to law 'did not apply during periods of dictatorship such as that of Shaka and Sekhukhune'.

163 This is almost identical to the words of Martin Luther King Jr in a letter he wrote while he was incarcerated at Birmingham Prison:

> Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects us all indirectly. I can never be what I ought to be until you are what you ought to be, and you can never be what you ought to be until I am what I ought to be.

See Martin Luther King Jr, 'Letter from a Birmingham jail' in JM Washington (ed), *Martin Luther King Jr I have a Dream: Writings and Speeches that changed the World* (Harper One 1992) 85.

164 Washington 85.

165 It means that 'by giving, and being charitable, one qualifies to receive from practically anyone in the world'. This is the kernel of *ubuntu*: giving generously and sharing selflessly.

166 See in general Idowu W 'To Each a Crumb of Right, to Neither the Whole Loaf': The Metaphor of the Bread and the Jurinomics of Justice in African Thought' 2012 *JJS* 56.

167 Literally, it means, 'Come to our house so that we may eat.' At a fundamental level, it means that decent food (including condiments, refreshments, cutlery, crockery and other utensils) should always be reserved for visitors or strangers.

otlhafunang oroga omongwe'.[168] These maxims would help prevent contracts from remaining 'weapons of mass destruction' in the hands of the 'economically powerful among us.[169]

There is also another maxim, which could help transform both criminal procedure and civil procedure. It relates to both extinctive and acquisitive prescription.[170] In Sesotho, Setswana or Sepedi it is '*molato ho o bole*'; in isiZulu, IsiXhosa or isiSwati it is '*icala aliboli*'. Literally, the maxim means, 'A criminal case or civil claim does not rot or waste away.' In reality, it means that there is no prescription in African law. A person's liability, be it criminal or civil, should not be dependent on a lapse of time. Only when the interests of justice have been served, either through conviction and sentence of the accused person, or absolution or dismissal of the plaintiff's civil claim, can the matter be regarded as having been finalised.[171] As indicated below, this maxim could be useful in the interpretation of exemption clauses[172] or the provisions of the Prescription Act.[173] It is also important to note that the language that the maxims are expressed in has always been accompanied by, and matched with, certain customs and practices. This way of life helped (and still helps) to concretise and give meaning to these maxims.[174] If infused into the country's

168 Literally, it means that a mouth that is chewing insults the one that is not chewing. At a formal level, the elders used it as a verbal sword to eradicate selfishness among their communities and progeny.

169 Louw AM 'Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can We Banish the Law of the Jungle: While Avoiding the Elephant in the Room' (2013) *PELJ/PER* 45 76; *King NO v De Jager* para 202-5.

170 In Setswana and Sepedi, the Sesotho '*ha*' in '*ha o bole*' is replaced by the guttural '*ga'*, to make it *'molato ga o bole*'.

171 Assuming that all the parties involved, particularly the accused or the defendant (respondent), is accorded all the rights, privileges and courtesy necessary in the circumstances of the case, and that all the appeal and review processes have been exhausted. 'Courtesy' in this context is a function of the right to human dignity: any person on whom court process is served (and to whom its nature and purport is explained) should be referred to as Mr Mkhize, Mrs Smith and Ms Mohamed – as Mandla, Irvin or Rasheeda – on the 'Return of Service'. The practice in the various offices of the sheriff – of addressing adults by their first names – is not in accordance with *ubuntu*. It would also seem that it is not in line with Rule 4 of the Uniform Rules of Court and the proviso to Rule 9(3)(g) of the Magistrates' Court Rules, which state that the sheriff should state the name of such a person and the capacity in which such a person stands in relation to the defendant or respondent concerned. Elders are never referred to by their first name in African custom and tradition. Clan-names and totems are resorted to instead – see Laband J *The Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (2018) 1-29.

172 See 4.3.1 below.

173 Act 68 of 1969.

174 Metz notes that 'the most salient ethical-political-legal feature among indigenous sub-

contractual jurisprudence, they would certainly help to prevent it from becoming a system that is characterised by 'patrimonial capitalism'.[175] This system is intended to keep the wealth and resources of the country in the hands of a particular group and to ensure that the wealthy among them become even wealthier.[176]

There are some practices which are very good examples of this phenomenon. First, it is the *mafisa* (*sisa*) contract.[177] This contract is founded on good neighbourliness, social solidarity and communalism, in terms of which a well-off person lends his or her livestock or poultry to a less fortunate neighbour for use during hard times.[178] These items could be milk, wool and eggs. Just like the *stokvel*, it served as a form of insurance which helped to protect a person's wealth (in the form of livestock) against unforeseen circumstances, such drought and disease, which may afflict his area at some or other time.[179]

Secondly, there is the *letsema* custom.[180] Known to many South African communities,[181] it was intended to encourage a spirit of volunteerism and of helping other people without expecting any remuneration. Thabo Mbeki, the former President of South Africa, gave it the official seal during his tenure by encouraging South Africans, particularly the youth, 'to be their own liberators' and occupy the 'frontline in the popular struggle for the reconstruction and development of (the) country'.[182] In addition to helping revive some of the African values and practices,

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Saharan Africans is the importance accorded to the community…Regardless of the precise relationship between law and morality, there is little doubt that the term "communitarian" is apt for characterising sub-Saharan norms' – see Metz T 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in O Ananzi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) 131 134.

175 *King NO v De Jager* para 205 and the authorities cited therein.

176 See *King NO v De Jager* para 205 and the authorities cited therein.

177 See Bekker CJ *Seymour's Customary Law in Southern Africa* (1989) 338–41.

178 Rautenbach (2018) 153-4; see also C Himonga & Nhlapo T *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 194-5.

179 See Rautenbach (2018) 153-4; see also C Himonga & Nhlapo T *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 194-5.

180 See the 'Batho Pele Vision', available at www.http:/www.dpsa.gov.za/documents/Abridged BP Programme July2014.pdf (accessed 30.08.2021).

181 In isiZulu and isiXhosa, it is known as '*ilima*' and derives from the word '*ukulima*' (which means 'to till' or 'to cultivate'). For a discussion of this concept, see Twala C 'Letsema/Iliwa' Campaign: A Smokescreen or Essential Strategy to deal with Unemployment Crisis in South Africa,', available at https://researchgate.net/profile/Chitjha-Twala (accessed 30.08.2021). For more on these practices, see 2.5 below.

182 See https://researchgate.net/profile/Chitjha-Twala.

it was also the former President's hope that the youth gain experience while helping others.[183] *Letsema* has become part of the government's *Batho-Pele* ('people first') public service policy. It is intended to inspire government employees into becoming a people-spirited corps of civil servants dedicated to 'ensuring a better life for all South Africans'.

Thirdly, it is seen in the *stokvel* which communities use in different ways to benefit the members.[184] Despite the destruction of the original, precolonial socio-political structure, these practices continue to serve this noble purpose. This is exemplified by the use of the idiomatic expression which resonates with black South Africans to this day: '*O entse botho*',[185] or '*Wenze ubuntu*'.[186] At a superficial level, it means that 'You have shown *ubuntu*'. But its deeper meaning is that 'you have displayed concern, compassion, balance, objectivity, fairness or justice in the circumstances of a particular case'.[187] These are the values that, it is hoped, South Africa's constitutional jurisprudence will be imbued with. However, it is also important to bear in mind that the drafters of the Constitution, like their forebears, were alive to the fact that human beings have the propensity for selfishness, cruelty and barbarity – and the capacity to be individualistic. They were also aware that *ubuntu*, like the document it undergirds, is aspirational and will not transform South Africans into a caring, generous, considerate and selfless society overnight.[188] They were conscious of the fact that it would take a long time to retrieve the protective and salutary

183 See https://researchgate.net/profile/Chitjha-Twala.

184 Schulze WG 'Sources of South African Banking Law: A Twenty-First Century Perspective Part II' (2003) *SA Merc Law* 601 605-6.

185 In Sesotho.

186 In isiZulu.

187 For instance, the original Sesotho criminal procedure was founded on, among other things, '*mooakhotleng ha tsekisoe*'. Literally, this means 'he who stumbles in court should not be prosecuted.' At a practical level, it meant that the courts were enjoined to show mercy to those who, because of intoxication or insanity, had fallen foul of the law – see Duncan P *Sotho Laws and Customs* (1960) viii.

188 It is for this reason that, during his mid-term budget speech in Parliament on the 26 October 2016, the former Minister of Finance, Pravin Gordhan, borrowed from the Sepedi proverb: '*Tau tsa hloka seboka, disitwa ke nare e hlotsa'* ('Lions that are fighting among themselves cannot catch even a limping buffalo'). In sum, he was exhorting South Africans to return to the underlying values of *ubuntu* – communitarianism, justice, equity and fairness – in order to preserve the substratum of the *humus politicus*. In this context, it means that if the people of the country do not work together, they will easily be overwhelmed by manageable social ills, such as poverty.

aspects of the original version of the South African common law[189] – which coincided with *ubuntu* on many counts – and preserve them. This is because the common law was distorted beyond recognition in order to extend privilege and wealth to one section of the population and subject the other to lack, poverty, disease and illiteracy.[190] Something drastic, fundamental and transformative had to be done in order to ensure redress. A Constitution, with a Bill of Rights deeply anchored in *ubuntu*, had to be crafted for this purpose. As Quartaert puts it:

> Human rights express the nobler parts of human endeavor – efforts to safeguard liberties, to promote social well-being, and ensure mutual tolerance and respect as necessary ingredients for human dignity … Rights neither exhaust nor supplant moral systems that are rooted in religion or charitable imperative, or popular ideas about the common good. Indeed, they coexist and at times even compete with other moral systems. Human rights visions, however, help illuminate the murky world of good and evil, justice and injustice.[191]

189 On the effect of apartheid on the common law, see E Cameron, *Justice: A Personal Account* (2014) 178–9.

190 Cameron 178-9.

191 JH Quartaert, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (2009) 4; Kroeze IJ 'Power Play: A Playful Theory of Interpretation' (2007) *TSAR* 19 33. On many occasions, judges are called upon, by a higher law, to bend but not to break the law of the land; or to 'rewrite (relevant) legislation (and) both play with and within the rules'. This is *ubuntu* in operation. On the subject of judicial activism, see Chikopa L 'Judicial Activism and the Protection of the Rights of Vulnerable Groups in Malawi' in A Meekotter et al. (eds) *Using the Courts to Protect Vulnerable People: A Perspective from the Judiciary and Legal Profession in Botswana, Malawi and Zambia* (2014), available at https://www.icrc.org/.../war.../protected.../prisoners-war/overview-detainees-protected-persons (accessed 28.07.2018), where the judge of appeal of the Supreme Court of Malawi says:

> > [A] Constitution [or legislation that implicates constitutional rights] should be interpreted in a generous and broad fashion, as opposed to a strict, legalistic, and pedantic one – a manner that gives life to the words used by the legislature and avoids at all times interpretations that produce absurdities. Whether or not a court indulges in judicial activism depends, in my view, on how generous, broadminded, non-legalistic, and non-pedantic it is prepared to be in dealing with the cases before it. The more generous, broad-minded, non-legalistic, and non-pedantic the court is, the higher the possibility that such a court is an activist court.

Quartaert could well have been describing *ubuntu* in this passage, particularly its moral, ethical and juridical content. Insofar as procedure and processes are concerned, *ubuntu* would mean that there would be much consideration when a letter of demand (or notice) is sent by one party to the proceedings to another, and that the privacy and dignity of the persons involved be protected. The exercise would entail that the plaintiff or the applicant, as the case may be, serve the summons[192] or declaration[193] personally on the defendant (or respondent)[194] himself. Even the Return of Service rendered by the Sheriff to the attorneys of the plaintiff or applicant must accord with respect for human dignity and privacy. In effect, this development would mean that the person to whom these documents have been delivered is acknowledged and recognised for the human being he or she is.[195] They would be accorded the respect that is required and demanded by their constitutional rights.[196] Even though some statutes require that the plaintiff or applicant send, or cause to be sent, the prerequisite notice to the defendant or respondent by registered mail,[197] other court process, such as the summons or the declaration, is not to be treated with the same consideration and delicacy.[198] This is because, in most instances, it can just be affixed to the main (outermost) door at the premises where the defendant or respondent resides.[199] These modes of service are likely to continue being utilised, particularly where the defendant or respondent resides in a rural or an underdeveloped area where 'online' service of court process is still a very remote possibility.[200]

192 See Rule 18 of the Uniform Rules of Court.

193 See Rule 20 of the Uniform Rules of Court.

194 This would be in the case of motion proceedings – see Rule 6 of the Uniform Rules of Court.

195 The reason is that human decency, which is the relational component of *ubuntu*, demands that these men and women be addressed by their appropriate appellations, such 'Mr Keane', 'Mrs Mkhize', 'Miss Dhlamini' or 'Ms Naidoo' – not just as 'John', 'Zanele', 'Thoko' or 'Imarissa' – see Rule 9 of the Magistrates' Court Rules and Rule 4 of the Uniform Rules of Court.

196 Such as the right to dignity (s 10) and privacy (14).

197 In this regard, see s 129 (5) (a) of the National Credit Act 34 of 2005. Subsection (5) and paragraph (a) were inserted into that Act in terms of the National Credit Agreement Amendment Act 19 of 2014.

198 It has to be served on the other party in person or someone who appears to be above the age of 15, or to be in control of the premises where the defendant or respondent resides, is employed, or conducts his or her business (see Rule 9 of the Magistrates Court Rules, and Rule 4 of the Uniform Rules of Court.

199 For some officials in the office of the sheriff, this means that the documents may be affixed on the gate however makeshift it may appear.

200 Unless, of course, the short message service (SMS) or WhatsApp service is introduced for

2.3 Ubuntu and continental connections

While the main purpose of this chapter is to continue to underscore the redemptive and transformative purpose of *ubuntu*, it also seeks to underline the connection between the concept itself and other normative values and philosophies. It is important to mention that the exercise will be limited to some biblical texts, public policy (*boni mores*) and African humanism (as developed, modified and practised by the peoples of Tanzania and Zambia), in order to indicate the points of contact between or among the different cultures of the peoples of Africa.

From the beginning of time, human migration has influenced interaction and a mutation in the values and norms of the peoples of the world.[201] It is also important to note that *ubuntu* is a timeless concept, not just a recent, post-apartheid creation. In reality, it is bound up to humanity and sub-Saharan Africa itself. Also, it cannot merely be artificially confined to the text of the Constitution and the dicta contained in the Law Reports.[202] For instance, Marcus Garvey and WEB Du Bois, though differing in strategy and tactic, were the founders of the philosophy of Pan-Africanism.[203] Garvey's philosophy of self-sufficiency influenced Africans on the continent and in the diaspora.[204] He was, in turn, influenced by the Africans and their way of life.[205] In fact, the Western Cape had a sizeable Caribbean, West Indian community at the turn of the twentieth century. Among them was Henry Sylvester Williams, who ended up becoming a member of the Cape Bar and, later, practising in the old province of Transvaal. There was, therefore, a great deal of cross-pollination of ideas, knowledge, experiences and way of life between these groups. Part of this exchange included the dissemination of the ethos of personhood

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this purpose, in which case the net of service and protection (of dignity and privacy) might be cast much wider.

201 Pawson D *Unlocking the Bible: A Unique Overview of the Whole Bible* (2015) 6-12.

202 See Du Plessis H 2-3 and the authorities cited therein.

203 See Ndletyana M 'Pan Africanism in South Africa: A Confluence of Local Origin and Diasporic Inspiration' in Vale P; Hamilton L & Prinsloo (ed) *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions* (2018) 145 -154; see also Ngcukaitobi T *The Land is Ours: South Africa's First Lawyers and the Birth of Constitutionalism* (2018) 41-7.

204 See Ndletyana 145-54; see also Ngcukaitobi 41-7. For a list of his papers and speeches, see Stubbs A *Steve Biko: I Write What I Like* (2004) 96-134.

205 Ndletyana 145-54; see also Ngcukaitobi 41-7.

(*ubuntu*).[206] The late Steven Bantu Biko, Professor Barney Pityana, Professor Itumeleng Mosala are some of the prominent South Africans who were influenced by the Garveyan philosophy. The essence of that philosophy was Black Consciousness, which Biko is known as the father of, in South Africa. It is also important to note that Black Consciousness is not inimical to the ethos of *ubuntu*. In fact, it emphasises important facets of it: (1) pride in one's history and heritage; (2) confidence in oneself; (3) self-reliance; (4) self-sufficiency; (5) and constant agitation for fairness, equity and justice.[207] Its core value is, therefore, that no one loses in an atmosphere of sharing.[208]

In order to fashion new rules, remedies and processes, human beings have tended to either draw from their own indigenous resources,[209] or, in exceptional cases, seek solutions from foreign or external sources.[210] This process was intended to resolve seemingly intractable legal disputes of their time.[211] As has been indicated briefly in chapter 1, it will be demonstrated in this chapter and the subsequent chapters how this process of juridical rediscovery has begun unfolding in South Africa, and how it still needs to continue unfolding, with the view to serving the interests of justice in respect or everyone who lives in the country. After many years of colonialism and apartheid, South Africa needed constitutional, socio-political and economic renewal. This would, it was hoped, ensure social cohesion, racial harmony and social justice.[212] There is a natural tendency among human beings to try, in the best way possible, to bring order to disorder, or to make chaotic circumstances much more tolerable.[213]

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206 As will be demonstrated in chapter 5, *ubuntu* and the interconnectedness of humanity seems to have had an influence in the agitation for and advancement of 'socio-economic rights', sometimes referred to as a 'third-generation rights' by international bodies such as the International Labour Organization (ILO).

207 See Stubbs 96-134.

208 See Stubbs 96-134.

209 In the case of South Africa, *ubuntu* seems to have been the preferred value for this purpose.

210 The development of the common law in accordance with 'purport, spirit and objects of the Bill of Rights' in terms of s 39 (2) of the Constitution.

211 See Ostwald M *Aristotle: Nicomachean Ethics* (1962) xi-xxiv.

212 Mbeki M 'Introduction' in Mbeki M (ed) *Advocates for Change: How to Overcome Africa's Challenges* (2011) 5-6.

213 There was the need to bring constitutional and juridical order to the socio-political and economic disorder caused by apartheid; see also Mendell D *Obama: From Promise to Power* (2017) 6.

As in most countries in sub-Saharan Africa, the moral fibre and social fabric of South Africa was torn asunder by the combined malaise of colonialism, racial segregation, labour migration and economic exclusion.[214] It is therefore important to understand why and how *ubuntu* became such a resonant constitutional and legal mantra for the country's jurists[215] and the general populace.[216] Its protean and pliable nature was suitable for developing the country's nascent constitutional democracy after 1994.[217] As indicated above, the starting point is to acknowledge that *ubuntu* is not a recent invention, nor the result of political machinations on the part of the leaders.[218] It has always been a way of life for sub-Saharan Africans.[219] For this category of Africans, *ubuntu* has always been the 'prescriptive value or quality of character denoting the humane treatment of others'.[220] It has always been rooted in their history, language, custom and folklore.[221] It is as old and as indigenous as the uKhahlamba (Drakensberg Mountains),[222] Lekoa (Vaal River), uThukela (Tugela River), Mapungubwe Kingdom (which extended from the Limpopo Province in South

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214 See Mbeki 5-6; see also Sparks A *Beyond A Miracle* (2003) 111 who says:

> The purpose of the (apartheid) policy was not only to protect white jobs but to attempt the Sisyphean task of reversing the relentless influx of rural black people to the cities … The result was that black people were deliberately given a separate and inferior education (most, in fact, got no education at all). They were barred from the major universities. They were prohibited by law from doing skilled work. A black man could carry a white craftsman's toolbox for him and hand him the tools. He could mix the paint and clean the paint brushes and set up the ladder, but could not paint the wall himself. Such work was reserved for whites under the Job Reservation Act (sic).

215 This point was made much clearer by the different judges of the Constitutional Court in *S v Makwanyane* 1995 (3) 591 (CC); see also Eleojo 297-9; see Fouéré 2.

216 Khoza R *Ubuntu Botho Vumunhu Vuthu African humanism* (1994) 9-11.

217 See *Makwanyane* above; however, cf. Kroeze I 'Doing Things With Value' (2012) 333-43.

218 See Furman K 'Exploring the Possibility of an *Ubuntu*-Based Political Philosophy' (2012), unpublished MA thesis submitted to the Faculty of Arts of Rhodes University 1-2.

219 See Bennett African Jurisprudence 1.

220 To paraphrase Barack Obama, it was intended as an exhortation to the members of the community to leave the world a better and safer place than they found it – see Mendell 6.

221 Khoza 1-3.

222 This is a range of mountains which traverses the Kingdom of Lesotho and covers about two-thirds of the length of South Africa. For the relevance and applicability of *ubuntu* in the Kingdom of Lesotho, see *Limo v Lesotho National General Insurance Company* (Unreported Const. Case 02/2012). This a case in which a minor who was injured in a motor collision, and whose claim against the insurance company had prescribed, sought to challenge the prescription laws of the country. To that end, counsel sought to persuade the court to infuse the values of *ubuntu* or *botho* in its interpretation of the relevant statute, insisting on humanitarian rather than legalistic approach.

Africa into Zimbabwe), the Zimbabwe Ruins, Lake Tanganyika, Nile River and the Ashanti Kingdom in Ghana.[223]As a result, it is referred to, variously, across the region, as *ubuntu*, *botho*, *vhuthu* or *vumunhu*.[224] Other expressions such as *Ujamaa*, African humanism, and *Umuganda* have been used, rather incorrectly, as equivalents of *ubuntu* instead of being considered as concepts or elements subsumed under it.[225] *Ujamaa*, African humanism and *Umuganda* each emphasise a particular aspect, facet or subset of *ubuntu*. They were intended to deal with the unique consequences that colonialism and racial and economic exclusion might have had in specific regions of the continent.[226] It is difficult to be definitive about the reasons for the far-reaching influence that *ubuntu* – and the accompanying maxims and ethos – has within the region. It is unquestionably rooted in the Zulu language and the history of southern Africa, which has largely been characterised by wars, such as the Mfecane (Difaqane) wars and the resultant migration and displacement.[227] These internecine wars – with Shaka, Mzilikazi[228] and Soshangane[229] as the major catalysts – changed both the topology and demographics of sub-Saharan Africa.

223 See Eleojo 297-8.

224 Khoza 3.

225 It is for this reason that some commentators treat *ubuntu* and dignity as either synonymous or totally incompatible. The better view is to treat respect for another person's dignity as an integral part of *ubuntu* – see Metz T '*Ubuntu* as a moral theory and human rights in South Africa' *African Human Rights Law Journal* (2011) 541-547; see also Cornell D 'Is there a difference that makes the difference between *Ubuntu* and dignity' (2010) *SAPL* 282 383.

226 Eleojo 289-9; Fouéré 1-2.

227 Leonard T *A History of South Africa: From the Earliest Known Inhabitants to the Present* (2014) 80-7

228 He was one of King Shaka's generals. His father was the son of Mashobane of the Khumalo people. After being sent on a military expedition to the present-day Lesotho, he never returned to base. Instead, he and a contingent of soldiers decided to travel in a north-westerly direction into the South African hinterland, killing members of some of the tribes they encountered and assimilating others. Mzilikazi's footprint is palpable in countries to the north and north-west of South Africa, such as Botswana, Zambia and Malawi – see Thompson 80-7; see also Laband J *Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (2018) 41-2; see also Beneke R *The Great Trek* (2013) 227-304.

229 After protracted wars between Shaka and the Ndwandwe tribe under Zwide ka Langa, the latter found it difficult to keep his kingdom intact. The kingdom eventually disintegrated, with Soshangane KaZikode of the Gaza (Gasa) tribe and Zwangendaba kaZiguda of the Jele people taking the north-easterly direction, and crossing the Lebombo Mountains into the present-day Delagoa Bay in Mozambique. Zwangendaba decided to move even further up, in a northerly direction, into territories which are now known as Malawi, Tanzania and Zambia – see Thompson L *A History of South Africa: From the Earliest Known Inhabitants to the Present* (2014) 80-87; see also Laband J *Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (2018) 41-2; 62, and 137-8.

2.4 The relationship between ubuntu and the Bible and other similar African concepts

Ubuntu is not the only normative standard known to humankind. Since time immemorial, human beings have conjured up norms and values in order to regulate behaviour amongst the denizens in their communities.[230] This universal quest for a just and fair normative yardstick – and the ultimate achievement of equity – has resulted in the creation of documents such as the Magna Carta and the Declaration of the Rights of Man.[231] *Ubuntu*, which is a compendium of moral and ethical values, is no exception: it is rooted in the lived experiences and struggles of the peoples of sub-Saharan Africa.[232] Any law, legislative or unwritten, which is not consonant with this reality is bound to be disrespected and ignored.[233]

Like many norms that originate from the living experiences of a particular community, *ubuntu* is so flexible and so pliable as to change whenever the needs and circumstances of the community change.[234] However, caution would have to be exercised, lest it be manipulated in order to serve non-juridical purposes or parochial interests of some traditionalists.[235] Any attempt to define *ubuntu* would not serve any practical purpose, but Mokgoro offers the following functional description of the concept:

> *Ubuntu*, a foundational value in traditional African society, evades being defined with scientific precision, but that does not preclude it from having particular relevance as a principle of legal interpretation. As a fundamental value of traditional African society, it connotes a worldview and an approach to human relationships in which humanness and the inherent humanity of the individual are central … Owing to its emphasis on the community, *ubuntu* runs the risk of being conflated with communalism. It

230 For a cartographical discussion and illustrations of human migration during biblical times, see Pawson D *Unlocking the Bible* (2015) 6-9.
231 Sachs *A Protecting Human Rights in New South Africa* (1990) 9-12.
232 Kamga 638.
233 Kamga 638. The collective resistance to the payment for the use of certain South African national roads.
234 Bennett TW Customary Law in South Africa (2004) 2.
235 See Bennett (2004) *Customary Law* 2; see Dlamini *Indigenous Law* 6A4, and Rautenbach 22. However, cf. *Shilubana v Nwamitwa* para 44-9.

> is important to hasten to a nuance that lies between communalism and *ubuntu*; the latter is more concerned with the realisation of the uniqueness of each individual in the context of his or her community, while communalism's focus is less on the autonomy of the individual members of the community and more on the collective.[236]

This passage emphasises one of the many aspects of *ubuntu*: that it is a relational ethic[237] reflecting the notion that the individual is as much a part of his community as the community is a reflection of his individuality.[238] But, it should be pointed out that the individual does not just disappear into an indefinable infinity of humanity.[239] He or she is as important a component of the particular society that, in turn, serves as his or her sanctuary.[240] However, as already indicated, *ubuntu* was distorted in very much the same way that customary law, in general, was distorted – in order to serve narrow ideological interests.[241] Part of the reason is that there was a distinction between the 'official', written version of customary law – which was prone to misrepresentation, misinterpretation and distortion[242] – and the 'living', ever-developing version thereof. The latter was, and still is, based on the 'lived' experiences of the different communities, and enjoys currency in those communities.[243]

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236 Mokgoro JY '*Ubuntu* As A Legal Principle In An Ever-changing World' in F Diedrich (ed) *Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 1-2; see also Idowu W 'Positivists' separability thesis reconsidered: Perspective from African legal theory' (2008) *JJS* 163 64, 173-174.

237 Cornell D 'Is there a difference that is the difference between *Ubuntu* and dignity' *SAPL* 382 393.

238 See Idowu *Legal theory* 64, 173-4.

239 See Idowu 64, 173-4; see also Idowu 'Scepticism, Racism and African Jurisprudence' (2005) Quest 73.

240 See Idowu 73. For a different view, see Keevy I: '*Ubuntu*: Ethnophilosophy and Core Constitutional Value (s)' in F Diedrich (ed) *Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

241 See *Gumede v President of South Africa* 2009 (4) SA (CC) para 11 and 16-18; see also Idowu W 'Positivists' separability thesis reconsidered: Perspective from African legal theory' (2008) JJS 164, 178-180, and Bennett TW *Ubuntu: An African Jurisprudence* (2018) 2-3 where he says that since the colonial conquest of Africa, indigenous customary laws 'were considered the product of an inferior civilisation, and were either actively suppressed or given only limited application for purposes of civil litigation among Africans'.

242 See *Gumede v President of South Africa* 17-8.

243 See Rautenbach (2018) 30-1; see also Himonga & Nhlapo 25-36, and *Gumede v President of South Africa* para 16-20.

2.4.1 Ubuntu and the Bible

It is important to remember that the South African law (including the law of contract) has Roman, Dutch, English and African origins.[244] It is also significant to note that the European component of that unwritten law – which is founded on Judeo-Christian teachings[245] – has been given unfair and inordinate preference in legal literature and judicial pronouncements.[246] However, the Constitutional Court has been agitating for the inclusion of *ubuntu* in the judicial equation.[247] Another point to make in this regard is that the human being is, by nature, gregarious. Human migration has always been precipitated by adventure and the search for better economic opportunities, largely through military force and subjugation of the local citizens.[248] The Bible is replete with such examples, most of which occurred in North Africa and the Horn of Africa.[249] Those developments necessitated the fashioning of flexible rules[250] to ensure that justice was served where parties had

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244 The Constitutional Court has, in the interest of justice, already warned against emphasising some of these sources while excluding others. They have to be treated equally – see *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* 2012 (1) 256 (CC) para 22. However, cf. Naude & Lubbe Naude T & Lubbe L 'Exemption Clauses – A Rethink Occasioned by Afrox Healthcare v Strydom Bpk' (2005) *SALJ* 441 446-53 where there is no mention, much less an exposition, of *ubuntu* or any of the African cultural or juridical norms values.

245 See Deuteronomy 16-25; see also Proverbs 1:3 where King Solomon says that the purpose of the proverbs is 'to teach people to ... do what is right, just and fair'. This description is also appropriate for African maxims as well. It is the essence of what they embody.

246 Religion and priests played no small part in this development – see Edwards AB 'The History of South African Law: An Outline' in Hosten WJ; Edwards AB; Bosman F, and Church J (eds) *Introduction to South African Law and Legal Theory* (1995) 274. However, it is important to point out that religion is but a fraction of African jurisprudence, and that the conception of justice among Africans is not limited only to law and religion – Idowu W 'To each a crumb of right, to neither the whole loaf': The metaphor of the bread and the jurinomics of justice in African legal thought' (2012) JJS 56 57.

247 See *Everfresh* para 22; 72; *Beadica v Oregon Trustee*s para 407-8, and *King NO v De Jager* para 202-5.

248 With the improvement in technology and ease of travel, this phenomenon is much more pronounced – see Edwards (1995) *History of South African Law* 275-8.

249 For instance, the story of Moses and of Joseph and his brothers, and the epistles that Paul wrote to the different communities that he met during his travels and ministry. Another example is that of the Moors from the north of Africa who invaded and colonised present-day Portugal and Spain. Also, around 1300 there was a group of Ethiopians who went to seek the help of Spain in their attempt to ward off the invading Muslims – see Allison Blakeley 'The Black Presence in Pre-20th Century Europe: A Hidden History', available at https://blackpast.org>perspectives-global-african-history.html (accessed on 20.09.2019). For a theological account in this regard, see Pawson D Unlocking the Bible (2015) 5-12.

250 See Kerr 488-489; also Kaser 15, Edwards 275-8.

concluded contracts, irrespective of their nationality or country of origin.[251] Insofar as the dispensing of justice is concerned, no story is more illustrative than the story of King Solomon's wisdom when he was approached by two women over a child who had died a few nights before and was exchanged by the one woman and placed next to the other.[252] Like *ubuntu*, the Bible places primacy on the sanctity of *the human being* or *human life*.[253] It teaches that Man and Woman were created by God in His own image.[254] This text accentuates the sacredness of human life; it also means that if one human being ill-treats another human being, he is, in reality, ill-treating God himself.[255] The golden thread that runs throughout the different books is the injunction to 'do good to other people' irrespective of their position and station in life.[256] It teaches human beings a lesson that 'unto whom much is given, much is expected'.[257] At a psychosocial level, these biblical injunctions seek to exhort members of the human race each to utilise their individual gifting to benefit one another. The Bible – which is reflective of the philosophy on which all the three

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251 See Kerr 488-9; also Kaser 15, Edwards 275-8.

252 1 Kings 3: 16-28. King Solomon suggested a wise solution: that the child be cut in half so that either woman could get her half of it. The one agreed to that suggestion, and the other objected to it and suggested instead that the child be given the first-mentioned one. The king decided to give the child to the woman who objected to the cutting of the child. The latter was, in reality, the mother of the child – 1 Kings 3:16-28. There are a few points to consider in this regard: (1) the word 'women' in this context refers to prostitute; (2) the women shared a room, and there was no other person when the incident occurred; (3) the lady who had caused the death of the child, somewhat negligently, acted surreptitiously, exchanged her dead child for the living one, and place it next to the other woman.

253 Hence the maxim '*umuntu ngumuntu ngabantu*'.

254 See Genesis 1:27.

255 This likeness of humankind to God is made much clearer by the admonition of Saul (before he was christened Paul) by God, demanding to know why the latter was persecuting *Him* – Act 9:1-19.

256 See Luke 6:31: 'Do unto others as you would have them do unto you'. Stephen Colbert, the American political commentator, paraphrased the text in negative terms, as follows:

> If [the United States of America] is going to be a Christian nation that doesn't help the poor, either we have to pretend that Jesus was as selfish as we are, or we've got to acknowledge that He commanded us to love the poor and serve the needy without condition and then admit that we just don't want to do it. This is an indication that human beings, because of their natural frailties, often fall short of these normative values, African or biblical; and have to be cajoled or coerced to adhere to them.

See 'Stephen Colbert on a Christian Nation', available at www.irumormill.com/conspiracies/Stephen-Colbert/Chistian-Nation.htm (accessed 27.05.2019).

257 See Luke 12:48.

Abrahamic faiths are based[258] – implores the faithful (1) not to take advantage of the poor and destitute; (2) to pay those who work for them on time;[259] and (3) to 'do unto others as [they] would have them do unto [themselves]'.[260] The Bible also exhorts human beings to love their neighbours as they love themselves.[261] There was no similar legal precept in the pre-democracy South African constitutional framework.[262] The Roman-Dutch and English components of the South African common law only indicate who one's neighbour is, and set out the circumstances in which a legal duty – to protect his or her bodily and proprietary interests from harm – arises.[263] As will be indicated below, a brand of common law was fashioned in order to facilitate the exploitation of one human being by another.[264] It was injected with racial prejudice and an assaultive type of language.[265] It was also propped up by a system that prevented 'the organic development of social bonds [but treated] people 'merely as a means for creating wealth' and creating a 'diseased' political life'.[266]

There is an equivalent of ubuntu in the Muslim word and lexicon. It is represented by the Arabic symbol 'Asa biyya'.[267] The expression was first coined by Abd Al Rahman Ibn Khaladun, a North African historian and sociologist of Arab extraction. Ibn Khaladun believed that Asa biyya helped to ensure solidarity and cohesion within

258 Judaism, Christianity and Islam. The process seems to have occurred as a result of interaction diffusion among people from Africa (Egypt), Middle East (Assyria and Mesopotamia) and Europe (Italy and Greece) – see Pawson J P *Unlocking the Bible* (2015) 6-9.

259 Deuteronomy 24:14.

260 See Luke 6:31. However, this, and many other biblical injunctions, seems to discriminate against 'non-believers'; see also Galatians 6:9-10 where Paul says: 'So let's not get tired of doing what is good … We should do good to everyone – *especially those in the family of faith*' (emphasis added).

261 See Matt 22: 39 (NIV).

262 See Corbett MM 'Aspects of the Role of Policy in the Evolution of Our Common Law' *SALJ* 52 55.

263 See *Donoghue v Stevens* 1932 AC 562 (HL) (Sc) 580-1; see *Minister van Polisie v Ewels* 1975 (3) 590 (A) 594-7. As to the difference between public policy in contracts, and *boni mores* in delict, see Louw 71-3 where the author dispels the myth that contract is a product of full and complete volition on the part of the parties.

264 Nash A 'The Double Lives of South African Marxism' Vale P; Hamilton L & Prinsloo EH (eds) *Intellectual Traditions in South Africa: Ideas, Individuals and Institution*s (2014) 51 56.

265 See Nash 56.

266 Nash 56.

267 See https://biography.yourdictionary.com/abd-al-rahman-ibn-muhammad-ibn-khaldun (accessed 03. 02.23).

the community.[268] For him, this kind of cohesion was conducive to co-operation and the division of labour.

That, in turn, was crucial in ensuring dynastic rule, which was viewed to be a unifying form of governance in his community at the time. It also enabled the community to produce enough goods and commodities for consumption – and for the export of surplus produce to other communities, some beyond the borders of his own community.[269]

However, it should be remembered that ubuntu has always been no more than a yard-stick against which human conduct was to be adjudged; a corrective which was meant to deal with niggling human foibles within a particular community. It bears remembering that Africans, themselves, were complicit in the sordid trans-Atlantic slave trade. The sold members of rival, neighbouring communities to American, French, Portuguese and Spanish potential buyers.[270]

2.4.2 Ubuntu and African humanism

After attaining independence, many African leaders sought to sew back together the social fabric and moral fibre that had been torn asunder by the politics and religion that were imposed on their countries and nations by colonial powers.[271] It was therefore imperative to understand the theoretical and moral foundations of their normative values.[272] For instance, Kenneth Kaunda, the former president of Zambia, and members of his postcolonial government introduced what they called

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268 See https://biography.yourdictionary.com/abd-al-rahman-ibn-muhammad-ibn-khaldun

269 See https://biography.yourdictionary.com/abd-al-rahman-ibn-muhammad-ibn-khaldun.

270 See Sieff K 'African country reckons with its history of selling slaves' available at https://www.washingtonpost.com/world/africa/an-african-country-reckons-with-its-history-of-selling-slaves/2018/01/29/5234f5aa-ff9a-11e7-86b9-8908743c79dd_story.html (accessed 06.02.2023).

271 Kanu I A 'Kenneth Kaunda and the Quest for an African Humanist Philosophy' (2014) *International Journal of Scientific Research* 375 376; see also Idowu W 'Positivists' separability thesis reconsidered: Perspective from African legal theory' (2008) JJS 163 178-81; see also Kaunda K *A Humanist in Africa: Letters to Collin Morris* (1966) 39 where the former President of Zambia says that 'unconditional services to our fellow man is the purest form of service to God'.

272 Gyekye K 'Person and Community in African Thought' in Wiredu K & Gyekye K (eds) *Person and Community* (1992) 101-105.

Zambian Humanism.[273] Even though Kaunda and his countrymen had experienced racism in the same way that their fellow Africans in the south had experienced apartheid,[274] they still placed God, the Supreme Being, at the centre of the ideology.[275] This ideology was to be a combination of African values, socialism and Christianity.[276] Their motivation was that Christianity, in its purest form, teaches respect for the dignity of other human beings, for equality, for the rejection of discrimination on the basis of colour or position and the exploitation of one human being by another.[277] However, there was a conundrum: the ideology did not gain traction among the people of Zambia.[278] This is because it was 'not rooted among Zambians',[279] and merely amounted to lip-service among the politicians of the country.[280] It was even difficult for academics in that country to call it a 'philosophy', at doctrinal level.[281] The real reason could be that Kaunda was just a real *humanist*, whose entire being was suffused with the spirit of *ubuntu*.[282] After Zambia attained independence, he tried to assure his erstwhile white oppressors that they would 'only be losing what they ought never have had – those privileges unrelated to ability and contribution; false valuations arrived at by false considerations'.[283] This is what the drafters of the South African Constitution sought to achieve: to create a society founded on equality, freedom and respect human worth and dignity (the essence

273 See Kanu 376.
274 Kanu 376.
275 Kanu 376. However, it is important to note that there has always been a clamour, among African scholars, for the examination and exposition of philosophies, theories and concepts from an Afrocentric perspective – see Biko *Africa Reimagined* 76-8.
276 See Kanu 376; see also Biko *Africa Reimagined* 76-8. This is because his father, David Kaunda, a Church of Scotland Church priest, and religion influenced his worldview.
277 See Kanu 376.
278 See Biko *Africa Reimagined* 76.
279 This is because many leaders on the continent were content with adopting the Western way of life, including the accompanying concepts, without thorough interrogation – Biko *Africa Reimagined* 76-7.
280 Kanu 376.
281 Because the term had no scientific or theoretical basis, it could not be described as an ideology or a philosophy.
282 Kaunda 66-8. On the relationship between *ubuntu* and other similar concepts, see Coleman 8-14.
283 Kaunda 67.

of *ubuntu*).[284] In the words of Gyekye, they had 'an unrelenting preoccupation with human welfare'.[285]

2.4.3 Ubuntu and Ujamaa

Like African humanism as propounded by Kaunda in Zambia, *Ujamaa* was limited in its application to politics and governmental matters in Tanzania. This is a political ideology which was made popular by the late former president of the East African country, Julius Nyerere.[286] Under him, *Ujamaa* came to represent the African brand of socialism.[287] The ideology was to be anchored in the African way of life: self-reliance and taking pride in the nation's autonomy.[288] It was essentially a call by the departed statesman to his countrymen (and other African nations) to take up the cudgels and combat all the socio-political and economic ills associated with capitalism.[289] Even though the ideology did not help extricate the people of Tanzania from poverty during Nyerere's tenure, there are Tanzanians who are making an attempt at reviving *ujamaa*, either for altruistic reasons or for selfish political ends.[290] As will be demonstrated below, *Ujamaa* and Zambian Humanism are essentially subsets of *ubuntu*: they have a more limited, geo-political reach, purpose and function.[291] As Fouéré puts it, *Ujamaa* is being used 'as a moral code in debates about social, political, and economic morality in a postsocialist situation characterised by increasing concerns about economic inequality, threats to national

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284 See in Van Wyk D 'Introduction to the South African Constitution' in Wan Wyk D; Dugard J; De Villiers B & Davis D (eds) in *Rights and Constitutionalism: The New South African Legal Order* (1994) 131-70.

285 Gyekye K African Cultural Values: An Introduction (1996) 57.

286 It is a Swahili word, and it means 'familyhood' – see Fouéré M-A 'Julius Nyerere, *Ujamaa*, and Political Morality in Contemporary Tanzania' *African Studies Review* (2014) 1 3; see also Idowu *African legal theory* 165, 178-80.

287 Fouéré 3. The concept is sometimes referred to Co-operative Economics – see https://www.officialkwanzaawebsite.org/ujamaa.html.

288 See Fouéré 3 where the writer says that the system is based on 'justice and equality for all [and] was built upon concrete government policies such as the communitization of the workforce, the collectivization of the means of production, the nationalisation of private businesses and housing, and the provision of public services – notably in health care and education'.

289 Hence the insistence on the nationalisation of all or most of the elements of the economy.

290 This is because, like *ubuntu*, the concept is protean and pliable. In the wrong hands, it could be manipulated for whatever purpose imaginable – Fouéré 2.

291 See Eleojo 297-8.

cohesion, and the high visibility of corruption in the political sphere'.[292] This view applies with equal force to African humanism, at the core of which is political solidarity, communality, communitarianism[293] and socialism[294] among Africans.[295] The ultimate objective of these philosophies – which appear to have been sides of the same coin – seems to have been to foster cooperation and solidarity among sub-Saharan African countries and their leaders.[296] They were also in search of an ideology or political philosophy that would supplant colonialism (and apartheid) and help transform their countries and constituent communities.[297] As indicated in chapter 3 and chapter 4, judges in South Africa and elsewhere,[298] have begun the process of transformative adjudication.[299] That process seems to be intended to transmogrify not just the values and norms that regulate the lives of the different communities, but also to ensure a palpable and perceptible change in the socio-economic conditions of the people involved.[300] Unfortunately, it is only the political will on the part of senior government functionaries that will determine whether these constitutional ideals are concretised.

292 See Fouéré 2.

293 As to the distinction between these terms, see Mokgoro *Legal Principle* 1-2; on the debate around the different brands of communitarianism, see Idowu *African legal theory* 179-80.

294 Unlike communism, which propagates the taking over of the means of production by the proletariat from the bourgeoisie, socialism acknowledges that there will always be differences between the poor and the rich, but advocates for some intervention on the part of the state to ensure that the gap between the two groups is not jarring – available at www.ushistory.org/gov/13b.a (accessed 26.04.2019).

295 For an explanation of who is 'African', see Eleojo 298 where he says that there are three kinds of people who can legitimately refer to Africa as their home: First, it is those who belong to the geographical entity within the confines of the African continent. Secondly, it is the various racial groups that inhabit the continent, whether they are of the North African Arab races, black sub-Saharan Africa, white South Africans, or Negroes. Thirdly, it is those whose socio-political, historical and cultural ties link them to Africa; see also Thabo Mbeki's 'I am an African' speech which he delivered on 8 May 1996 in Cape Town in acknowledgement of the adoption of the Constitution of South Africa Act by the Constituent Assembly, available at https://*www.soweto.co.za.html.i_iam an african* (accessed 13.04.2019).

296 See Fouéré 2.

297 Fouéré 2.

298 In this regard, see Chikopa L 'Judicial Activism and the Protection of Vulnerable Groups in Malawi' viewed from *https://www.icrc.org/.../war.../protected.../prisoners-war/overview-detainees-protected-persons* (accessed 28.07.2018).

299 See *Beadica 321 CC and Others v Oregon Trust* 2020 (5) SA 247 (CC) para 206-8.

300 Para 206-8, 231.

2.4.4 Umuganda

Umuganda is a Rwandese way of life which is intended to encourage the spirit of self-help and generosity among the people of Rwanda.[301] When he became the president of that country, Paul Kagame revived that concept. The concept was refashioned and repurposed – by adding psychosocial elements – in order to respond to the specific needs of the Rwandese nation after the genocide that almost exterminated a generation of its people in 1993.[302] Its main purpose was to restore the moral fibre and the social fabric of that nation.[303] Even among some Tanzanians, there are plans afoot to revive *Ujamaa,* in order to deal with the postcolonial scourge of corruption in that country.[304] The need for the revival of these African concepts stems from the socio-political ills that currently bedevil many African countries; and the desire to make certain that the noble ideals of the founding fathers - that there shall be food, water and bread for all[305] - are not just meant for benefit of the ruling families and their friends.[306] It is for that reason that some commentators and politicians believe that 'it is impossible for an African child to be afflicted by racial prejudice'.[307] For them, it is not possible to countenance an African parent teaching a child to hate another human being on the basis of colour.[308] It would even be

301 See Uwimbabazi P 'An Analysis of Umuganda: The Policy and Practice of Community Service in Rwanda' (unpublished PhD thesis, University of KwaZulu-Natal, 2015) 2-5. *Umuganda* means 'community work' in Kinyarwanda, which, like isiZulu in South Africa, is the *lingua franca* in Rwanda.

302 Uwimbabazi 2-5.

303 Uwimbabazi 2-5.

304 See Fouéré 2.

305 Words spoken by Nelson Mandela on 10 May 1994, when he was inaugurated as the first post-apartheid president of South Africa. He was drawing on Exodus 23:25 'Worship the Lord your God, and his blessing will be on your food and water ... and he shall bless thy bread and thy water.'

306 For instance, in South Africa, there are several commissions of enquiry which seek to determine whether some or other ingenious method has been devised by some ministers and government functionaries to create criminal enterprises, in order to divert government revenue and assets into their own estates. The most publicised and prominent of these entities is the Judicial Commission of Inquiry into Allegations of State Capture, colloquially known as the 'Zondo Commission', after its Chairperson, Justice Raymond Zondo.

307 This comment was made by Mzwanele Manyi, a former member of the National Executive Committee of the African National Congress (ANC) and now the Chief Policy Officer of the African Transformation Movement (ATM), talking in an interview with Eusebius MacKaiser on *Radio 702* on 16 January 2019. Mr Manyi is now the spokesperson for the Jacob Gedleyihlekisa Zuma Foundation.

308 However, it is Nelson Mandela who was closer to the truth when he said that no one is 'born hating another person because of the colour of his skin, or his background, or his religion'. People 'are taught to hate (at a young age), and (that) if they can learn to hate, they can

much more grating to their conscience to observe another person being made to perform tasks that would reduce their status and dignity in the estimation of their peers or children.[309] Therefore, whereas African humanism and *Umganda* are regional and limited, *ubuntu* is expansive and universal.[310]

2.5 Ubuntu and customary law practices

As indicated above, South Africans were looking for an overarching, redeeming, value which had a moral and ethical content that would minimise vice and increase virtue incrementally. They did not have to look very far or embark on an arduous search. *Ubuntu*, the age-old concept, was already in existence, as part of South Africa's precolonial oral history, folklore and jurisprudence.[311] It was a means through which precolonial societies in sub-Saharan Africa ensured social balance or equilibrium, which was very important for peace and cohesion.[312] *Ubuntu*, like many other similar concepts, was fashioned through trial and error,[313] and that provided the concept with its kernel characteristics: flexibility, fairness, justice and equity.[314] In addition to the maxims referred to above, there are customs that help to give essence and meaning to *ubuntu*. These practices include[315] the *mafisa* (*sisa*)

be taught to love, for love comes more naturally to the human heart than its opposite' – see 'No one is born hating another', available at *www.gooreads.com/111810-no-one-is-born-hating-another.htlm* (accessed 04.04.2019).

309 For example, where a domestic worker is made to wash the soiled undergarments of her employer and his adult children.

310 Coleman 8-14.

311 Sachs A *Protection of Human Rights in a New South Africa* (1990) 102-3; see also Biko *Africa Reimagined* 83 where the author lists *ubuntu* as one of the 'Pan African particularities'.

312 Sachs 102-3.

313 Sachs 102-3.

314 As to the distinction between justice and equity, see Ostwald 141-2.

315 There is also what is called, glibly, 'black tax', a colloquial reference to the obligation resting on black persons who are able-bodied and have the means to do so, to provide material and other forms of support to those of their relatives and agnates who are indigent – see Bekker CJ *Seymour's Customary Law in Southern Africa* (1989) 69-77.

contract,[316] *letsema*[317] and the *stokvel*.[318] The practices will now be discussed *seriatim*. The purpose of the exercise is to demonstrate the actual setting in which *ubuntu* finds expression, and the customs through which the concept is applied in as part of 'living customary law'.[319] It is also intended to indicate that, but for these and other similar practices, the erosion of the social fabric and moral fibre among black communities could have been much worse. The socio-political and economic circumstances prevailing at that time, as engendered by colonialism and apartheid, were not in alignment with the foundational value of African precolonial societies: *ubuntu*.

2.5.1 The mafisa (sisa) contract

The *mafisa (sisa)* contract is an agreement founded on good neighbourliness, social solidarity and communalism, in terms of which a well-off person lends his livestock or to a less fortunate neighbour for use and enjoyment during hard times.[320] The animals may be used for milk, wool and eggs, or for ploughing or breeding.[321] Oftentimes, if the owner of the livestock is satisfied with the manner in which the use and enjoyment of the animals was carried out by the neighbour or possessor, the latter is, customarily, to be rewarded appropriately.[322] It is hoped that the principle that underlies the *mafisa* contract will, in good time, be used to transform

316 This is a contract founded on good neighbourliness, social solidarity and communalism, in terms of which a well-off person lends his or her livestock or poultry to a less fortunate neighbour for use during hard times. These could be milk, wool and eggs – Bekker 338–41.

317 This is a Sesotho custom that was intended to encourage a spirit of volunteerism: helping other people without expecting any remuneration. Thabo Mbeki, the former president of South Africa, gave it the official seal during his tenure. It is now part of the government's Batho-Pele ('people first') public service policy. It is intended to inspire government employees into becoming a people-spirited corps of civil servants, thereby 'ensuring a better life for all South Africans', available at www.http:/www.dpsa.gov.za/documents (accessed 09.05. 2018).

318 Even though this practice is not completely 'indigenous' to precolonial South Africa, it has been infused with the spirit of *ubuntu*. It provides a dependable financial and social support structure to its members. It also serves as a networking forum where resources and skills are shared and exchanged – WG Schulze 'Sources of South African Banking Law: A Twenty-First Century Perspective Part II' *SA Merc Law* (2003) 601 605-6.

319 *Shilubana & others v Nwamitwa* 2009 (2) 66 (CC) para 49-55.

320 However, wool and the progeny of the livestock are not part of the arrangement – see Beeker 339.

321 See Bekker 340; see also Rautenbach 163-4.
153-4, and Himonga C & Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 194-5.

322 Bekker 338-41; Rautenbach C *Introduction to Legal Pluralism in South Africa* (2018) 163-4.

South Africa's contract law. This could be achieved by, for instance: (a) not charging interest on loans made to people who are indigent, particularly those who wish to purchase a decent home for themselves and their families; and (b) allowing for an appreciably higher interest to be earned on their often meagre investments.[323] The practice could also be relied on to temper the harshness of freedom of contract and individual autonomy that it is based on. This can be done by demonstrating that *bana bamotho ba arolellana tlhogo ya tsie* ('siblings can even share the head of a locust if need be') does not, in any way, displace the natural, human urge for self-preservation. One cannot, therefore, in the process of advancing other people's interests, foolishly and destroy one's own.[324] And, the converse also seems to hold true: it would foolish for one to promote another person's interest to one's own detriment.[325] In the current South African context, the freedom of parties to a contract is not (and should not be) absolute.[326] Whatever they do (or do not do) has to occur within the ethical and constitutional framework whose main pillar is *ubuntu*.

2.5.2 The letsema practice

This is a practice that is founded on the generosity of spirit. As with Umuganda, in Rwanda, the practice is primarily intended to encourage members of the community to sacrifice their time and resources in order to help the sick, poor, aged and the disabled.[327] Although the custom gained prominence during Thabo Mbeki's tenure as President of South Africa, he is certainly not its originator; the practice predates him.[328] However, Mbeki can certainly take credit for reviving the custom in order to encourage the spirit of loyalty to the country and its Constitution, selfless service among government employees, and the idea that rendering essential government

323 For instance, in order to escape the squalour and crime that is prevalent in informal settlements of South Africa.

324 See *Botha v Rich NO* para 46; see also Louw 75-8.

325 *Botha v Rich NO* para 46; see also Louw 75-8.

326 *Botha v Rich NO* para 46; see also Louw 75-8.

327 As with *Umuganda* in Rwanda, the practice is now linked to the government's Batho-Pele (people first) public service policy. It is intended to inspire government employees into becoming a people-spirited corps of civil servants, thereby 'ensuring a better life for all South Africans', available at www.http:/www.dpsa.gov.za/documents (accessed 09.05. 2018).

328 Keevy 26.

services is not just a clock-bound affair but driven by the needs of the citizens (and residents) of the country.[329] The essence, or leitmotif, of *letsema* seems to be very similar to what is called '*Umuganda*' in Rwanda. *Umuganda* is a practice which involves the community 'coming together in order to do something good for the benefit of a person, the community or nation'.[330] Both these practices seek to encourage generosity and selflessness, particularly where senior citizens and vulnerable persons are concerned.[331]

2.5.3 The stokvel

This is an agreement between or among any number of people in terms of which money is lent to, or services are rendered for the benefit of one of them or his or her family, on the understanding that the member will reciprocate to each of the other members on a rotational basis in the future.[332] Even though *stokvel* is not completely 'indigenous' to precolonial South Africa, it has been infused with the values that *ubuntu* embodies.[333] It seems to serve three primary purposes. First, it provides a safety net, a stop-gap in times of penury.[334] Those of an entrepreneurial bent have relied on it to purchase landed property to resell, or set up business enterprises, such as taxi operations.[335] Secondly, those who live in the townships and suburbs use the *stokvel* to create networking forums through which they can share resources and skills – and help to bring to each other's attention job opportunities and possibilities of professional advancement. Thirdly, the *stokvel* also serves as an important social support system for those members of the community who are experiencing grief and bereavement in times of death or loss of a loved

329 Available at www.http:/www.dpsa.gov.za/documents (accessed 09.05. 2018).
330 See Uwimbabazi 2-3; 55-8.
331 Uwimbabazi 2-3; 55-8.
332 See Sharrock R (ed) *The Law of Banking and Payment in South Africa* (2016) 11, 43-44.
333 See Schulze 605-6.
334 For example, Schulze describes the practice in the following terms:

> The *stokvel* is important for the commercial and business world because it resembles several concepts of the "formal" South African law of insurance and banking. A *stokvel* is a form of credit-rotating association in terms of which a group of people enter into an agreement to contribute a fixed amount of money to a common pool on a periodic basis.

335 Sharrock (2016) 11, 43-5.

one. The relational nature of the *stokvel* also finds application in times of celebration - when the children of the neigbours graduate from college or have a wedding or one of the many traditional festivities. This kind of support comes in the form of cars, tools and labour that are required in the days preceding the funeral or particular festivity – or even a few days thereafter. It is also important to note that, in many black communities, whenever a neighbour has borrowed a hoe, a pot or similar implement, it is incumbent on him or her to return it with some food, meat, seedlings or grain inside.[336] The customary practices, therefore, help to ensure that the social fabric and moral fibre of a particular community, urban or rural, are kept intact – for posterity.[337]

Interestingly, the seemingly innocuous legal nature and character of an advertisement, in relation to the offer and acceptance in the creation of a contract, could help to demonstrate the importance of *ubuntu* in the law of contract. It could also assist in indicating how the quality of fairness and equity which are inherent in *ubuntu* could be infused into this branch of the law. In terms of the common law, only a person who knows about an offer can accept it.[338] However, this raises the question: 'What happens when a member of society finds a lost dog, with the address of the owner embossed on its collar, and in respect of which an offer was made unbeknown to the member of society?' *Ubuntu* would dictate that any person in the position of the member of society be paid a portion of the award originally offered, however small.[339] After all, according to *ubuntu*, appreciation and

336 Obviously, these maxims and accompanying practices have waned in the glare of poverty and other socio-economic problems, which have precipitated greed and selfishness.

337 The major concern is that, with the destruction of the moral fibre and the social fabric of South African society, *ubuntu* is likely to be eroded by vices such as greed, corruption and xenophobia.

338 The other requirements to be met before an offer can be accepted by an offeree are that (a) the offeree must have the necessary capacity to contract; (b) the offeree must the person to whom or member of a group or class of persons to whom the offer was made; (c) the acceptance by the offeree must correspond to the terms and conditions of the offer, and (d) the offer must not have lapsed. For the legal role and significance of advertisements in the creation of contracts, see Van Huyssteen et al. 62-80; see also *Bloom v American Swiss Watch* 1915 AD 100 102-5 (where there was a break-in and theft at the premises of American Swiss, and the court held that the claim for a reward, by Bloom, did not comply with the exact terms of the advertisement itself; see also *Crawley v R* 1909 TS 1105 (where the accused had insisted on getting the brand of tobacco that he had been advertised on the display window of the store and had bought from the store previously).

339 See the rubric on car guards below.

gratitude[340] count for much more than the money when lost property is returned to the original owner. Moreover, an advertisement is, in many instances, not an offer, but an invitation to members of society (or class thereof) to come and do business with the person who placed the advertisement.[341] So, in this instance, the act of taking the dog back to the owner amounts to an offer, which falls to be accepted or rejected by the owner.[342] The finder becomes the offeror, and the owner, the offeree.[343] All these practices are reflection of how the law could (and should) be: humane and responsive. As discussed below, the Constitutional Court demonstrated that it could be done.[344] What remains is for this transformative kind of adjudication to percolate and permeate through the system, not only where public law is concerned, but also where private interests, contractual – not just delictual[345] – are at stake. That would help to keep the social fabric and moral fibre intact – and, perhaps, ensure financial security; economic stability, and industrial peace for posterity.[346]

As indicated above,[347] these practices confirm the manner in which customary law – of which *ubuntu* is an integral part – has been characterised by the courts[348] and academics[349] as comprising the following features: (a) inherent flexibility; (b)

340 As they say in isiZulu, '*Ukubonga okuncane, ukubonga okukhulu*' ('gratitude goes a long way'). For a better context in which this maxim applies, see 2.2 above.

341 See Kerr 111-29; see also Van Huyssteen et al. 62-79, Nagel & Kuschke 53-60, *Bloom v American Swiss Watch* 1915 AD 100 102-105, and *Crawley v R* 1909 TS 1105.

342 The acceptance would depend on the circumstances of that case: (1) the state in which the dog was found; the cost that the member of society incurred in caring for and keeping it safe in the interim.

343 See Kerr 111-29; see also Van Huyssteen *et al*. 62-79, Nagel & Kuschke 53-60, and *Bloom v American Swiss Watch* 1915 AD 100 102-105.

344 However, see Hutchison A & Sibanda N 'A living customary law of commercial contracting in South Africa: some law-related hypothesis (2017) *SALJHR* 380-7 who say that the dicta from the Constitutional Court 'present a potentially idealised vision of society, which, at least in the cases dealing with contracts, is seldom backed up by empirical evidence, relying rather on a judge's own personal worldview, or a nominally 'African' worldview.' However, the maxims and practices discussed here, which are just a drop in the ocean of African knowledge systems, could help to develop an appropriate jurisprudence and practice in this regard. All that is required is one case from which will sprout a judgment delivered with courage and austerity. That judicial occurrence will help to nurture the precedential seed that was planted by Nkabinde J in *Botha v Rich NO* para 46.

345 In this regard, see *Dikoko v Mokhatla* 2006 (6) SA 352 (CC) paras 68-9, 112-3.

346 Idowu *African Legal Theory* 174-5.

347 See 1.1 above.

348 See Bhe v Magistrate, Khayelitsha para 45,166.

349 Himonga & Nhlapo 18; Rautenbach 28-30.

consensus seeking; (c) the prevention and resolution of disputes and disagreements; (d) the unity of family structures and fostering co-operation and a sense of responsibility; (e) the obligation to care for family members; (f) perpetuation of the family, and (g) nurturing communitarian values.[350] None of the other normative standards and values have these attributes encapsulated as one. And, that is the distinguishing feature of *ubuntu*.

2.6 Criticism of ubuntu

The first criticism is that *ubuntu* is a 'new' and strange concept.[351] As indicated above, this assertion cannot be correct; it is founded on ignorance or cultural chauvinism. Westerners, including some South Africans of European extraction, seem to be very quick to brand what they do not know as strange or *contra bonos mores*.[352] *Ubuntu* has not only been part of African philosophy and jurisprudence since time immemorial, but has also been an integral component of the 'living customary law' of the different indigenous communities of South Africa for an equivalent amount of time.[353] It is, therefore, rooted in the native soil of South Africa.[354]

350 See Rautenbach 22; see also Himonga *et al* 385 where the learned authors enumerate what ubuntu - (a) it is to be contrasted with vengeance; (b) it dictates that a high value be placed on the life of a human being; (c) is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another; (d) dictates a shift from confrontation to mediation and conciliation; (e) dictates good attitudes and shared concern; (f) favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant; (g) favours restorative rather than retributive justice; (h) operates in a direction favouring reconciliation rather than estrangement of disputants; (i) works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant; (j) promotes mutual understanding rather than punishment; (k) favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; and, (l) favours civility and civilised dialogue premised on mutual tolerance. Clearly, these attributes set ubuntu apart from other similar normative values, concepts or philosophies.

351 See Bennett *African Equity* 30–53.

352 For instance, the successive colonial and apartheid governments refused to accord recognition to customary marriages, despite being valid in terms of the original *lex loci celebrationis* – see Dlamini CRM 'Recognition of a Customary Marriage' (1982) *De Rebus* 593 594; see also Idowu W 'Scepticism, Racism and African Jurisprudence: Questioning the problematique of relevance' (2003) *Quest* 63 74-9

353 Himonga 44.

354 Devenish 587.

The second criticism is that *ubuntu* is vague and ambiguous, and that the *dicta* on it that have found their way into the law reports are just a collection of the judges' own personal, and subjective, views.[355] However, the criticism loses potency when one considers that the *ubuntu*, like many other normative phenomena, 'encompasses different values simultaneously', and that is where its strength lies.[356] It is also important to note that most of the judges are South African men and women who received the values embodied by the concept, from oral history, as passed down to them by their parents and other agnates. Some of them were, prior to ascending to the Bench, in the trenches of public interest or human rights litigation, and they know how dehumanising poverty and oppression were to the majority of South Africans.[357] The fact that the one judge emphasises one basic right in one context, and the other another in a different context, does not render the rest of the catalogue worthless.[358] The judges are acutely aware that all these rights are part of the same founding document.

The third criticism, which is linked to the second, is that *ubuntu* could be used to mean virtually anything to anyone, thereby stifling the debate on its nuances.[359] Kroeze, for instance, says that even though there is nothing wrong with *ubuntu* as a concept, there is definitely something wrong 'with the Constitutional Court's approach to constitutional values'.[360] This is because, she opines, the court just invokes values (such as *ubuntu*) like 'little divinities' whose validity and authenticity are not to be questioned by anyone.[361] She concludes that these values might end up being 'accepted as immutable, debate-stopping certainties without any apparent

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355 Himonga C, Taylor M & Pope A, 'Reflections on the Judicial Views on *Ubuntu* (2013) *PER/PELJ* 372 385-6

356 Himonga *et al.* 385-6.

357 They include the late Chief Justices Arthur Chaskalson, Ishmael Mohammed and Pius Langa, Deputy Chief Justice Dikgang Moseneke, and Justices Kate O'Regan, Louis Skweyiya, and Edwin Cameron.

358 For instance, in *Hugo v President of the Republic of South Africa* 1997 (4) SA 1 (CC) para 74, Kriegler J laid emphasis on the importance of equality, saying that equality 'is our Constitution's focus and organising principle'. In *S v Makwanyane* para 144 and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37, O'Regan J stressed the significance of dignity.

359 See Bohler-Muller 367; see also Kroeze *Ubuntu court* 333.

360 Kroeze *Ubuntu court* 341.

361 See Kroeze *Ubuntu court* 341; however, cf. Low AM 'Yet Another Call for A Greater Role for Good Faith in the South African Law of Contract: We Banish the Law of the Jungle While Avoiding the Elephant in the Room' (2013) *PER/PELJ* 45 47-50, 101.

awareness of their ontological status as cultural artefacts'.[362] It is readily conceded that the parameters of *ubuntu* need to be carefully delineated.[363] This is because the concept is just like the proverbial unruly horse which 'when you get astride [it], you never know where it will carry you'.[364] However, that should not be done with the result that its juridical potency is diluted, or its practical relevance and flexibility stunted. In other words, we should not end up with a contrived version of the concept that only serves ulterior and extraneous interests.[365] Nor should *ubuntu* remain a mere loan-word used only to give a florid resonance to a weak contention or dictum:[366] a verbal crutch of sorts. It is gratifying, however, to note that the judges, led by the justices at the Constitutional Court, are beginning to rely on *ubuntu* to expand or circumscribe old legal remedies and processes in order to improve their efficacy.[367]

The fourth criticism is that *ubuntu* is a communal and relational ethic which stifles individual autonomy.[368] This is one of the many myths about African concepts that need debunking.[369] As has been the case with *lobolo* and the customary marriage, *ubuntu* is being viewed from a Western perspective, through a European or American lens, with disastrous results.[370] This approach creates the impression that communality and individual autonomy are mutually exclusive in African law and

362 Kroeze *Ubuntu court* 343.

363 The greater challenge lies not in whether 'we can understand or determine the exact contours of *ubuntu*, but in defending a certain conception of *ubuntu*' – see Mokgoro Y & Woolman S, 'Where Dignity ends and *ubuntu* begins: An Amplification of, as well as an Identification in Drucilla Cornell's Thoughts' (2010) *SAPL* 401 406.

364 To borrow from Burrough J in *Richardson v Mellish* (1924) 2 Bing 229 252.

365 See Devenish 587.

366 See the dictum of Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 335 (CC) para 112-3; see also Kroeze *Ubuntu court* 340.

367 To illustrate this point, some of the post-Makwanyane judgments such as *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) *and Molusi & Others v Voges NO* 2016 (3) SA 370 (CC) are discussed below.

368 See D Cornell, 'Is there a Difference that makes a Difference between *Ubuntu* and Dignity?' (2010) *SAPL* 382 396.

369 See Coleman 11.

370 See *Gumede v President of South Africa* 2009 (3) SA 152 (CC) paras 16–8; see also *Amodu Tijani v The Secretary, Southern Nigeria* 1912 (2) AC 399 (PC) 404, and Dlamini Recognition of a Customary Marriage (1982) SALJ 593 594.

jurisprudence.[371] Even during the not-so-idyllic, precolonial times,[372] the individual, male or female, had clearly distinct and separate rights which did not require the cooperation of the entire community for their assertion, realisation and protection.[373] Despite its relational nature, *ubuntu* allows every (adult) member of the community to retain his or her individual personality and agency, and not 'transcend (his or her) biological distinctiveness'.[374] It would, therefore, be ill-advised to confuse *ubuntu* 'with simple-minded communitarianism'.[375] It would also be simplistic, if not fallacious, to assume that the freedom that an individual enjoys in a communal setting is just an insignificant means to a collective end; a negligible drop in the ocean of his society's collective interests.[376] A Zulu bead mini-skirt made - or a jersey crocheted and embroidered - by a young girl in rural South Africa cannot, in all sincerity, be characterised as just a 'personal' means to a communitarian end.[377] It involves much more than that. To illustrate this point, the relationship between the individual and his or her property in a traditional setting, and the consequences of marriage under customary law are referred to immediately below. This assertion should, however, not be interpreted to mean that dignity, as a concept, is synonymous with *ubuntu*. It is just a part of it.[378]

There is family property, house property and personal property under customary law.[379] Family property – which is sometimes referred to as 'the general family estate'[380] – comprises property that the family head has not allotted to any particular

371 See Idowu *African Legal Theory* 175; see also Nyerere JK Freedom and Socialism: A Selection of Writings and Speeches 1965-1967 (1968) 5 where he says that 'people's equality must be reflected in the political organisation; (and) everyone must be an equal participant in the government of his society'.

372 A phrase used by Moseneke DCJ in *Gumede v President of South Africa* para 19.

373 See T W Bennett *Customary Law* 256-7. However, cf. Metz *African Values* 134-5.

374 Cornell 392, where she also says that in *ubuntu* 'individuals are intertwined in a world of ethical relations and obligations from the time they are born'. However, this part of her argument seems to characterise *ubuntu* as a purely relational ethic that does not allow for individuality or autonomy.

Cornell 392 where the author says that *ubuntu* is both 'the law of the social transcendence of the individual' and 'the law of the social bond'.

376 See Coleman 12.

377 See Coleman 12 and the authorities cited therein.

378 See Cornell 392; see also Dlamini Indigenous Law 6A4-6.

379 Bennett *Customary Law* 254–60.

380 Bennett *Customary Law* 258.

house.[381] It has to be used for the benefit of all the members of the family.[382] House property consists of the property that has already been allotted to a particular house.[383] In many instances, this category includes the *lobolo* paid in respect of maidens of a particular house in the homestead (family home), or fines and damages paid for the wrongs committed against the women or children of that house.[384] Both family property and house property fall under the control of the family head[385] and must be used for the benefit of all the members of the family.[386] However, different rules apply in respect of personal property. It accrues to, and inheres in, the individual owner concerned (male or female) to the exclusion of everybody else.[387] The examples of this category of property are the person's own clothes, pets, weapons or artefacts; these can be used only with the consent and permission of that owner.[388]

A customary marriage is viewed as the coming together of two family groups to which the bridal couple belong.[389] However, the individuality of the two persons making up the bridal couple cannot be discounted, or their agency minimised.[390] This is because, among other requirements, the consent of the woman is an

381 Bennett *Customary Law* 256-7. It is important to note that in allotting the property, the family head has to consider the rights and interests of all the individual members of the family, including the women and children.

382 It is submitted that, under original customary law, this was the only category of property that the family head could dispose of by means of a will – Bekker 72. However, on how the law on this point has been changed to rid it of (unfair) discrimination on the basis of race, sex and gender, see *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); see also section 6 of the Recognition of Customary Marriages Act 120 of 1998, and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

383 A 'house' is a unit into which a family home is divided; and it has its own property and status – see Bekker 126.

384 See Bennett *Customary Law* 256–7.

385 It is important to note that South Africa's constitutional compact, of which *ubuntu* is an integral part, now prohibits unfair discrimination on the basis of sex or gender – see section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

386 Bennett *Customary Law* 255.

387 See Bennett *Customary Law* 256–7.

388 Bennett *Customary Law* 256–7.

389 Bekker 96.

390 Bekker 106–7, 110–1.

essential part of the resultant matrimonial pact, and the enjoyment of conjugal rights is strictly conditional on her consent.[391]

2.7 Conclusion

Though it is of Zulu etymological origin, *ubuntu* is of sub-Saharan significance and reach. It lays emphasis on the human being irrespective of race, creed or origin. The purpose of infusing *ubuntu* into the law of South Africa is part of a broader project of 'Africanising', 'indigenising', or decolonising every aspect of South African life. It is also clear that, in many respects, *ubuntu* is coterminous with many other *human* normative values. However, it is not – like African humanism, Ujamaa and *Umuganda* – parochial or limited in its application. Nor is it intended to address only certain socio-economic, psychosocial or political ills within a particular community.

Chapter 3 examines the points of contact between *ubuntu* on the one hand, and good faith, equity and public policy on the other. Up until now, the constitutional and legal effect of these concepts, as determinants of validity and enforceability, is not clear. For that reason, the concepts need to be infused with *ubuntu* – the foundational value of the Constitution – so that the entire *corpus* of contract law is firmly grounded in it.

391 With regard to the approach of the South African courts where forced marriages and the custom of *ukuthwala* are concerned, see *Jezile v S* 2015 (2) *SACR* 452 (WCC). Section 38 of the Natal Codes of Zulu Law 1987 (Proc 151 GG 10966/9-10), and the KwaZulu Act on the Natal Code of Zulu Law Act 16 of 1985 (the Codes), also help ensure that women are not coerced into marriages to which they do not want to be party.

CHAPTER 3

THE TRANSFORMATIVE CAPACITY OF *UBUNTU* AND ITS RELATIONSHIP WITH EQUITY, GOOD FAITH AND PUBLIC POLICY

3.1 Introduction

In the previous chapter, it was demonstrated that *ubuntu* is a flexible concept that emphasises the essence of humankind, irrespective of race, creed or origin. The importance of language (and accompanying African maxims) was also examined. It was indicated that language is a suitable transmitter of norms and values that are likely to transform the law of South Africa, thereby ensuring fairness, equity and justice. This chapter examines the general relationship between *ubuntu* and other legal phenomena, and the impact these phenomena are likely to have on the transformation of the South African law of contract in the future. It is also argued that *ubuntu* can be used to revive those principles of the common law that are in accord with South Africa's constitutional and transformative project.

It will be further demonstrated that *ubuntu*,[392] because of its transformative 'humanising' effect, will help to provide the South African law, particularly the law of contract, with a *human* face. As indicated below, there are remedies that were abolished from, or crafted into, the politico-legal edifice in order to advance and protect the economic interests of one group to the detriment of another.[393] The premise of this contention is that the ruling elite of yesteryear did not possess infinite wisdom to foretell the juridical changes that are currently taking place in the country. Nor were they motivated by serving the general interests of the entire populace. Instead, they were engaged in narrow divisive legal or judicial and ideological wars which had nothing to do with the interests of justice.[394] In other words, the plan was to have, as the general source of common law, values that

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392 As a philosophy and a way of life, the concept encourages and enjoins each human being to be fair, honourable and just in dealing with others – *Mbiti African Religions and Philosophy* (1991) 8-10; see also Idowu W 'To Each a Crumb of Right, to Neither the Whole Loaf': The Metaphor of the Bread and the Jurinomics of Justice in African Thought' 2012 *JJS* 56-83.

393 See chapter 4, on the common-law principles of contract, and related concepts that still require attention and transformation.

394 See Margo 282.

originated from a particular part of Europe and which were couched and packaged in a particular language. The whole exercise led to the denigration, stunting and distortion of other legitimate sources, such as English Law and its casuistic element of equity,[395] and customary law (including *ubuntu*).

3.2 The re-examination and reconfiguration of South Africa's 'unwritten' legal norms

As indicated above, *ubuntu* is the matrix on which the transformative shift in South Africa is happening, or is supposed to happen. The genesis of its constitutional impetus derives from the postamble of the Constitution. The preamble itself[396] enjoins all South Africans to eradicate the divisions of the past and 'establish an open society based on democratic society based on democratic values, social justice and fundamental human rights'.[397] These 'fundamental rights' include the right to human dignity[398] and the right to equality.[399] The irony is that in the very same way that the common law was, because of its flexibility, used to create or discard certain remedies and processes to benefit the white side of the racial divide,[400] *ubuntu* can now be, and is already being used, to ensure justice to the entire populace.[401] This proposition is further buttressed by the maxim *ubi ius ibi remedium*.[402] As part of their judicial function, judges often fashion new remedies in line with the development and advancements of the country at a particular time.[403] This development is often motivated by ideological considerations or judicial pragmatism (including the need to prevent opportunistic or nebulous claims).[404] The Constitution

395 Corder & Davis 3-7.

396 The Constitution of South Africa Act 108 1996. The preamble thereto exhorts everyone '*to recognise the injustices of our past*'.
This is the most visible concretisation or juridicalisation of *ubuntu* since the postamble to the Constitution of the Republic of South Africa Act 98 of 1993.

398 Section 10 of the Constitution.

399 Section 9 of the Constitution.

400 See *Bank of Lisbon v De Ornelas* 1988 (3) SA 580 (A) 607.

401 This aspect is elaborated on in 4.3.

402 It means 'where there is right there ought to be a remedy'. It enjoins judges to make an attempt at fashioning out (and granting) a remedy in the given circumstances of that case.

403 For the role of equity in plaguing the gaps in the law and ensuring fairness, see Ross D (ed) *The Nicomachean Ethics of Aristotle* (1925) 132-134; see also Ackrill JL *Aristotle's Ethics* (1973) 110-1, and Ostwald M *Aristotle: Nicomachean Ethics* (1962) 141-2; Naude & Lubbe Exemptions – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom* 446-53.

404 Ross 132-4; Ostwald 141-2, and Naude & Lubbe 446-53.

recognises and acknowledges customary law (which includes *ubuntu* and all its facets and ramifications) as a binding source of law.[405] And, seemingly e 'right to culture*x abundanti cautela*, it also created 'the right to culture',[406] which includes *ubuntu*. As a result, the courts have a duty to develop rules, procedures and processes that will ensure full enjoyment of this generic right. The flexible and inclusive nature of *ubuntu* will ensure that the language of rights and justice is not 'very shallow and lacking emotion',[407] 'inhumane'[408] and 'sterile'.[409] In heeding the injunction of the Constitution and its foundational value of *ubuntu*, any remedy that is created or law that is enacted will have to ensure equality, equity, justice and fairness.[410] There are many factors which behove the courts – and indeed Parliament – to strive for these constitutional goals and outcomes. South Africa was, for many years, torn asunder by racial segregation and economic disparity. It is even an indictment that South Africa still fits the description of 'two countries in one'[411] or the 'most unequal societies in the world'.[412] Sandton, an upmarket suburb of

405 See section 31 and 211(3) of the Constitution.

406 The 'right to culture' seems to be already subsumed under the provisions pertaining to the recognition and application of customary law – see s 15 and 211 of the Constitution.

407 These are some of the epithets that Jessica Lenahan used in reference to the United States' domestic law, in a lecture she gave to law students and visitors at Cornell University on 25 September 2019. Ms Lenahan is the woman whose name, and story of domestic abuse, made headlines across the world. She lamented the inadequacies within the US legal system and its incapability to protect the country's citizens from spousal abuse – see *Lenahan-Gonzales & Others v US & Others* (2005) 545 US 748. The judgment is available at https://www.law.columbia.edu/inter-american-human-rights-system (accessed 17. 10.2019).

408 *Lenahan-Gonzales & Others* 748.

409 *Lenahan-Gonzales & Others* 748.

410 See the Preamble to, and section 9 of, the Constitution.

411 In his 'Reconciliation and Nation-Building' speech on 29 May 1998 in the National Assembly, former President Thabo Mbeki said: 'A major component part of the issue of reconciliation and nation building is defined by and derives from the material conditions in our society which have divided our country into two nations, the one black and the other white. We therefore make bold to say that South Africa is a country of two nations. One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure.' It would seem Mbeki lifted these words from the Report of the Advisory Commission on Civil Disorders, which was instituted by the President Lyndon Johnson of the United States of America in 1967, to investigate the causes of the riots in that country in1967 ((the Kerner Report). The chairperson of the Commission was the then Governor of Illinois, Otto Kerner, available at https://www.blackpast.org/african-american-history/national-advisory-commission-civil-disorders-kerner-report-1967 (accessed 12.02.2023).

412 The World Bank's 2015 Annual Report indicates that South Africa is one of the most unequal societies in the world, with 55.5 per cent (or about 30 million people) living below the breadline of R992 a month. According to the 2018 Report, 'Overcoming Poverty and Inequality in South Africa: An Assessment of the Drivers, Constraints and Opportunities', the

Johannesburg – which is reputed to be home to most of South Africa's billionaires – is just a stone's throw away from Alexandra, a township which is characterised by grime, crime and abject poverty.[413]

It is an incontrovertible matter of history that black people in South Africa were denied quality education,[414] a fact that led to their being excluded from the job market by a systematic low absorption into the mainstream economy.[415] Black South Africans were still expected to enter into commercial contracts on the same terms and conditions as their white, educated and wealthy countrymen. The common law, whose principles could have afforded some form of protection,[416] was stifled by the conservative and rigid approach of the courts.[417] This approach exacerbated the already unfair situation in which many black people found themselves: they could not extricate themselves from unfair contracts, or those contracts that were entered into under unfair circumstances.[418] The *laesio enormis* – which was introduced by the Justinian Code, the *Corpus Juris Civilis,* to alleviate the harsh consequences of the application of the *pacta sunt servanda* principle – is an example of what the

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conditions have not changed for the better, available at http://documents.worldbank.org (accessed 27.05.2019).

413 Given the racial discrimination and economic disparities of that time, members of the white community were better equipped to deal with some of the legal and contractual intricacies associated with buying goods and services on credit – see Otto JM & Otto R-L *The Credit Agreements Act Explained* (2016) 2; see also Nagel CJ & Kuschke B (eds) *Commercial Law* (2019) 290. In the absence of consumer protection legislation (such as the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008), unfair discrimination would have persisted in this regard. Credit providers or suppliers would have continued to charge exorbitant prices, admission fees and school fees, thereby indirectly preventing members of the previously disadvantaged communities from accessing certain hotels, lodges, cinemas, schools, universities and other similar services and facilities.

414 See in general Dugard J *Human Rights and the South African Legal Order* (1978) 55-106; see also Mbeki M 'Introduction' in Mbeki M (ed) *Advocates for Change: How to overcome Africa's challenge* (2011) 5-6.

415 See Dugard *Human Rights* 55-106; see also Mbeki *Advocate for Change* 5-6.

416 Boberg PQR *Law of Person and the Family* (1977) 79: 'The point is simply that, in the field of private law racial discrimination is superimposed piecemeal by legislative enactment upon a common law framework that knows no distinctions of colour, class or creed'. On the flexibility and pliability of the common law, see also *Magna Alloys & Research (SA) v Ellis* 1984 4 SA 874 (A) *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7-9. However, as discussed in chapter 4, the new constitutional dispensation is in need of judges who are attuned to the need for judicial transformation and transformative adjudication.

417 See Kerr AJ T*he Principles of the Law of Contract* (2002) 638-66; see also *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 859 (A), and *Bank of Lisbon and South Africa v De Ornelas and Another* 1988 (3) SA 580 (A) 607.

418 See Bradfield 17 and all the authorities cited therein; see also *Burger v Central South African Railways* 1903 TS 571 576.

common law could have achieved.[419] *Laesio enormis* was initially introduced to protect rural farmers from urban capitalists who had the financial muscle to force the hand of the sellers.[420] Then, the seller was in a weaker position, and needed to be protected.[421] However, centuries later, the shoe was on the other foot – the purchaser needed protection from extortionate sellers.[422] The changes were occasioned by the shift in the economic balance of the world, and the remedy came to be relied on more by the purchaser than by the seller.[423] The *laesio enormis*, together with many other contractual remedies, such as the *exceptio doli generalis* were either abolished, or abrogated by disuse.[424] In many instances, the approach was influenced by the political ideology of the time,[425] or founded on some practice which had no basis in law.[426] For instance, concepts such as public policy and good faith[427] were viewed through the prism of Western legal norms and values, which left black people with a sense of injustice whose effect is still felt to date. Nor was there any sound reason or principle given for the abolition of the law of equity or its non-reception into South African law.[428] Reliance on public policy did not provide adequate protection to many of the parties, particularly the illiterate ones who fell for the ruses and wiles of the more educated businesspeople. This is because, by

419 Barnard J *THRHR* (2008) 'The unfairness of the price and the doctrine of *laesio enormis* in consumer sales' 521; see also Kerr 9 and all the authorities cited therein.

420 The price of the *merx*, particularly land, had to be *verum* or *justum*. There had to be an appreciable relationship between the price and the thing sold. As Barnard puts it: 'The rule was that the seller of land for less than half its real value might get back his land on returning the price unless the buyer preferred to pay the full price – see 522.

421 Barnard 522.

422 Bernard 523.

423 Bernard 523.

424 Bernard 523.

425 See *Bank v of Lisbon and South Africa v Ornelas* 1988 (3) SA 580 (A). This is the case where where the *exceptio doli generalis* was abolished – see 607; see also Hutchison D 'Non-variation clauses in contract: any escape from the Shifren straitjacket?' (2002) *SALJ* 720 736-44. However, see Kerr 488-489; 637-40 where the writer indicates that the authority on which abolition of the *exceptio* was grounded was not solid. See also *Van der Merwe v Meades* 1991 (2) SA 1 (A) 8, where the Appellate Division held, without deciding, that the *replicatio doli*, and by extension the *exceptio doli generalis*, was still part of the South African Law of Contract.

426 See in general, *National Union of Textileworkers v Stags Packings (Pty) Ltd* 1982 (1) SA 580 (T).

427 See Bradfield 12-4.

428 See Bennett 50 – 1: 'As it happened, the English doctrine of equity was not "received" into South African law. Purists engaged in the *bellum juridicum* [the conscious ideologisation of the law] argued that an alien concept such as this would pollute Roman-Dutch law.' See also Kerr 657-9.

definition, public policy refers to the legal convictions of a particular society as perceived and articulated by the judges in resolving disputes brought before them.[429] That state of affairs led to untold levels of injustice for the largely uneducated section of the population.[430]

It is for that reason that, since the advent of constitutional democracy in the country, *ubuntu* has become the prism through which public policy has been viewed and articulated.[431] *Ubuntu* commends itself to the South African legal transformative project insofar as it relates to the law of contract specifically. The reasons are the following. First, the concept, as has been interpreted and articulated by the courts, is currently the only viable corrective – or normative value – that can ensure a gradual and transformative development of good faith, equity and public policy. Even though both original versions of customary law and the common law shared two somewhat dissonant features, patriarchy and flexibility, the former was, though not completely egalitarian, at least humanitarian.[432] Secondly, it is not coloured by race. Thirdly, its content and ethos is universal. Fourth, it is flexible enough to cover any eventuality, but equally pliable to counter any abuse of court process. Fifth, it is capable of fulfilling the role that good faith, equity and public policy could not fulfil under colonialism and apartheid**.** Sixth, it can be used – as will be shown in chapters 4 and 5 – to create new rights, remedies and processes – in order to ensure fairness, justice and equity for all the people who live in South Africa.

429 See Neethling et al. *Law of Delict* (1999) 37-8; see also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597; *Gumede v President South Africa* 2009 (3) SA 152 (CC) para 16-8, and Moseneke D *All Rise: A Judicial Memoir* 6-7.

430 Moseneke *All Rise* 6-7.

431 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 51; see also *RH v DE* 2014 (6) SA 436 (SCA) 17-8; *DE v RH* 2015 (5) SA 83 (CC) para 3; *Makate v Vodacom (Pty) Ltd* 2016 (4) 121 (CC) para 87, and *Sarrahwitz v Maritz* NO 2015 (8) BCLR 925 (CC) para 29.

432 See *King NO v De Jager* 2021 (4) SA I (CC) para 54; see also *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 90 (fn 112) and the authorities cited therein.

3.3 The relationship between good faith, equity, public policy and the common law[433]

Human beings have always sought and found ways by which to ameliorate or circumvent the failings of their rulers or law-makers.[434] They have always been in search for ways in which to achieve a higher form of justice – the high-water mark of equity – in those circumstances.[435] This goal was achieved in at least four ways. The first was by articulating the particular community's collective notions of justice.[436] The judges are able to engage in this process through the pleadings and court process as drawn up by counsel, and their able arguments.[437] Secondly, by fashioning out new ameliorative remedies or legal solutions to new problems and

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433 It is important to note that, in isiZulu, 'common law' is known as *umthetho wezinkantolo* ('court-law' or 'judge-made law'). In other words, the greater their flexibility in their approach to the law of contract, the greater the opportunity for justice and equity to be dispensed in this this area of the law – Louw AM 'Yet Another Call for A Greater Role for Good Faith in the South African law of contract: We Banish the Law of the Jungle While Avoiding the Elephant in the Room' (2013) *PER/PELJ* 45-50; 101

434 Even in the darkest days of colonialism and apartheid, jurists, of all races, used their wisdom and ingenuity to create space for a measure of fairness and justice – see Le Roux & Davis D Le Roux M & Davis D *Lawfare: Judging Politics in South Africa* (2019) 23-65.

435 In precolonial times, that normative value has been *ubuntu*. It is the matrix on which the post-apartheid constitutional and transformative shift is taking place – and should continue to take place.

436 See Corbett 67 where the learned author says:

> A community has certain common values and norms. These are in part a heritage from the past. To some extent too they are the product of the influence of other communities; of the interaction that takes place between peoples in all spheres of human activity; of the sayings and writings of the philosophers, the thinkers, the leaders, which have universal human appeal; of the living example which other societies provide. It is these values and norms that the judge must apply in making his decision. And in doing so he must become 'the living voice of the people'; he must "know us better than we know ourselves"; he must interpret society to itself.

Unfortunately, at the time when the former chief justice of South Africa delivered his address, the country was a completely different place; characterised by racial classification, segregation and economic exclusion. Except in a few isolated cases, the judges were not 'the voice of (all) the people; nor did they know the black section of the community any better'.

437 However, as indicated above, the majority of the judges who were appointed before 1994 could not, all on their own, be entrusted with transformative judicial law-making process, particularly where novel legal concepts such as *ubuntu* were at issue. – see Margo 284. After all, they are not automatons that are untouched by the history, ideology and politics that is associated with their parentage.

new solutions.[438] Thirdly, by striving for social cohesion and industrial peace. In the context of the common law of contract, the exercise entails ensuring contractual justice at all times. Fourth, by not completely ignoring public opinion. In *S v Makwanyane,*[439] Chaskalson P (as he then was) warns judges against being slavishly swayed by public opinion. However, the former President of the Constitutional Court was at pains to state whether public opinion could be completely ignored in considering the merits or otherwise, when *ubuntu* is under consideration in respect the death penalty.[440] If harnessed properly, public opinion could provide a suitable foil against which to test the foibles and viability of any emerging or nascent version of 'living customary law' within a particular community.[441] For instance, there is no such concept as 'prescription' in customary law.[442] In other words, a civil claim or criminal charge has no point of extinction, and may not be extinguished by a mere lapse of time.[443]

As will be indicated below, the people of South Africa have, at various stages of the country's politico-legal development, relied on concepts such as *ubuntu*, good faith, public policy and reasonableness, in order to achieve fairness and justice – and political objectives – in the circumstances that prevailed at a particular point in time.[444] The golden thread that runs through these concepts is their pliability which would have ensured even-handedness in ever-changing circumstances.[445] However, true to the juridical paradox that was the pre-democracy South African law, the protective shield that was inherent in the common law – an amalgam of Roman,

438 See Margo 284.

439 1995 (3) 391 (CC).

440 Para 87-9.

441 See *Shilubana & Others v Nwamitwa* 2009 (2) SA (CC) para 49-55.

442 The applicable maxim is '*Icala aliboli*' (in isiZulu); or '*Molato ha o bole*' (in Sesotho). In this regard, see *Maisela v Kgoloane* 2002 (2) SA 370 (T)376-7; see also Himonga & Nhlapo *African Customary Law: Post-Apartheid Living Law Perspectives* 188.

443 See Himonga & Nhlapo 188.

444 In the United States, for instance, there is, among other remedies, the concept of 'unconscionability', which is often relied on to avert harsh consequences of an unfair contract. There is also what is referred to as 'effective breach'. This is a defence that a defendant who is being sued for breach of contract can raise by indicating that another person, a third party, made a better offer to him (during the subsistence of the current contract) than that which the contract his contract with the plaintiff was entered into – see Marrow BP 'Contractual Unconscionability: Identifying and Understanding its Essential Elements' (2000) *New York Law Journal* 18 21-4.

445 See Davis & Le Roux (2019) 24-5; see also *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 45.

Dutch and English - was rendered useless and nugatory by statutes.[446] And, as indicated in chapter 1,[447] the statutes were a product of political ideology and racial prejudice.[448]

As a result, the most ameliorative and effective of these remedies were either abolished by the courts, through their pronouncements,[449] or abrogated by disuse.[450] The motivation seems to have either been the individual judge's own political leanings or legal culture and practice in the country at the time.[451] After the advent of constitutional democracy in South Africa, there was a need to re-examine all laws of the land. The process has meant declaring invalid and unconstitutional those legal concepts, processes and remedies that do not advance the country's democratic project.[452] It also meant extricating from antiquity, and the recent history of polarisation, those concepts, remedies and processes that would help ensure justice and equity.[453] The common law – which encompasses good faith, fairness, reasonableness and public policy – was distorted, in order to achieve

446 Sparks A *Beyond the Miracle: Inside the New South Africa* (2011) 22.

447 See 1.3 above.

448 *Ibid*. Nor did the concept of public policy, which was meant to be a rather furtive substitute for the *exceptio doli generalis*, offer any adequate alternative to vulnerable parties. This is because, for its efficacy, public policy depended largely on the mores of the white community, to the exclusion of those of the black community – Corbett MM 'Aspects of the Role of Policy in the Evolution of Our Common Law' *SALJ* (1987) 52 67-9.

449 See *Bank of Lisbon v Ornelas* 340.

450 See also *Green v Fitzgerald* 1914 AD 88 103, where the Appellate Division held that adultery was no longer a crime in South Africa. It is also important to note that, due to change in the population's moral outlook and values, adultery is no longer a delict – see, in general, *RH V DE* 2014 SCA 436 (SCA); see also *RH v DE* 2015 (5) SA 23 (CC).

451 See Le Roux & Davis (2019) 27-8.

452 Arrest *tamquam suspectus de fuga* (which was a common-law remedy). This a remedy that was available to a creditor against a debtor who owed him or her about R40, and whom, on reasonable grounds, was suspected of preparing to remove from the country, thereby avoiding payment of the debt – see *Malachi v Cape Dance Academy International (Pty) Ltd & Others* 2010 (6) SA 1 (CC) The tenor of the judgment of Mogoeng J demonstrates that the *tamquam* was not consonant with South Africa's democratic project; on that ground, an order was granted that the offending sub-section (s 30 (3) of the Magistrates' Court 32 of 1944) be excised from the rest of the section - para 23-7, 45-7.

453 See Corbett 66-9; see also Van Huyssteen *et al* 13-4, and *S v Zuma* 1995 (2) SA 642 (CC) para 17, where Kentridge AJ said that the pre-1994 legal principles and concepts 'cannot just be ignored'. The reason is that some of them 'obviously contain much of lasting value'; see too.

political and ideological ends.[454] And, a significant section of the South African population was left without any juridical protective net.[455]

Because of these self-inflicted imperfections and self-imposed limitations, these concepts were not well-suited to serve the interests and needs of an all-inclusive society envisioned by the Constitution.[456] The constitutional and legal environment denied all South Africans of a possibly libertarian constitutional jurisprudence.[457] Something more had to happen for the entire nation to realise that dream. For that reason, many legal concepts have had to be infused with the contents and ethos of *ubuntu* – in order to free them from the shackles of racial ideological prejudice.[458]

For instance, in *Potgieter v Potgieter NO & Others*,[459] Brand JA failed to recognise that his own dictum that he lifted and cited from *South African Forestry Co Ltd v*

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454 As stated by Mhlantla J in *King NO v De Jager* para 72, the common law was supposed to be an ever-evolving system of law which could also be enhanced through the 'backwards and forwards process of adjudication'. However, some of the judges, particularly in the Supreme Court of Appeal, seem to have been content with just looking 'backwards', particularly where the law of contract was concerned.

455 Cameron succinctly describes the pre-democracy South Africa's constitutional position on the common law:

> From 1948, the apartheid Parliament exploited its electorally unaccountable Westminster-type powers to enforce separation of black and white. The apartheid legislature could enact any law, no matter how hateful, oppressive or demeaning. And it often did. No provision of the Roman-Dutch common law, no court ruling, no principles of fairness could make the slightest difference. What Parliament was supreme law, and had to be enforced. The only hope for mitigation was to soften the edges of the law through interpretation, and to defeat its application in a particular case through court manoeuvres. This is the space in which human rights lawyers worked under apartheid' – see Cameron E *Justice: A personal account* (2014) 178-9; see also, in general, Dugard *Human Rights* 14-36.

456 See the preamble to both the interim Constitution and the final one.

457 See Cameron E *Justice: A Personal Account* (2014) 178-279; see also Dugard *Human Rights* 14-36.

458 See *King NO v De Jager* para 202-3.

459 *See Potgieter v Potgieter and Others* 2012 (1) SA 637 (SCA) para 32. The learned judge of appeal continued on this rigid line of thought in Eskom Holdings SOC Ltd v Masinda 2019 (5) 386 (SCA). In that case, Ms Masinda, the respondent (the applicant in the court a quo), had her application for a spoliation order was dismissed. The Supreme Court of Appeal said – per Brand JA - that such an order would not be appropriate in circumstance where the applicant sought that her property to be re-connected to the national electricity grid whilst, at the same time, not paying for the electricity supply. His view was, as indicated in 1.3 above, that the rights under consideration was not enforceable by an order for mandament van spolie – para 24-5. It is submitted that the SCA was just splitting hairs. The origin or purpose of the

York Timbers Ltd[460] was, itself, confusing at best and contradictory at worst.[461] That case turned on the validity of an amendment to a trust by the founder thereof and the trustees. The reason was that some of the beneficiaries, who had already benefited under the trust, had not consented to the amendment. The Supreme Court of Appeal described the concepts of fairness, good faith and public policy as 'abstract' but 'fundamental to our law of contract'.[462] In the course of his judgment, the judge of appeal said the following:

> These abstract values perform creative, informative and controlling functions through established rules of the law of this contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.[463]

This seems to be the 'dogmatic approach' that the Supreme Court of Appeal has continued to adopt in defiance of post-1994,[464] transformative jurisprudence that is informed by the ethos of *ubuntu*.[465] The nub of this rigid approach is that a contract cannot necessarily be terminated or rendered unenforceable merely because it is unfair or unjust. Economic certainty, or financial security, is preferred and given primacy over contractual justice and fairness.[466] What follows is an examination of

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460 2005 (3) SA 323 (SCA). In this case, the Department of Forestry, which had in the interim assigned its rights and obligations to Safcol (appellant), instituted proceedings to cancel a contract between itself and York Timbers (respondent) on the basis of breach. The main allegation was that York had, over an extended period of time, acted in breach of a contract that had been entered between the parties. However, Safcol alleged, it had no intention to negotiate in good faith, and deliberately obstructed the negotiations in that regard. The parties were, in terms of the agreement, obliged to negotiate and revise prices for softwood. Alternatively, Safcol, averred that York Timbers had failed to act in accordance with the dictates of reasonableness, fairness and good faith.

461 Para 27.

462 See *Potgieter v Potgieter* para 32.

463 See para 27.

464 See Coleman 23-26; see also Boonzaier L *Rereading Botha v Rich* (2020) SALJ 1 11-2, who believes that the possibility of the two courts finding each other is a possibility despite their relationship being currently 'fractious'.

465 See *King NO v De Jager* para 202-3.

466 See *York Timbers Ltd* para 27. Sadly, this seems to be the approach adopted by Ngcobo J for the majority in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 30; see also Coleman 23-26. However, as indicated in chapter 4, the approach was not fully endorsed by the other justices in their minority judgments. Nor are the suggestions, by commentators such as Boonzaier and Coleman and others – that the two approaches be merged – themselves

these concepts and how political ideology and conservative judicial law-making emasculated the otherwise flexible common law.[467]

3.3.1 Good faith

Under Roman law and Roman-Dutch Law, good faith referred to the sense of honesty which every person was required to adopt when entering into contracts and fulfilling all the undertakings made in terms thereof.[468] Any term or condition of the contract which was in conflict with the dictates of good faith was deemed to be fraudulent or unconscionable and ultimately inequitable.[469] This is because a contract is by definition an agreement in terms of which parties transfer a portion of his estate for the benefit of another.[470] It is an agreement which is at the core of any country's economy. It is also capable of being used as an instrument of exploitation of the vulnerable denizens by the wealthy and powerful.[471] This class of persons needs to be protected from the wiles of such people.

In Roman Law and Roman-Dutch Law, good faith 'stood in the centre of the [people's] daily legal life'.[472] It was intended for those contractual relations which were not governed by statute or formulae, but were informal and founded on the consensus of the parties.[473] It also created a duty on contracting parties to fulfil their

unsatisfactory. As indicated below at 4.2.2, the one court is the apex court, while the other is a lower court which is still beholden to the pre-constitutional past.

467 See Klare & Davis 44-45; see also Louw AM 'Yet Another Call for A Greater Role for Good Faith in the South African Law of Contract: We Banish the Law of the Jungle While Avoiding the Elephant in the Room' (2013) *PER/PELJ* 45-50, 101.

468 See the minority judgment by Olivier JA in *Eerste Nasionale Bank Beperk* v *Saayman* 1997 (4) SA 302 (SCA) para 16-20 and the authorities cited therein. For more on this concept, see chapter 4.

469 See Kaser M *Roman Private Law* (1980) 17-9; 173-4; Naude & Lubbe 46-53.

470 Van Huyssteen et al. 10 define it as an 'agreement which is made with the intention of creating an obligation or obligations [between the parties involved]'. In the context of the transfer of the economy, the wealthy and powerful can always refuse to create such obligations. Hence, there is a legislative imperative to ensure broad-based black economic empowerment (BBBEE). As with affirmative action, the objective of which is to ensure an equitable demographic representativity in the workplace, BBBEE has, as its main objective, the equitable transfer of wealth and resources of the country – see the Employment Equity Act 55 of 1998; see also the Broad-based Black Economic Empowerment Act 53 0f 2003.

471 See *Eerste Nasionale Bank v Saayman* 16-20.

472 Kaser 17-4. On the history and role of good faith, see Naude & Lubbe 46-7.

473 These contracts included sale and hiring (lease, contract of service, or employment) and the contract of services (where the services of independent contractors were employed).

contractual undertakings.[474] In other words, it was not just an option that the parties to a contract could easily dispense with:[475] it had the force of law.[476] It is for this reason that Bernard-Naude, whilst acknowledging that good faith has been part of the South African law of contract for many years as a 'signifier',[477] his observation, however, is that the concept is now emerging as a 'master-signifier'.[478] But, he is of the view that good faith is about to displace 'freedom of contract' from atop that lofty perch.[479] However, as will be shown below, this postulate is tantamount to re-inventing the wheel; or, to steal from the Bible, it is like putting old wine in new skins.[480] That appellation and description seems appropriate for **ubuntu.** In other words, it is only *ubuntu* that will help restore good faith to its rightful place – and not be shrouded in uncertainty.[481] Currently, good faith is not a stand-alone requirement for the validity of common-law contracts in South Africa.[482] It is merely one of many factors to be considered in determining whether a particular agreement is fair or not,[483] or unconscionable or not.[484] It is only to be relied on as an interpretative tool 'in evaluating the conduct of the parties both in respect of its performance … and in its antecedent negotiation'.[485]

474 Kaser 17-9. However, see *Brisley v Drotsky* para 22; see also *Afrox Healthcare* para 33-6.

475 See *Brisley v Drotsky* 2002 (4) SA 1 (SCA); see also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 33-6.

476 See Kaser 17-9; see also Naude & Lubbe 46-53.

477 This, he says, is a concept, like the 'will theory', 'reliance theory', 'consensus', misrepresentation', and many other similar concepts, which distinguish the law of contract from other branches of the law or other disciplines – 250.

478 This is because, the learned author says, it is only in recent times that good faith 'has merged in a diachronic way, that is, as a new threshold in our system of contract that is creating new patterns'.– see 247.

479 See Barnard-Naude 253.

480 See Matthew 9:14-7; Mark 2: 22-3, Luke 5:33-9.

481 See *York Timbers Limited* 27; see also *Potgieter v Potgieter* para 32.

482 See Van Huyssteen *et al.* 13-26; see also Du Plessis H 5-6, *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *York Timbers Limited* para 32-4, and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 33-6.

483 See *Beadica v Oregon Trustee* para 22-23; see also Barkhuizen v Napier Van Huyssteen *et al* 13-26; see also Du Plessis H 5-6.

484 Strictly speaking, the concept of 'unconscionability' is not a specific, stand-alone ground on which to vitiate a contract in South Africa. It is a factor to be considered in determining whether the reprehensibility of the conduct of one of the parties to a contract is contrary to public policy.

485 Kerr 301.

However, the approach is different in other jurisdictions: unconscionability is, in and of itself, a ground on which a contract can be completely vitiated.[486] It is not just a function of public policy or a determinant thereof.[487] Put otherwise, in South Africa, it is only the kind of unconscionability that offends against public policy that taken into account, and is of relevance, for contractual purposes.[488] It is for that reason that good faith was, originally, intended as a measure of honesty and fair-dealing that was displayed in the creation of a particular contract by the parties.[489] As a concept, good faith is found in both private law and public law in South Africa.[490] Insofar as private law is concerned, it finds application in the context of the law of contract.[491] It was intended to ensure that the parties fulfilled whatever undertakings they might have made to each other.[492] It has also meant that, where one of the parties involuntarily relied on the other for the disclosure of crucial information, the latter is obliged to disclose that information to the former, without

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486 See Marrow BP 'Contractual Unconscionability: Identifying and Understanding its Essential Elements' (2000) *New York Law Journal* 26.

487 The concept seems to enjoy especial prevalence and relevance in case law and legal literature in the United States of America. It is often relied on where the contract is a result of unequal bargaining and is oppressive to one of the parties. For instance, Marrow says:

> [It] thus appears that there are at least three threshold rules leading to a conclusion that a covenant is actually unconscionable — *i.e.,* one-sided, oppressive and likely to result in unfair surprise: Its effect is profoundly discriminatory to one of the contracting parties. It contains language that attempts to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition. It contains language the real meaning of which is intentionally obscured from one of the parties. All three elements justify judicial interference because they have the appearance of being unfair, they have an unfair consequence, and there is no reasonable basis for enforcing the contested covenant' – see Marrow 21.

488 See *Sasfin (Pty) Ltd v Beukes* 13-4; see also *Afrox Healthcare* 31-2.

489 Marrow 21. However, it is important to note that even though public policy is a factor in considering whether a contract is illegal or enforceable, judges are still required to exercise caution and restraint in that regard – see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8, and Van Huyssteen et al. 214 and the authorities cited therein. However, cf. *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 88.

490 In the latter sphere, it is bound up to the concept of reasonableness and fairness, insofar as they relate to the exercise of state power by public officials. In that context, good faith helped to curb arbitrariness, capriciousness and injustice in the performance of administrative functions by government functionaries – see Wiechers M *Administrative Law* (1985) 254-7.

491 See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 72; see also *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 95.

492 See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 72; see also *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 95.

being prompted.[493] Good faith was, in reality, intended to ensure that there is honesty between the parties during negotiations, that there was fairness in the effect of the terms of the resultant contract, and that a reasonable interpretation would be attached to its terms in case of a dispute.[494] But, it is important to understand that there are other related phenomena – such as freedom of contract, consensuality, individual autonomy[495] – continue to play the role of ensuring that there is fair play in the law of contract.[496]

However, there is a glaring gap that continues to exist in this branch of South African law. It lies in the fact that the absence of good faith does not necessarily render a contract invalid.[497] Put otherwise, good faith would have to be infused with *ubuntu* and developed into a full, substantive rule of contract.[498] And, if that development does not take place soon, contractual injustice will persist. As Louw puts it, it is 'inconceivable that the community's sense of what is acceptable (*ubuntu* and the concern for the well-being of others) should not play a fundamental role in determining which contracts (and conduct in the negotiation, conclusion and enforcement of contracts) should be allowed by the courts'.[499] The judicial exposition of good faith in South Africa is a creative way of issuing a blank cheque to the 'economically powerful' to continue passing on wealth among themselves.[500] This is

493 This is because some contracts, like the partnership or insurance, involve involuntary reliance of the one party on the other for information, and a greater degree of disclosure – see Davis *et al. Companies and other business structures* (2013) 376.

494 See Kerr AJ *The Principles of the Law of Contract* (2002) 301-2.

495 This refers to one's right to choose the persons whom one wishes to enter into a contract with and the kind of contract one wishes to enter into. It also includes the responsibility to accept the consequences of such a choice – see Van Huyssteen et al. 12-3.

496 Obviously, statutes such as the National Credit Act 34 of 2005 and the Alienation of Land Act 68 of 1981 helped to remedy weaknesses in the common law, thereby protecting vulnerable consumers, many of whom are black.

497 See *York Timbers Limited* para 27; see also *Potgieter v Potgieter* para 32, and *Brisley v Drotsky* para 22.

498 See Van Huyssteen *et al*. 150. It is for that reason that a voidable contract will continue to bind the parties until it is set aside by the courts at the insistence of the aggrieved party.

499 See Louw 77.

500 See Louw 59; see also Barnard-Naude 52, who is of the view that good faith is gradually emerging as a potent contractual remedy. In the same way that freedom to contract was viewed in the context of public policy, I see good faith as a subset of *ubuntu*. For that reason, *ubuntu* is, in my view the new 'master-signifier'. Moreover, in *Beadica v Oregon* Trustees (WCC) para 40, there needs to be an audit of all the common law principles on Contract. For that reason, 'good faith' as developed by the courts, particularly the Appellate Division (now the SCA), has to change.

because, in terms of the country's contract laws, concepts such as good faith are not substantive in nature, but only perform a 'creative, informative and controlling function through established rules of the law of contract'.[501] Continued judicial resistance, which has always been informed by legal conservatism and formalism, remains an impediment to an equitable and transformative contractual jurisprudence.[502] And, the intimation by Barnard-Naude, that good faith is, suddenly, so metamorphosed as to qualify to supplant all the other common law principles of contract (including *ubuntu*), is not helpful.[503]

The Constitution – and the ethos of *ubuntu* that it espouses – has become indispensable in this regard. That development demands that all the applicable common-law principles of contract be developed in accordance with the prescripts of the current constitutional dispensation.[504] Despite some initial scepticism and conservatism in this regard,[505] the Constitutional Court has had occasion to clarify the significance of *ubuntu vis-à-vis* common-law principles of contract.[506] In *Everfresh,* Moseneke DCJ said that *ubuntu* now 'influences our constitutional compact'.[507] The judgment considered the relevance and force of good faith in determining whether the parties were obliged to negotiate the renewal of a contract of lease prior to its termination. The question was particularly important because the contract did not create a deadlock-breaking mechanism. After lamenting a lack

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501 See *York Timbers Limited* para 27; *Bredenkamp* para 53; *Potgieter v Potgieter* para 32.

502 Louw 59-60.

503 See Barnard-Naude 248 where the learned author says:

> In other words, my contention is that [because of good faith as the new master-signifier] the South African 'system' of contracts is altering itself to the point that it is *increasingly disconfirming its identity*, generating through its very iterability 'new meanings which can be further pursued and enhanced' by the practice of the particular 'political contestant' – the legal subject – within its milieu. As such, this disconfirmation which gives rise to new meaning is indicative of the gradual fulfilment – in the terrain of private law – of the mandate of the South African Constitution, understood as facilitating the process of 'transformative constitutionalism'(emphasis provided).

504 *See Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71-2; see also *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 87.

505 See in general, the majority judgment, per Ngcobo J in *Barkhuizen v Napier* para 27-30. Bennett 46; see also Du Plessis H 7-8.

506 See *Everfresh* para 72.

507 See *Everfresh* para 72; see also *Combined Developers (Pty) Ltd v Arun Holdings and Other*s 2015 (3) SA 215 (WCC) 240-1 where Davis J says that like public policy, good faith requires an element of reasonableness between parties in dealing with each other. He also warns judges from engaging in a 'contested economic debate' they should rather refrain from.

of proper pleading (as pertains to *ubuntu*), the Deputy Judge President said that where there is a contractual obligation to negotiate in good faith 'it would be hardly imaginable that our constitutional values would not require that the negotiations be done reasonably'.[508]

Prior to the advent of constitutional democracy in South Africa, there was political, racial and economic segregation between black and white South Africans.[509] And, the latter group, in the main, comprised educated individuals and sophisticated businessmen.[510] As indicated in chapter 4, most of the contracts were elaborate and confusing to the majority of the people.[511] It was also very easy for white businesspeople, in particular, to take advantage of black people who were compelled by circumstances to enter into such agreements.[512] In the main, such contracts excluded almost all liability on the part of the business, and made the customer 'agree' to the exclusion of virtually all liability of the businessman that he or she would not otherwise have agreed to.[513] Until fairly recently, the courts drew a clear distinction between contracts that required 'ordinary' good faith and those – such as of partnerships and insurance – that were viewed as calling for a higher threshold, utmost good faith – *uberrimae fidei*.[514] The parties involved in the latter kind of contracts were expected to behave like brothers (or sisters) in relation to each other.[515]

However, because the concept was viewed from a purely Western perspective, it did not serve the interests of all South Africans. Hence the need to infuse *ubuntu* into this branch of South African law in order to transform and legitimise it.[516] This

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508 See *Everfresh* 72.

509 This was largely because most of the contracts, such as the so-called 'ticket cases', did not involve any negotiation between the parties, and nor did they require any signature by the parties – see Kerr 344-5.

510 See Kerr 344-5; see also Otto JM & Otto 2, and Nagel & Kuschke 290.

511 See Otto JM & Otto 2; see also Nagel & Kuschke 290.

512 See Otto JM & Otto 2; see also Nagel & Kuschke 290, see also Louw 59.

513 See Otto JM & Otto 2; see also Nagel & Kuschke 290.

514 The legal position has now changed. This is because all contracts in South Africa are supposed to be *bonae fidei – Mutual and Federal v Oudtshoorn Municipality* 1985 (1) SA 419 (A). However, as already indicated, good faith was coloured by race; and that makes *ubuntu* a significant corrective. It is also judicially characterised as merely of 'creative, informative and controlling value' – see *York Timbers Limited* para 27.

515 They were not supposed to intentionally lead each other astray – Van Huyssteen *et al*. 20.

516 Thereby giving it a human face – see *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*

is because *ubuntu*, in addition to being relational as an ethic, also requires that ample empathy[517] be displayed – by both litigant and judge – in order to ensure contractual justice. The inescapable conclusion is that but for the distortion of some of the common-law principles, the individual South African citizen, irrespective of colour, race or class, would have been accorded the full protection of the law under both colonialism and apartheid.[518] However, that did not happen because the laws of the country were viewed through the prism of race, prejudice and ideology.[519] As a result, good faith, equity and public policy – just to mention the three – were denuded of their all-encompassing protective potency.[520]

3.3.2 Equity

Although 'equity' is not a prominent feature in the South African law of contract,[521] it is one of the non-legislative means through which people have created normative values to ensure even-handedness in resolving legal disputes.[522] These normative values, which are often part of a community's tradition, culture and folklore, seem to serve three important functions.[523] First, they provide the community in which they find expression with a collective and concretised set of emotions which help to legitimise its existing imperfect rules and norms.[524] Secondly, as a yardstick, they

(Pty) Ltd 2012 (1) SA 256 (CC) para 72-74; see also Van Huyssteen et al. 21, 256-7.

517 Empathy, as a component of *ubuntu*, demands that one appreciates the predicament and plight of one's fellow human beings whilst protecting one's own interests. It does not allow those who are rich and powerful to take advantage of the poor and vulnerable.

518 See Cameron 178-9; see also *Everfresh* para 23.

519 See Cameron 178-9; see also *Everfresh* para 23.

520 See Cameron 178-9; see also *Everfresh* para 23. However, cf. Wallis 558-9 where the author, a judge of the Supreme Court of Appeal, says that 'one should be careful of reading too much into Yacoob J's comments'. The author this thesis respectfully disagrees.

521 It was, however, an integral part of Roman Law and Roman-Dutch Law. See Kaser 17-9, 173-4.

522 See Idowu *African legal theory* 174, and Idowu *A Crumb* 76-9 where he points out that African philosophy and jurisprudence are not just about redistributive justice, but are also concerned about conciliation. Parties to a suit ought to leave 'courts neither puffed up nor cast down — for each a crumb of right, for neither of them the whole loaf'. The loaf metaphor helps to indicate the many facets of justice in African jurisprudence, particularly its wholesome and accessible or affordable nature. The objective is to ensure that the families of the litigants remain intact after the matter has been finalised. For the socio-political matrix of concepts such as this, see Biko H *Africa Reimagined: Reclaiming a sense of abundance and prosperity* (2019) 21.

523 With regard to the developments in South Africa, see Naude & Lubbe 446-53.

524 See Kaser M *Roman Private Law* (1980) 15-8; see Naude & Lubbe 446-53.

are sufficiently elastic and flexible[525] as to provide the broadest and widest possible protection to the deserving litigants.[526] Thirdly, they help to ameliorate the harsh consequences of the laws and decrees made or issued by the incumbent lawmaker or the ruling elite.[527] This outcome was achieved through the reliance on *ubuntu* among sub-Saharan Africans,[528] and on equity, in Greece[529] and, to a certain extent, England.[530] There are even suggestions for the adoption of the 'relational theory of contract'.[531] Its adherents say it commends itself to the South African setup because it emphasises the circumstances in which a contract was entered into as well as the practices and trade customs of the particular community.[532]

From a conceptual and epistemological perspective, justice and equity seem to be similar.[533] However, their practical application and effect is quite different: while justice is relational and arithmetic, equity is intrinsic and geometric.[534] Even though equity has largely been associated with the law of England and the office of

525 In *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), Harms DP said that fairness (equity) 'remains a slippery concept' – para 54. It is unfortunate that the judge president of the Supreme Court did not find it necessary to elaborate. It must be mentioned that as a component of *ubuntu,* fairness assists in doing 'simple justice between the contracting parties' – see para 73.

526 These are the qualities that the common law had, but statutory law and the largely literalist-intentionalist approach of the courts of the time stifled its development – see Du Plessis L *Re-Interpretation of Statutes* (2002) 149-54. However, one cannot agree with Du Plessis's assertion that the common law (including the presumptions) 'can "stand in" for the Constitution in areas where the Constitution does not cater for certain values'. As per the provisions of section 2, the Constitution is the supreme law of the land; in it, is enveloped the all-embracing and all-encompassing ethos of *ubuntu*.

527 See Kaser 15-8.

528 For the position in West Africa, particularly among the Igbo, see Agbakoba, JCA & Nwauche ES African 'Conceptions of Justice, Responsibility and Punishment' (2006) *Cambrian Law Review* 73 76-78.

The term derives from the Greek word *epieikes* which, much like *ubuntu*, means 'fair', 'right', 'decent', 'honest' or 'equitable' – see Ostwald M *Aristotle: Nicomachean Ethics* (1962) 141, 307; see also Naude & Lubbe 446-53.

530 See Bennett *African Equity* 49-50.

531 Coleman 38-9; see also Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication (2017) *SALJ* 296-9. For a critique of the theory, see 4.3.3 below.

532 Coleman 38-9; see also Hutchison 296-9.

533 For instance, Aristotle viewed equity as a better form of justice. – see Ostwald 141.

534 Justice seems to be concerned with the need for equalisation, irrespective of the outcome of the process. It does not matter what the quantity or quality of what is being distributed is – see Dlamini CRM in JMT Labuschagne & De Kock *Festschrift* (1995) 35 37-40.; see also Naude & Lubbe 446-53.

Chancellor of the Exchequer,[535] it is actually Aristotle who is its true originator.[536] He believed that the generality and universality of the concept ensured a 'better form of justice'.[537] It is with this understanding that equity was developed from, or as an adjunct of, the British court structure and practice.[538] This development was intended to ameliorate the harshness of the outcomes engendered by certain cases emerging from the ordinary courts.[539] The Courts of Equity created a parallel body of flexible rules that were insulated from, and shorn of, all cumbersome formalities.[540] This set of rules was, however, met with strenuous resistance from 'puritan' lawyers and judges, who believed that the common law already served the purposes that equity was intended for.[541]

However, it is important to understand that, like *ubuntu*, equity is not the same thing as justice; it is much more than that, and it is intended to ensure that the gaps in legal provisions and processes are plugged, thereby ensuring fairness and equity.[542] Had equity been assimilated into, and gradually harmonised with, the rules of the 'benign' version of common law, the South African legal system would have been the richer for it.[543] Ideological and political battles got in the way of this development. For instance, in *Weinerlein v Goch Buildings Ltd*,[544] the Appellate Division (now the Supreme Court of Appeal) stated that equity had not been

535 There, the concept is generally viewed as having two components: (1) the 'law of equity' which pertains to actual, practical problems arising from private law and commercial law; and (2) the 'philosophical' side which is believed to concerned such 'utopian' concepts as fairness, equality and justice, and intended 'to disrupt normative social conditions and practices, including mainstream legal reasoning' – available at http://www.open.edu/openlearn/society-politics-law/law/equity-law-and-idea/content-section (accessed 12.06.2019).

536 Davis D 'Equality and Equal Protection' in Van Wyk et (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) Juta & Co 196-197, and Ross D *The Nicomachean Ethics of Aristotle* (1965) 106-32.

537 For instance, Aristotle was of the view that there was a narrower meaning of 'justice' which refers to something being contrary to the law. He also believed that justice involved a meridian or mean between virtue and vice, good and bad, and that it also had an element of benefit and proportion - see Ostwald 111-8.

538 Bennett TW *Ubuntu: An African Equity* (2011) 51-2.

539 Bennett 51-2.

540 Bennett 51-2.

541 Bennett 51-2.

542 Equity has been viewed as being capable of ensuring a higher quality and standard of justice to the litigants – see Davis (1994) 196-7.

543 See Bennett 51-2; see *Potgieter v Potgieter and Others* 2012 (1) SA 637 (SCA) para 34; see also 'The uneven journey to uncertainty in contract' (2013) 76 *THRHR* 80 93-4.

544 1925 AD 282.

incorporated into South African law and therefore could not be applied in these situations where contractual disputes were involved.[545] The nub of these court decisions is that good faith is not a stand-alone, independent concept,[546] and that the courts would not enforce a contract that was, in view of 'established' common law principles, against public policy.[547] In other words, the Appellate Division has always insisted that these open-ended principles should be used sparingly and only in the clearest of cases.[548]

Unfortunately, some of the judgments of the Constitutional Court – the guardian of South Africa's Constitution – seem to be tied up by the judicial shackles and manacles of the past.[549] As indicated in the next rubric, *ubuntu*, as the foundational value of the Constitution, should be relied on in cases of this nature, in order to ensure contractual and economic justice.[550] In reality, these principles – fairness, reasonableness and justice – should no longer be disparaged as 'free-floating'. They are, in fact, encompassed in the foundational value of the Constitution, of *ubuntu*: the common-law principles of contract should be developed in accordance with it. For instance, in *Beadica v Oregon Trustees,*[551] Theron J said that *Barkhuizen v Napier*[552] is still the leading authority for the view that good faith and equity are not self-standing concepts[553] of the South African law of contract, and that *Botha v Rich* should be understood in its specific statutory context in which it was considered and delivered.[554] The justice did, however, acknowledge that there is now *ubuntu* (and its ethos) that needs to be taken into account in this regard, and that judges 'should

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545 295.

546 See *Brisley v Drotsky* para 22; see also *Afrox Healthcare* para 31-2, *Barkhuizen v Napier* 2007 (5) SA 323 (SCA) para 73-5; Van Huyssteen et al. 372-3, and Thompson S 'Beadica 231: An end to the trilogy?' (2020) SALJ 641 642.

547 See *Brisley v Drotsky* para 22; see also *Afrox Healthcare* para 31-2; *Barkhuizen v Napier* 2007 (5) SA 323 (SCA); para 73-5 Van Huyssteen et al. 372-3.

548 See *York Timbers Limited* para 27; see also *Potgieter v Potgieter* para 32, and Van Huyssteen et al. 372-3.

549 See Van Huyssteen *et al.* 372-3; see also Louw 58-61.

550 Van Huyssteen *et al*. 372-3.

551 Victor AJ's minority judgment appears much more emphatic in this regard – para 207.

552 However, it is important to emphasise the point that even though the common law supports and encourages freedom to contract, courts exist for the purposes of ensuring that fairness and justice – *Barkhuizen v Napier* para 73-5, 87.

553 See para 57, 73; see also *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 22*; Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 54; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 31-36, and Thompson 642.

554 Para 56.

not lose sight of the transformative mandate of (the) Constitution'.[555] At the same time, the justice seems to continue along the old, beaten path of the Appellate Division (which had no 'democratic' constitution to guide it). She continues to treat good faith, fairness and equity merely as loose, free-floating concepts with no permanent place in our law.[556] Even though the learned justice acknowledges the paucity of development in this area of South African Law, she still insists that such development needs to be conducted 'in an incremental fashion'.[557] It is for this reason that I do not share the optimism of other commentators in this regard: that good faith is, suddenly, being christened as panacea for all the country's contractual injustices.[558]

She also appears to be overly cautious in relation to what she refers to as 'over-zealous judicial reform'.[559] Contractual justice and peace in the workplace – where the common law finds application – can no longer be postponed, not even for a day. Put otherwise, *ubuntu* should now be deployed in order to 'address deficiencies in the law of contract'[560]and curb any further contractual injustice, where the common law of contract – not consumer protection law – finds application. This goal can be achieved by first understanding that fairness, reasonableness, justice and equity are subsets of *ubuntu*.[561] After all, *ubuntu* undergirds South Africa's constitutional and legal system. It is the foundation of the Constitution.

3.3.3 Public policy

Public policy represents the legal convictions of a particular society; its sense of what is right or wrong, fair or unfair.[562] These convictions change over time as the composition and mores of that community change.[563] As indicated in the previous rubric, *ubuntu* is the foundational constitutional value; and it should not be made

555 Para 74.
556 Para 57, 73. See also *Bredenkamp* para 53-4.
557 Para 76
558 See Barnard-Naude 248-52.
559 *AB v Pridwin* para 76.
560 Para 75.
561 Para 207.
562 See Corbett 53-64; see also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597.
563 See Corbett 64; see also *Ewels* 597.

subservient to the common law.[564] It is true that, to a certain extent, public policy, together with the concept of good faith, did ameliorate what could easily have been harsh legal consequences for black litigants under apartheid and colonialism.[565] This was particularly the case in certain, but limited, private-law situations.[566] Therefore, unlike in the public-law sphere, where the identitarian ideology and politics of segregation and economic exclusion were more profound, the private-law component of the legal system had some ameliorative, albeit negligible, aspects that benefited all the citizens and residents of the country.[567] Moreover, 'public policy' and *boni mores* have always been defined in non-sectarian and inclusive terms as the 'legal convictions of a particular society'.[568] These concepts have always been used to determine what is fair or unfair, what is just or unjust, or what is equitable or inequitable – where a contractual or delicate dispute was to be

564 Para 207.

565 See *Bank of Lisbon Ltd v De Ornelas & another* 1988 (3) SA 580 (A); see also *Sasfin v Beukes* 1989 (1) SA 1 (A) 6-9. However, cf. *Van der Merwe v Meades* 1991 (2) SA 1 (A) para 5-8. What is disconcerting about these decisions is that the Appellate Division (now the Supreme Court of Appeal) was beginning to move away from the crystallised, salutary common-law principles, and supplanting them with the concept of public policy which was, during that period, tainted by race and ideology. It would seem as though some judges of the Supreme Court Appeal, and the Constitutional Court, still prefer (defer to) the pre-democracy jurisprudence in this regard – see *Beadica v Trustees* para 25-8, 57-9. This, and other cases, is discussed further in chapter 4.

566 Of course, everything hinged on the judge adjudicating upon the matter and whether the case was not in the domain of public law – see Corder H & Davis D 'Law and Social Practice: An Introduction' in H Corder (ed) *Law and Social Practice in South Africa* 15. However, cf. Margo C 'Reflections on Some Aspects of Judicial Function' in Kahn E (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 282-93, and Corbett MM 'Some aspect of public policy and their contribution the development of our common law' *SALJ* (1987) 52 54 where the former Chief Justice explains the limited role of common law in the following terms: 'The (US) Supreme Court's position as constitutional adjudicator represents probably the highwater mark of judicial power in the policymaking sphere. And the contrast between the situation in the United States and the situation in this country, where the courts do not act as the guardians and exponents of a Bill of Rights, where there is no power of judicial review of parliamentary legislation and where even some of the common-law powers of the courts have been statutorily truncated, is obvious. Nevertheless, these manifest differences should not be allowed to obscure the real and important policy making function that our courts perform in the process of developing the common law and adjusting it to the ever-changing needs of society.'

567 Corder & Davis 15.

568 See *Minister v Polisie* 1975 (3) 590 597; see also Corbett 67-9. However, it is important to emphasise that the country's judges were emasculated and that their interpretation of public policy could not ameliorate the problems engendered by the South African version of parliamentary sovereignty. They saw themselves as mere interpreters of the law, not its makers – See Van der Vyver JD 'Parliamentary sovereignty, fundamental freedom and the bill of rights' *SALJ* 557 561-3.

resolved.[569] In other words, public policy is society's way of gauging what is reasonable or unreasonable in the given facts of a particular case.[570] However, sight should not be lost of the deleterious effects that apartheid and colonialism had in this regard.[571] These politico-legal systems diluted the efficacy potency that public policy would have introduced to the jurisprudence of the country.[572] Justice and fairness were viewed from the perspective of white male judges who populated the bench.[573] The socio-economic milieu and the political climate in which these judicial officers were raised and educated, influenced their judicial function negatively.[574]

As discussed in chapter 4,[575] the pre-Constitution era approach to public policy was influenced, not by the imperative to do justice between the citizens of the country, but by ideology and the politics of the day. However, as a concept, public policy remains part of South Africa's new constitutional jurisprudence. It also stands to be developed in terms of the provisions of the Constitution,[576] thereby infusing them with the ethos of *ubuntu*.[577] It no longer depends on the idiosyncrasies and personal whims of a particular judge.[578]

3.3.4 The common-law presumptions, maxims and similar phenomena

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569 See Van der Vyver 561-3; see also Corbett 62-68; see also Louw 71-5, on the perceived differences between 'public policy' and '*boni mores*'.

570 See Neethling et al. 37-38. On the perceived differences between public policy and *boni mores*, see Louw 71-5.

571 See Margo 284; see also Corbett 62-64.

572 See *S v Makwanyane* para 48-51; see also Moseneke *All Rise* 6-7.

573 See *Makwanyane* para 48-51; see also Moseneke *All Rise* 6-7.

574 See Corder & Davis 15; see also Dugard J *Confronting Apartheid: A personal history of South Africa, Namibia and Palestine* (2018) 123-124 where he says that in cases with political undertones 'both judges and government tended to deny that judge had a choice; any room for manoeuvre'.

575 See 4.3.

576 In terms of s of 39 (2) of the Constitution.

577 See Van Huyssteen *et al* 2-3; see also *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) 560-1; *Barkhuizen v Napier* para 28-36; see also *RH v DE* 2014 (6) SA 436 (SCA) 17-8; *RH v DE* 2014 (6) SA 436 (SCA) 13 para 3; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 87, and *Sarrahwitz v Maritz* NO 2015 (4) SA 491 (CC) para 29.

578 See *Brisley v Drotsky* para 24. And, to borrow from Chaskalson P, in *S v Makwanyane* 1995 (3) 391 (CC) para 44, race determined the content of public policy in South Africa.

To a large extent, the presumptions constitute the Roman-Dutch part of the South African common law.[579] During the colonial and apartheid periods, the juridical interpretive process involved discerning the meaning of the words by (a) relying on the words used in the text itself,[580] and (b) deductive methods of reasoning, which involve reliance on the maxims (which are themselves part of the common law) as well.[581] Like the common law itself, the presumptions were supposed to have served as the unwritten Bill of Rights for the people of South Africa, particularly the disadvantaged section of the population.[582]

Like a silhouette which disappears in the glare of the sun, presumptions were not effective where an Act of Parliament clearly and expressly excluded them.[583] In other words, where the language of the statute was not clear or ambiguous, the relevant presumptions applied; and in many instance had an ameliorative effect.[584] Maxims, on the other hand, are deductive rules born out of (Roman-Dutch) custom, culture and tradition.[585] Basically, they are based on a syllogistic method of reasoning which is, itself, founded on certain premises and human experience.[586] However, because the country's constitutional system was founded on parliamentary sovereignty - a distorted version of it[587]- the express language of the legislative text often prevailed - however benign and ameliorative some parts of the common law might have been.[588]

Another problem was that their interpretative function was not particularly clear. There were three factors which gave rise to this situation. First, these presumptions seem to embody only the unspoken aspirations and wishes of the white portion of

579 Du Plessis 151. The other part is English Law.
580 This could be a statute, a written contract or a will.
581 Wiechers M *Administrative Law* (1985) 43-5
582 See in general Nkosi S '*Ubuntu* and the law: its juridical transformative impact' (2019) *SAPL 1*; see also Budlender G 'On Practising Law' in Corder H (ed) *Law and Social Practice in South Africa* (1988), 321-2.
583 Budlender 321-2.
584 Wiechers 41-2.
585 Wiechers 41-2.
586 Many African maxims also display this characteristic – see Bennett *Customary Law* 7-8; see also Metz 134-5.
587 Van der Vyver 561-3.
588 Du Plessis 150.

the community.[589] So, in the South African context 'judges' law', as the common law is often referred to, was a reflection of the values of that community, alone.[590] Secondly, the presumptions and maxims were rendered weak and ineffectual by the accompanying identitarian, segregationist ideology on which the politico-legal framework of the time was founded.[591] One example is the rule that courts must attach to unambiguous words their plain meaning unless such an interpretation will lead to absurdity, or to a result that is contrary to the purpose of the particular statute.[592] There is also the *ultra duplum* rule, which states that a debtor should not be made to pay double the amount he owes the creditor under the guise of interest.[593] In other words, as soon the interest equals or exceeds the capital it must stop running.[594] But some businesspeople found a way to circumvent the rule. They achieved that goal by 'capitalising' the interest already paid, so that the interest would begin to run on the new, inflated capital amount.[595] This is the mischief that section 103 (5) of the National Credit Act[596] seeks to deal with. However, the provisions of section 103(5) apply only to 'credit agreements' in terms of the National Credit Act.[597] There is also the *laesio enormis*, *exceptio doli generalis*[598] and the *exceptio non adempleti contractus*.[599] Thirdly, even though the presumptions only served an auxiliary or subsidiary function,[600] of filling in glaring gaps in a particular text, their potency in serving justice was curtailed by draconian legislation. Now, the Constitution, in addition to having *ubuntu* as its foundational

589 White males - not all South Africans - enjoyed most of the rights, privileges, benefits and protection that the law could provide – see *S v Makwanyane* at para 88; 149-52.

590 See Moseneke *All Rise* 6.

591 They could not exist or be applied in the face of clear statutory language – see Du Plessis 149-150; see also Wiechers 41-43, and Moseneke *All Rise* 6.

592 See Du Plessis *Re-interpretation* 103-105; see also *Botha v Rich NO* para 29.

593 In this regard, see Otto & Otto 99-101.

594 Otto & Otto 99-101.

595 Otto & Otto 100.

596 Act 34 of 2005.

597 S 8 (1) thereof.

598 For a further discussion of these concepts, see chapter 4.

599 In *Botha v Rich NO* para 29, 33-41 Nkabinde demonstrated how to straddle the common law and applicable statutory provisions, thereby producing a just and equitable outcome in the circumstances of the case. For a critique of the judgment, see Bhana D & Meekotter A 'The Impact of the Constitution on the Common Law of Contract: Botha v Rich NO' (2015) *SALJ* 494 499-512.

600 Du Plessis *Re-interpretation* 149.

value and spirit, clarifies the question of its supremacy in the context of 'adjudicative subsidiarity'.[601]

Section 39 (2) of the Constitution enjoins the courts to develop the common law and customary law in accordance with the values of the Constitution.[602] The process involves a two-stage inquiry:[603] (a) does the common law on the particular point require any development in line with the values espoused by the Constitution; and (b) how should such development take place?[604] Implicit in the process is that there are aspects of common law – and customary law – which do not require any development; they are consonant with South Africa's constitutional project.[605] The common-law presumptions provide a good example of this phenomenon: they are coterminous with the African ethic of *ubuntu* in that they seek to promote justice, certainty[606] fairness and equity.[607] On the one hand, there are those presumptions that place a negative duty on the court in order to ensure that a certain injustice is avoided or eliminated. These presumptions include those that are against unfairness, discrimination, self-incrimination, and the ousting of the jurisdiction of the court.[608] Even before 1994, some of the judges guarded their jurisdiction jealously, in order to ensure that that legislation interfered, as minimally as possible, with the rights and interests of the citizen.[609] On the other hand, there are those presumptions that place a positive duty on the judicial officer, thereby adding or increasing the substantive content of the right(s) in question. This category includes the presumption of innocence in favour of accused person in criminal proceedings;[610] or interpreting in a strict manner harsh or ambiguous injunctions.[611]

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601 Du Plessis *Re-interpretation* 151. In other words, there is no longer any possibility that any person or institution would be beyond the reach of the law.

602 The courts have no discretion in this regard. It is a constitutional obligation which rests on them while performing their judicial function – see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 40.

603 See *Carmichele v Minister of Safety and Security* para 39-41.

604 *Carmichele v Minister of Safety and Security* para 39-41.

605 Du Plessis 149-54.

606 For instance, the presumption that the legislature does not intent to change existing law than is necessary

607 But, as indicated above, the legislature had the last word on these matters.

608 See Du Plessis *Re-interpretation* 154-6.

609 See *Mathope v Soweto Council* 1983 (4) SA 287 (W) 288-92; see also Du Plessis 169-71.

610 Du Plessis *Re-interpretation* 154. The relevant presumption is that the legislature did not intend an unjust, inequitable and unreasonable consequence.

611 Du Plessis *Re-interpretation* 156-64.

In other words, all those statutory provisions or legal rules that have the effect of depriving the citizen of his liberty, should be given a more restrictive meaning.[612]

3.4 Conclusion

The objective of this chapter was to indicate that human beings have, when faced with new legal and moral challenges, fashioned new rules and norms to deal with such challenges. In the context of South Africa, it has been *ubuntu*. A comparative perspective, as between *ubuntu* and some of the other philosophies was provided. Most of these philosophies have either sprung out of it or been influenced by it. The aim was to demonstrate that *ubuntu* is not just an African concept which is intended to provide the South African constitutional and legal system with a human face, but also to demonstrate that, whatever ameliorative function some common-law principles and remedies might have had, they were limited by political and ideological considerations. These considerations were much more pronounced in the light of the *juridicum bellum* that was taking place during that time. Reference to, and reliance on, certain sources by the judges, depended on their training, background and ideological leanings. The result was that many people were left without adequate contractual remedies, such as the *laesio enormis* and *exceptio doli generalis,* when they needed redress. Nor were the presumptions and maxims of any significant value: they were rendered ineffectual by legislation. They frequently had to give way to the often clear and unambiguous language of the relevant statute.

However, the '*judisiele broedertwis*' seems to persist to date, despite there being a Constitution and a Bill of Rights. This juridical and doctrinal contestation seems to stem from the position which some of the judges and academics have taken in the context of the 'certainty-transformation' debate. And, for that reason, even neutral concepts such as 'good faith', 'fairness' and 'public policy' are being clouded or stifled out of this area of the law.[613] They have been reduced to being 'floating' principles,

612 Du Plessis *Re-interpretation* 156-64.

613 See *York Timber Ltd* para 27; see also *Bredenkamp* para 39, and *Beadica v Oregon Trustees* (SCA) 38. However, see cf. *Everfresh* para 23 where Yacoob J said that the development of South Africa's economy and contract law has 'been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law'. The justice also said that

with merely a 'creative' but not substantive - role in the development of the common-law rules of contract.[614]

This is the delicate judicial divide that Nkabinde J was trying to straddle in *Botha v Rich NO*; and ensuring that the ethos of *ubuntu* was infused into that branch of South African law. Whilst proffering a seemingly constitutionally compliant common-law remedy to the facts of the case, the learned justice was also mindful of the provisions of section 39 (2) when interpreting the provisions of section 27 (3) of the Alienation of Land Act. Anything less would have left many South Africans, especially black people, short-changed,[615] and the lawmakers would have been found to have defaulted on the undertaking they made in terms of the 'promissory note' (Constitution) they issued to all the denizens in 1994.[616]

In Chapter 4, it is demonstrated how the common law principles of contract can be infused with *ubuntu* in order to ensure fairness and justice.

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the common law of contract regulates an environment in which trade and commerce take place among all South African; and should, therefore, be developed in a way that takes 'cognisance of the values of the vast majority of people'.

614 See *York Timber Ltd* para 27; see also *Bredenkamp* para 39, and *Potgieter v Potgieter* para 32-4.

615 To paraphrase Martin Luther King Jr *I Have A Dream: Writings & Speeches that Changed the World* (Washington M) 102.

616 King puts it thus: 'When the architects of our republic wrote the magnificent words of our Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed all inalienable rights of life, liberty and the pursuit of happiness' – 102.

CHAPTER 4

THE IMPACT OF THE CONSTITUTION ON SOUTH AFRICAN LAW OF CONTRACT

4.1 Introduction

In the previous chapter it was demonstrated that, because of its 'humanising' effect, *ubuntu* is conducive to making the South African law of contract an equitable branch of law that is amenable to transformation.[617] It was also shown how the concept could be used to transmogrify this area of South African law; and resuscitate, refashion and repurpose all those useful principles of the common law on contract that were abrogated by disuse or abolished for political and ideological reasons. In this chapter, it will be demonstrated how *ubuntu*, as the country's fundamental constitutional value, is necessary and essential for the development of the law of contract – particularly as it relates to the validity and enforceability of individual contracts.[618] The exercise entails examining the relevant provisions of the Constitution. In chapter 3, it should be remembered, it was demonstrated how and why *ubuntu* is the underlying value and organising principle of the country's constitutional framework. It was also indicated why *ubuntu* is now an indispensable factor in adjudicating the constitutional validity of a particular common-law principle.

4.2 The impact of the provisions of Constitution on common law principles on contract

4.2.1 Preliminary points

Some of the points made in the previous rubric[619] bear repeating – for emphasis and elucidation. The main objective of introducing the current constitutional dispensation was to 'cure a historically tainted judicial culture [and] to procure a new hierarchy of courts with the highest court above all existing courts'.[620] In truth, this seminal document was intended to 'weed out' bad law by introducing new

617 See *Barkhuizen v Napier* para 207-8.
618 Its effect on the common law contract of employment will be discussed in chapter 5.
619 See 4.1 below.
620 Moseneke D *All Rise: A Judicial Memoir* (2020) 64.

methodology to law-making and adjudication.[621] However, there seems to be a paradox: while the Constitution has introduced a solution to one problem, it has created another problem. Its provisions also apply in the private-law sphere.[622] But, unlike the interim Constitution, it does not contain any specific reference to *ubuntu*.[623]

For that reason, there are two preliminary questions that this stage of the inquiry raises: (1) why are the recent law reports and legal literature so replete with references to *ubuntu*; and (2) why does South African law of contract appear to be somewhat resistant to the influence of *ubuntu* – and not amenable to change – up until now?[624] With regard to the first question, the answer is not difficult to find. As indicated in chapter 3, *ubuntu* is the normative value that the people of South Africa have adopted as their organising constitutional principle in order help to humanise some of the components of the old system, of apartheid and colonialism, which still continue to dehumanise the majority of the country's citizens.[625]

With regard to the second preliminary question, it is important to consider that *ubuntu* is part of the all-encompassing process of decolonisation that is currently taking place in South Africa.[626] At the core of this process is the demand for a paradigm shift in how indigenous African knowledge systems are being utilised for pedagogical, academic and juridical purposes.[627] The demand is that these reservoirs of knowledge be rediscovered and acknowledged.[628] Aristotle, Voltaire,

621 Moseneke *All Rise* 64.

622 See section 8 (2) and (3) of the Constitution.

623 In *Beadica v Oregon Trustees* para 1 Theron J said that the extent to which a court 'may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era'.

624 See Du Plessis HM 'Legal Pluralism, *ubuntu* and the Use of Open Norms in the South African Common Law of Contract' (2019) *PER/PELJ* 3-5; see also Corder & Davis Corder H & Davis D 'Introduction' in Corder H (ed) *Law and Social Practice in South Africa* (1988) 3-7. There is a need to rid the country of identitarian tendencies and to agitate for a meaningful transformation of its institutions and economy.

626 See 'Indigenous Knowledge in Africa: Challenges and Opportunities', an Inaugural Lecture delivered on 4 November 2009 by Professor A Osman of the Centre for Africa Studies at the University of the Free State, available at https://www.bing.com/search?q=Professor+Osman+inaugural+address&cvid (accessed 04. 04.2020).

627 See Osman https://www.bing.com/search?q=Professor+Osman+inaugural+address&cvid.

628 See Osman *inaugural address*.

Shakespeare or Yeats should not be the be-all and end-all of every intellectual debate. There are many African sages[629] whose works should be referred to constantly. Everything good from any part of the world should be embraced and utilised for the benefit of humanity – not just because it resonates only with a particular race group or class. Nor should anything, however irrelevant, be embraced merely because it originates in Europe or America. There is a very strong determination to decolonise, and thereby *humanise,* South Africa's laws, rules and practices.[630] The determination is made all the more significant by the fact that most of the Western concepts and phenomena – such as 'parliamentary sovereignty',[631] 'democracy', 'liberalism' and 'justice' – were distorted under colonialism and apartheid in order to maintain the colonialist project.[632] Even though there have been jurists of exceptional courage during the time of colonialism and apartheid, many judges of that era could not exclusively be entrusted with the task of transformative adjudication.[633] The need for that kind of adjudication is much more crucial for the South African law of contract, in all its facets.

It should also be acknowledged that precolonial Africans had their own legal and constitutional systems, such as they were, which stood them in good stead until the arrival of white people. *Ubuntu*, which was an integral part of those systems also served as a moral and ethical code or an unwritten Bill of Rights. That is why it is

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629 Such as Professor Mbiti, the Kenyan philosopher; Ngugi Wa Thiong'o, the Kenyan novelist and literary critic; and Credo Mutwa, the South African philosopher and traditional healer.

630 See *S v Makwanyane* para 88.

631 See Van der Vyver JD 'Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights' (1982) *SALJ* 557 560-1.

632 These concepts were given an identitarian shade in order to serve the white population to the exclusion of the black majority – see Van der Vyver 560-1. Friedman describes the two faces of liberalism in South Africa in the following terms:

> The liberal tradition here traces its roots to the Cape Colony where some, among white clergy, politicians and intellectuals, favoured a more accommodating to the black majority than mainstream white opinion. An issue that tended to separate white liberals from the white majority was the Cape franchise, which extended the vote to a small number of black people who could meet a forbidding set of qualifications.

See Friedman S 'The Ambiguous Legacy of Liberalism in South Africa: Less a Theory of Society, More A State of Mind?' in Vale P; Hamilton L & Prinsloo (ed) *Intellectual Traditions in South Africa* (2014) 36-7.

633 For an exposition of what the concept entails, see the judgment of Victor AJ in *Beadica v Oregon Trustees* para 206-7.

difficult to agree completely with Wallis's view that the South African Constitution does not 'embody any particular economic theory'.[634] *Ubuntu* is the foundational value that undergirds South Africa's constitution and the jurisprudence that the country espouses. It seeks to promote generosity, selflessness, fairness – and the spirit of communalism and communitarianism.[635] However, as indicated above, it was distorted and stunted, in the same way that customary law in general was.[636] However, like many other jewels and treasures that lie in the depths of the South African legal system, it had to be retrieved and utilised for the liberation project. It is hoped, therefore, that *ubuntu* will serve as a searchlight that will shine on all the other juridical gems that still lie buried in that trove. In other words, *ubuntu* will continue to enhance the country's jurisprudence, influence its moral economy,[637] and ensure contractual justice and that development will, in turn, ensure prosperity, fairness and equity in the distribution of goods and offices (positions and privileges). Fourth, the answer seems to flow from the letter and spirit of the Constitution itself.

Also, the preamble makes social justice (itself an integral part of *ubuntu*) the matrix – *Grundnorm*[638] – of the Constitution. It is true that it was merely referred to as an afterthought, in the postamble (epilogue) of the interim Constitution.[639] Nor does it appear anywhere in the 'final' Constitution. There are five important factors from which the answer can possibly be discerned. First, from precolonial times to date, *ubuntu* has been the normative constant in all the legal transactions and socio-political interactions among sub-Saharan Africans.[640] Unlike the old Roman *ius*

634 Wallis M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 550.

635 See *S v Makwanyane* para 224; *PE Municipality* para 35-38, and *Dikoko v Mokhatla* para 68-9; 112-3.

636 See *Gumede v President of South Africa* para 15-9.

637 Little describes this phenomenon as 'the idea that peasant communities share a set of normative attitudes concerning the social relations and social behaviours that surround the local economy: the availability of food, the prices of subsistence commodities, the proper administration of taxation, and the operation of charity – see D Little 'Understanding Society. 'Moral economy' as a historical social concept', available at *https://understandingsociety.blogspot.com/.../moral-economy-as-historical-social.html* (accessed on 05.09.2018).

638 This is the principle or idea that undergirds the moral as well as the legal order of a particular society – see Cornell 385.

639 See the Constitution of South Africa Act 98 of 1993; see also Bennett *African Jurisprudence* 2.

640 Distortions and misinterpretations notwithstanding.

civile[641] in relation to the *ius gentium*[642] and *ius honorarium*,[643] which were intended to ameliorate the legal predicament of the *peregrini,*[644] *ubuntu* is not just an adjunct to the South African constitutional structure.[645] It is the Constitution's organising principle from which all the laws derive legitimacy and validity.[646]

Secondly, the interim Constitution was intended to serve as a 'bridge' which would take the country from its repressive past to a democratic future where there would be equality, freedom and respect for human dignity.[647] Thirdly, the interim Constitution contained 34 constitutional principles on the basis of which a Constitution (containing a Bill of Rights with humane provisions) was to be negotiated and drafted.[648] Fourth, both the interim and the final Constitution contained provisions in terms of which customary law was to be accorded full recognition as a source of law in South Africa.[649] *Ubuntu* has always been an integral part of customary law.[650] It is for that reason that it was itself stunted and stifled when customary law suffered the same fate.

641 This was a system of law which applied exclusively to Roman citizens.

642 Unlike *ius civile*, this was a set of rules that regulated relations between Roman citizens and foreigners, or between foreigners *inter se*.

643 This was a set of flexible rules which was intended to ensure equity and justice in the dealings between Roman citizens and foreigners. These rules also included good faith (*bonae fidei*). Like *ubuntu* in African customary law, good faith was necessitated by the fact that, in Roman Law, transactions were largely verbal. Everything depended on the honesty of the parties – Kaser M (Translated by Dannenbring R) *Roman Private Law* (1980) 43; 51-2.

644 See para *Everfresh* para 23.

645 Whilst the *ius civile* was meant exclusively for legal relations among Roman citizens themselves, the *ius gentium* regulated those as between the Romans and non-Romans or non-Romans themselves. The irony is that, like *ubuntu*, *ius gentium* provided much-needed equity and justice to the parties to a particular legal dispute. It was shorn of all the rigours, strictures and formalities that were inherent in the *ius gentium* – see Kaser 31-34. This is the component of Roman-Dutch Law which could have extricated black South Africans from economic exclusion and exploitation – see also Du Plessis H 1-6; Corbett MM 'Aspects of the Role of Policy in the Evolution of our Common Law' (1987*) SALJ* 66-9.

646 See section 2 (the Supremacy Clause) thereof.

647 See the preamble thereto, and the constitutional principles on which the drafting of Constitution of South Africa Act 108 was to be based, particularly Constitutional Principle I.

648 See in particular Constitutional Principles II, XI and III (1).

649 Section 31 and 181 (1) and (2) of the interim Constitution, and 30 and 211 of the Constitution.

650 In the words of Devenish: 'The moral basis of [the South African] constitutionalism and rights has its genesis in the ethical content of the teachings of the great religious traditions and philosophies of civilizations, both occidental and oriental, as well as indigenous values like *ubuntu*' – *A Commentary on the South African Bill of Rights* (1999) 623.

Fifth, the public participated in the constitution-making process,[651] the purpose of which was to ensure that the final product was indigenous or autochthonous in nature, application and reach.[652] Sixth, there is a common-law presumption – which is not in conflict with the values of the Constitution – that the legislature does not intend to repeal existing laws (which include the common law itself) more than is necessary.[653] This means that it was not the intention of the framers of the 'final' Constitution to supplant pre-colonial South Africa's organising principle, *ubuntu*, with something else.[654] Already, at that crucial time, *ubuntu* was firmly embedded in the collective psyche of all South Africans as an essential part of their legal convictions - irrespective of race or political ideology. All these factors, therefore, make it necessary for *ubuntu* to continue to undergird South Africa's constitutional theoretical foundations and legal practice.[655]

4.2.2 The law of contract and specific provisions of the Constitution

As already indicated in Chapter 3, the postamble of the interim Constitution makes *ubuntu* an integral part of the country's constitutional framework. Therefore, in examining the provisions of the Constitution insofar as they relate to the law of contract, it is important to consider the impact of *ubuntu* on that branch of the law as well. Failing that, economic liberation and equitable distribution of wealth and resources of the land will just be a dream for the majority of South Africans.[656] That the interim Constitution created a top-down social compact between the state and the citizens is not in doubt.[657] It was its application as between citizens that

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651 Van Wyk D 'Introduction to the South African Constitution' in Van Wyk D; Dugard J; De Villiers B & Davis D (eds) in *Rights and Constitutionalism: The South African Legal Order* (1993) 140-60.

652 Dugard J *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (2008) 151; see also Devenish 623.

653 See *Botha and Another v Rich NO & Others* 2014 (4) SA 124 (CC) para 45-51.

654 The Constitutional Court described the document as a 'transitional constitution but one *which itself establishes a new order in South Africa*' – see *S v Makwanyane* para 48) (emphasis added). And, as indicated in Chapter 1, this is the document that thrust *ubuntu* – as a juridical transformative value – into South Africa's collective psyche.

655 Even after 1 April 1997, which is the date on which the 'final' Constitution came into being.

656 Mbeki *Advocate for Change: How to Overcome South Africa's Challenges* (2011) 1-13.

657 See s 7-33 of the interim Constitution. For instance, s 7 provided: 'This chapter shall bind all legislative and executive organs of state at all levels of government.' Van Wyk laments the seminal document's 'stylistic deference to the old order' in the manner in which it was drafted – Van Wyk D 'Introduction to the South African Constitution' in Van Wyk D; Dugard J; De Villiers B & Davis D (eds) Rights and Constitutionalism: The New South African Legal Order

generated a lot of court decisions and academic debate. Some of the courts held that the Constitution was 'vertical' in its operation, as constitutional convention has always dictated,[658] while others contended that it applied 'horizontally' in the adjudication of private-law[659] disputes among citizens.[660] In *Baloro v University of Bophuthatswana*,[661] Friedman JP demonstrated, albeit *obiter*, that its applicability or otherwise was not as clear-cut and that there were certain areas that called for careful consideration.[662] This, the judge reasoned, was because there are public entities that depend on the patronage of the citizens in order to thrive.[663] Also, there are private entities that depend on government subsidies, taxes and other similar sources for survival.[664] In other words, there were those exceptional instances where there was indirect seepage or *Dwittwikung* of the provisions of the interim Constitution into the individual, private sphere.[665]

(1994) 131 159. S 8 of the Constitution binds the judiciary; and natural and juristic persons as well 'depending on the nature of the right and the nature of the duty imposed by the right [itself]'.

658 See, in general, *Mandela v Falati* 1995 (1) SA 251 (W).

659 Those that may arise from delicts, contracts or divorce.

660 In order to protect the citizen against the incursions by, and excesses of government functionaries. This is because legality, as a constitutional concept, can only be determined with reference to the basic law of any country. In the case of South Africa, such a determination includes taking the content of *ubuntu* into account.

661 1995 (4) 197 (B).

662 At 328; see also *Gardener v Whittaker* 1995 (2) SA 672 (E) 683-4 where Froneman J said that Bills of Rights were primarily intended to safeguard the rights of the individuals from unjustified interference by powerful organs of state. But the judge also conceded that the matter does not conduce to easy answers and that the 'deepest norms' of the Constitution should determine whether a matter between private citizens should be resolved by direct resort to the provisions of the Constitution or be left to the principles of common law as developed in 'with the values of the Constitution'. The judge concluded by resorting to the common law, saying that one constitutional right cannot be relied on to diminish or limit another (as in the case of defamation, where freedom of expression and the right to dignity and reputation are involved). In addition, the plaintiff bore the onus to show how his or her reputation had been impaired. This was an indirect application of the Bill of Rights. Kentridge AJ, for the Constitutional Court, seemed to suggest that this was an 'indirect' horizontal application of the Constitution by Froneman J. With respect, I disagree with Kentridge AJ on this point. Froneman J was using the Constitution to balance the two competing rights, and the resultant development of the common law, if it, indeed, happened, it was definitely incidental – see *Gardener v Whittaker* 1996 (4) SA 337 (CC) para 9-10.

663 See *Baloro v University of Bophuthatswana* 238; also *AB v Pridwin* para 131 where the Constitutional Court said that by 'subjecting private power (to contract) to constitutional control, 'section 8(2) recognises that private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage'.

664 See *Baloro v University of Bophuthatswana* 238; also *AB v Pridwin* para 131.

665 See *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T) 47; see also *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D) 381-2.

This often happened when the provisions of the Bill of Rights were resorted to in order to develop the common law.[666] The debate was somewhat settled in *Du Plessis v De Klerk,*[667] where the Constitutional Court said that the interim Constitution did not have any direct horizontal application but that its provisions could be relied on, indirectly, only when the courts were required to develop the common law.[668] The reason is that the interim Constitution created two different roles for the two pinnacle courts of the country.[669] Constitutional matters were to be the exclusive preserve of the Constitutional Court, while other matters (pertaining to the common law) were left to the jurisdiction of the Appellate Division (now the Supreme Court of Appeal).[670] The court also stated that the matter should be determined with reference to whether (1) parties were private citizens; (2) private agencies;[671] (3) one is an organ of state, and the other a private citizen, and (4) the nature of the constitutional right sought to be enforced.[672]

The final Constitution then came into operation,[673] and the vertical-horizontal debate was put to rest – somewhat.[674] The question was whether the Constitution could be resorted to by natural or juristic persons in order to enforce their rights against each other.[675] Chapter 2 (that is, section 7 to 39) of the Constitution guarantees the individual, among other rights, the right to equality, life, human dignity, property, and following a trade, occupation or profession of his or her choice. It also protects an individual's right to freedom of movement and freedom of association. There are three possible instances where the applicability of the Constitution – as between private persons in a contractual dispute – can arise. First,

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666 *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T) 47; see also *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D) 381-2.

667 1996 (4) 850 (CC).

668 Para 60.

669 Para 57-64.

670 Para 57-64.

671 This is also in line with the views of Froneman J in *Baloro v University of Bophuthatswana* 1995 (4) 197 (B), as well as with the views stated by the Constitutional Court *in Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), namely that juristic persons do not control themselves; they are controlled by human beings who should adhere to the provisions of the Constitution and the foundational value of *ubuntu* para 24.

672 See Cockerel 3A9-3A12.

673 It came into operation on 1 April 1997.

674 This was achieved by enacting s 8 (2). In this context, see *AB v Pridwin* para 128-9. However, cf. *Du Plessis v De Klerk* 1996 (3) SA 580 (CC) para 62.

675 Currie & De Waal 32-4.

when there is no common-law principle that directly applies to that particular legal dispute.[676] This is because direct application is supposed to be reserved for situations where the court is called upon to test a particular piece of legislation for consistency with the provisions of the Constitution.[677] Secondly, there are instances where it may become necessary for the courts to develop the common law (or customary law) in accordance with the spirit, purport and objects of the Constitution.[678] That would be an instance of indirect application of the Constitution, seemingly to avoid inconsistency that may arise between existing law (common law or statutory law) and the Constitution.[679] For that reason, clarity is important in this context – for posterity. As Victor AJ put, albeit in a different context, in *King NO v De Jager*, these rules need to 'be recalibrated towards more egalitarian and *ubuntu* based ends'.[680]

As already indicated above, both the common law and customary law were distorted in order to achieve goals other than juridical ones.[681] Thirdly, there may be a need to infuse public policy – an important determinant of contractual enforceability – with the values of the Constitution (which include *ubuntu*).[682] The Constitution is an embodiment of the values and ethos of *ubuntu*.[683] Despite views to the contrary,[684]

676 See *Combined Developers v Arun* 235-6.

677 Currie I & De Waal J *The Bill of Rights Handbook* (2013) 67.

678 See *Combined Developers (Pty) Ltd v Arun* 235-6; see also section 39 (2) of the Constitution.

679 Currie & De Waal 24-25, 69-70. However, because the Constitution is the supreme law of the land, it is submitted that it must be applied in any constitutional or legal dispute. Avoidance and subsidiarity, as constitutional concepts, should not be used to subvert the South African constitutional project. This is because their application presupposes a clean, healthy politico-legal system where equality, justice and equity find full expression and application. As indicated above, it is a truism that South Africa is one of the most unequal societies in the world. It would also seem as though the doctrine of subsidiarity is apposite only in instances where the legislation in question implicates the rights enshrined in the Bill of Right. Except for the judiciary, there is no other person on whom the duty rests to adjudicate on common-law rights. For that reason, it would not be appropriate to insist on the application of the doctrine. On the concept of subsidiarity and its constitutional and legal implications, see the judgment of Davis J (para 22-4) and Hlophe JP (para 9-10) *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* [2016] ZAWCHC 206; see also *My Vote Counts v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC) para 52-53, *King NO v De Jager* para 175-94. However, the justice sounded a word of warning: that where there is a statute which implicates one of the rights stated in the Bill of Rights, then, the principle of subsidiarity cannot be ignored – para 194.

680 Para 202.

681 See 1.5 above.

682 See *Combined Developers v Arun* 233.

683 Devenish GE *A Commentary on the South African Bill of Rights* (1999) 621-3.

684 See Currie & De Waal 68-69; see also *S v Mhlungu* 1995 (3) SA 867 (CC) para 59 where it

it would seem as though direct resort to the Constitution - in order to deal with legal or contractual disputes between citizens - will be more of a rule than an exception in the future.[685] In other words, whether the Constitution is applied directly or indirectly - as between private citizens - the result is likely to be substantively (and procedurally) the same.[686] Moreover, the top-down approach to (or avoidance of) the intersection between Constitutional Law and the law of contract originates in Europe, particularly England.[687] There was a great deal of agitation for a move away from absolute monarchy, to the protection of civil rights through Parliament.[688] As a result, the horizontal application of the Bill of Rights has traditionally been perceived to be 'at variance with the traditional approach of the vertical application of human rights'.[689] However, in countries like South Africa, where there is a history of racial segregation and economic exclusion, that approach might perpetuate contractual injustices.[690] It has perpetuated the abuse of contractual rights and duties by powerful individuals or conglomerates. It continues to be used as a ruse to postpone or delay the distribution of wealth and economic justice.[691] The South African constitutional project (and the emerging jurisprudence) would have been in

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is suggested that the Constitution should be treated as a document of last resort. It is suggested that the conduct of public officials – in relation to the applicable statute – should be examined, first, in order to determine whether their conduct is consistent with the provisions of the Constitution; that where the common law is applicable, it should, accordingly, be applied. Where the common law needs to be developed, it should be so developed. However, this, it is submitted, seems like a contradiction in terms. First, section 2 of the Constitution itself makes the instrument the supreme law of the country, a document of first resort. Secondly, section 8 (1) makes the Bill of Rights applicable to all law. Thirdly, the postulate assumes that all statutory law is compliant with the Constitution. On the contrary, many pre-1994 statutes are being challenged, on a daily basis, in the courts of a country. With regard to the supremacy of the Constitution, see *Pharmaceutical Manufacturers Association of South Africa and Another in re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44.

685 For the factors to be considered in this regard, see *Khumalo v Holomisa* para 31-3; see also *King NO v De Jager* para 173-4.
See Langa J in *Barkhuizen v Napier* para 86; see also Currie & De Waal 69 who suggest that everything should depend on the circumstances of the case and the particular legal principle that is implicated, as per the facts of the case.

687 See *S v Gqoza and Another* 756 (Ck GD) 761-6; see also Pugh GW 'Historical Approach to the Doctrine of Sovereign Immunity' (1953) *Louisiana Law Journal* 476 478-80.

688 Pugh 478-80.

689 Coleman 5-6 authorities cited therein.

690 See *King NO v De Jager* para 201-3. However, see Lewis C *Uneven Journey* 92-4; see also *Beadica v Oregon Trustees* (SCA) para 39, and Wallis M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 547-9.
See *King NO v De Jager* Lewis C *Uneven Journey* 92-4; see also *Beadica v Oregon Trustees* (SCA) para 39, and Wallis 547-8.

vain. Nor is the suggestion that the Constitutional Court's *ubuntu*-inspired jurisprudence be confined only to common law and private international law contractual disputes.[692]

In order to put the intersection between the Constitution and the Law of Contract into perspective, the provisions of section 8 of the Constitution need to be examined.[693] Section 8 lays down the mechanism on how and when to apply the provisions of the Constitution where individual persons are involved.[694] There seems to be a view that policy, procedural and substantive factors and considerations militate against direct horizontal application of the Constitution.[695] The justification seems to be that superior courts[696] do not have to buckle under the pressure of cases that could ably have been heard by the lower courts.[697] The Constitutional Court should just be the final arbiter insofar as the meaning to be placed on a particular statute is concerned.[698] However, the indirect application of the provisions of the Constitution, allows other important role players (such as politicians, public servants, consumer bodies and academics) to participate in this juridical interpretative process. This is because, as per the provisions of section 8(1) of the Constitution, the Bill of Rights applies to all law, and it binds all the branches of

692 See Coleman 33-9 and the authorities cited therein.

693 Section 8 provides that:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural and a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms subsection (2), a court –
> (a) in order to give effect to a right in the Bill, must apply, if necessary, develop the common law to the extent that legislation does not give effect to that right; and
> (b) may develop the common law to limit that right provided that limitation is in accordance with section 36 (1).
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

694 See *AB v Pridwin Preparatory School* para [2020] ZACC 12 para 216-7.

695 See Currie & De Waal 67.

696 These are the different provincial and local divisions of the High Court; Labour Court; Labour Appeal Court; the Supreme Court of Appeal, and the Constitutional Court.

697 Currie & De Waal 67.

698 Currie & De Waal 67.

government, including the judiciary. As a result, there now seem to be three approaches to the law of contract in this regard: (a) indirect application, which is accompanied by examining the content of public policy at a particular time;[699] (b) and direct application, which is often associated with the constitutional principle of subsidiarity or avoidance.[700]

For some time, the decision whether the Constitution should apply directly or indirectly (as between individuals or juristic persons), in terms of section 8, depended on (a) the nature of the right in dispute; (b) the danger of perpetuating inequality and disadvantage in this area of the law; and (c) allowing powerful private persons from undermining the constitutional objective – of achieving real and substantive equality.[701] The argument about the need to prevent the constitutionalisation ('juridification') of the law of contract as an excuse to keep that branch of the law untransformed.[702] The reason is that section 8 is intended to assist in determining whether a particular statutory right should be limited in some way in the circumstances of the case.[703] This means that, in the context of section 8, the common law can only be applied to limit or extend a statutory right that an individual may be enjoying (or duty imposed on him or her). Therefore, section 8(3)(a) applies only where a statutory right is sought to be extended or limited whilst developing the common law in the process.[704] It would seem as though the processes ought to be contemporaneous or simultaneous. Therefore, the majority judgment in

699 See *Barkhuizen v Napier* para 30. However, cf. para 186.

700 See Curie & De Waal 66-71. In *King NO v De Jager* all three judgments seem to display this line of judicial reasoning, with the difference lying only in emphasis.

701 See *King NO v De Jager* para 178.

702 See Du Toit D 'Labour Law and the Bill of Rights' in De Beer (ed) *Bill of Rights Compendium* 4B12-4B13. However, cf. Naude & Lubbe who seem to suggest that different considerations should apply in respect of purely commercial, on the one hand, and those pertaining to health care. However, the authors seem to lose sight of the fact, mentioned below at 4.3.2, that many uneducated people in South Africa have suffered financial ruin (tantamount to death) as a result of unconscionably one-sided contracts.

703 See section 8 (2) of the Constitution; see also *AB v Pridwin* para 126, 128-9, where Theron J stated that the Constitution applies directly to individuals.

704 See Cameron and Froneman JJ in *AB v Pridwin* para 217 where they state that the common law obligation of private schools, to provide basic education on their own terms, has been extended. It now creates a correlative negative duty 'not to diminish or interfere with a child's right to a basic education where an independent school provides basic education'. It is now clear that the interests of the children (which are paramount) cannot be ignored by the parties in the exercise of their respective contractual rights.

Barkhuizen v Napier cannot be supported on this point.[705] The court said that there is no need for the provisions of the Constitution to apply directly to the law of contract, but that the values that underlie it may have to be taken into account in determining whether or not the terms of a particular contract were against public policy.[706]

This submission is based on the following points. First, the Supreme Court of Appeal is no longer the final arbiter where common law is concerned: the Constitutional Court is now the apex court of the land. Secondly, the provisions of the Constitution now bind all the branches of the state, including the judiciary.[707] It is a pity that Langa CJ did not elaborate on why he disagreed with Ngcobo J's exposition of the law on this point.[708] In truth, the chief justice was not in complete agreement with the learned justice on this specific point: the unquestioning, if slavish approach to the indirect application of the Constitution in this context.[709] As Victor AJ put it in *King NO and Others v De Jager and Others*,[710] 'indirect application is not always the correct route, even in contract cases'.[711] Victor AJ was referring to Mhlantla J's

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705 See *King NO v De Jager* para 179.

706 Para 30. However, cf. *AB v Pridwin* 105; see also 129-31. The majority in that case, per Theron J, acknowledged that the matter was not a purely contractual one in nature. Their view was that it had a constitutional dimension to it, that is, (1) the interests of the children where they are concerned; and (2) the children's right to basic education. For that reason, Theron J did not find it necessary to consider public policy. Instead, she examined the school's constitutional duty in this regard and concluded that the decision of the school to terminate the contract between itself and the parents of the children, was unconstitutional. She also held that there was no justification to violate the school's constitutional duty and interfere with the children's right to basic education. In other words, though subject to limitation, in terms of section 36, such a right cannot be limited by contractual terms.

707 See section 8 of the Constitution; see also Rautenbach IM 'Introduction to the Bill of Rights in De Beer (ed) *Bill of Rights Compendium* (1999) A133-4.

708 See *Barkhuizen v Napier* where he said:

> To the extent that Ngcobo J's judgment holds that the only acceptable approach to challenging the constitutionality of contractual terms is indirect application under section 39(2), I disagree. While I agree that indirect application may ordinarily be the best manner to address the problem, I am not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them.

See para 30. It is important to note that s 30 is the nub of Ngcobo J's judgment: there is no need for the direct application of the Constitution to contractual disputes as between persons in the private sphere.

709 Para 186.

710 [2021] ZACC 9

711 Para 179.

approach in her minority judgment: that the learned justice unduly relied on Ngcobo J's views in *Barkhuizen v Napier*,[712] and that the approach had to be reconsidered.[713] This is because, as the acting justice put it in her concurring but separate judgment, the case was not one that merely 'concerned the right of access to courts which if relied on directly would pose certain conceptual difficulties'.[714] It would seem as if the 'conceptual difficulties' that the learned acting justice was referring to pertain to, among other issues, the undue emphasis that is sought to be placed on *pacta servanda sunt* and the right to human dignity – at the expense of the right to equality.[715] This approach is particularly important where there is no applicable legislation that implicates any of the rights that are contained in the Bill of Rights.[716] It is for that reason that she relied on the principle of subsidiarity, albeit on different grounds. Her view was that the will under construction in that matter necessitated a direct application of the Constitution. However, because there was already piece of legislation whose purpose it was to give effect to the provisions of section 9(4) of the Constitution – and prevent unfair discrimination.[717] Consequently, her Ladyship added, the matter could only be resolved by applying the principle of subsidiarity.[718] The inference to be drawn, therefore, is that the principle of solidarity (avoidance) is applicable only in exceptional cases, where there is a directly applicable piece of legislation. In other words, the direct application of the provisions of the Constitution is not the correct route to follow.[719]

In *King NO v De Jager*, the court was called upon to determine the validity of a will which included a clause that excluded females in the family from inheriting – the will created a *fideicommissum* in terms of which the fiduciary and all the commissaries could only be males. In the event that there were no females among the descendants of the testator, the will provided for the reversion of the relevant portion of the estate to the surviving males and their male descendants. In his

712 Para 30.
713 Para 179.
714 Para 179
715 Para 179.
716 Para 180.
717 Para 180.
718 Para 180.
719 Para 179.

majority judgment, Jafta J stated that freedom of testation was part of an individual's constitutional the right to dignity (in the same way that *pacta servanda sunt* is, in the context of contracts).[720] However, he was of the view that the exercise of that right, which is protected by section 25(1), should not lead to unlawfulness, lest it be unenforceable.[721] In other words, a testator cannot, in the exercise of that common-law right (of testation), infringe another person's right to equality – and not to be unfairly discriminated against – in terms of a section 9(4). And, the offending clause of that will was declared invalid.

In sum, the three judgments represent three possible judicial approaches in this regard. Justice Mhlantla's dissenting judgment, as already indicated, can be used in support of indirect reliance on the Bill of Rights in resolving contractual disputes. The majority judgment, as per Jafta J, is at the other extreme. It represents the view that supports direct application of the Bill of Rights in such (contractual) matters. Victor AJ took a *via media*: that where there is an applicable piece of legislation that amplifies or implicates the constitutional rights of the parties, the principle of subsidiarity (or avoidance) cannot be ignored. The provisions of that particular Act have to be considered first; and thereafter, proceed to examine those of the Constitution only determine the constitutionality of that Act.

The supremacy of the Constitution cannot be over-emphasised; nor can it be denied that the parameters of the common law are set by the spirit, purport and objects of the Bill of Rights.[722] Section 8(3)(b) incorporates section 36(1) by reference, which means that the common law is 'a law of general application' in terms of which any right that is contained in the Bill of Rights may be limited.[723] It is submitted that customary law (of which *ubuntu* is an integral part) is also such a 'law of general application'. It is submitted, further, that customary law can be relied on, for instance, in the interpretation of any statute that regulates the charging of interest[724] and the calculation of the different periods of prescription that are

720 Para 123-4.
721 Para 125.
722 Para 35. This view is also supported by Cornelius S *Interpretation of Contracts* (2016) 47. However, cf. *Barkhuizen v Napier* para 186 and *AB v Pridwin* para 67.
723 See section 36 of the Constitution.
724 There is a view that there is no such a thing as prescription in customary law. What is

stipulated in the various statutes.[725] The reasons for this assertion are that (1) customary law is now a recognised as source of law in terms of the Constitution; (2)[726] and it applies 'equally to all, and is not arbitrary',[727] provided, of course, that such limitation occurs in a manner that is reasonable or justifiable in an open and democratic society based on freedom, equality and dignity.[728] However, section 8 (3) should not be interpreted to mean that *any* aspect of the common law can limit or supplement the provisions of the Bill of Rights or the Constitution.[729] It is only the *developed* version of it that can serve that purpose, in terms of section 36.[730] As Jafta J put it in *King NO v De Jager*, section 36 'applies to a limitation of rights and not to what is inconsistent with values [which is the purpose of section 39 (2)]'.[731]

It is also important to note that the hands of the courts are not tied in any way where the provisions of the Constitution are concerned and contractual justice is required.[732] The law of contract is not (and should not be) beyond the reach of the Constitution.[733] The Constitutional Court, in *AB v Pridwin,*[734] stated that the problem is not with the 'facial effect of the terms', but with 'the effect of its enforcement'.[735] In that case, Justice Nicholls stated that she does not understand section 8(2) and (3) to inhibit 'the enforceability of a contractual clause by direct application of the Bill of Rights to private persons'.[736] The case in *AB v Pridwin* concerned a breach of

important is to ensure that the interests of justice are serve irrespective of the time lapse – Himonga C & Nhlapo T (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 208-9.

725 In this regard, see in general *Maisela v Kgolane NO* SA 2002 (2) SA 370 376-7 (T).

726 See section 30 and 211 (3). In other words, customary law applies to everyone, irrespective of race, who wishes to take advantage of the rights.

727 See Cornelius 47.

728 For reasons already stated in chapter 2 and 3, customary law is not such a law.

729 cf. Cornelius 47, and Cockerel 3A15-3A16.

730 *Barkhuizen v Napier* para 217; see also Cornelius 47-8. However, cf. Cockerel 3A15-6. As indicated above, the common law can only be developed, in this regard, where the purpose is to limit or extend a particular statutory right, not the common law in general as envisaged in section 39(2).

731 Para 98.

732 See *Barkhuizen v Napier* para 35. However, if the dictum of Ngcobo J in para 30 of the judgment is considered, then the statement is contradictory. It seems to give primacy to the indirect application of the Constitution.

733 Para 35.

734 2020 (5) SA 327 (CC).

735 Para 66.

736 Para 67.

a contract between a private school and the parents of two of its pupils. The question that arose for determination was whether the provisions of the Constitution applied directly in the circumstances of the case. The provisions of section 28, or the interpretation thereof, became the decisive factor in determining the enforceability of the contract under consideration.

The Constitution is now the supreme law of South Africa;[737] and any law or conduct that is in contravention thereof must be declared invalid.[738] It is important to note, however, that *ubuntu* is now both a source of juridical values and an interpretative tool, particularly where public policy calls for consideration and development.[739] In other words, *ubuntu* can no longer be ignored, especially where the South African law of contract is concerned.[740] If it just remains a theoretical textbook concept, meaningful transformation will not take place and injustice and unfairness will persist.[741] As indicated above, *ubuntu* should be resorted to in order to maintain and sustain relational, familial or societal bonds, not to rupture them.[742] It should

737 See section 2 of thereof.

738 See section 174 (2). However, a contract, or its terms, does not amount to a 'law or conduct that is inconsistent with the Constitution' – see *Barkhuizen v Napier* para 25-6; see *AB v Pridwin* para 106.

739 *Napier v Barkhuizen* para 51-2.

740 See Klare & Davis (2010) 412 where the authors say: 'Section 39(2) directs decision makers gradually but purposefully to develop new methods of approaching and new criteria for resolving common law questions. By a "transformative methodology" we mean an approach to legal problems informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just democratic, and egalitarian social order' – see Davis & Klare (2010) 412.

741 See *King NO v De Jager* paras 203 where Victor AJ pointed out some doctrinal similarities between freedom of testation in the law of succession and the freedom to contract, and said the following:

> Freedom of testation is in essence freedom of contract. Freedom of testation cannot now be cloaked with constitutional protection under the guise of 'human dignity and autonomy'. There is an overemphasis on the use of individualist, libertarian and neo-liberal definitions of freedom of testation as opposed to a definition founded on the countervailing principles of equality and *ubuntu*. There is a failure to consider the appropriate context and the distributive consequences of freedom of testation.

It is submitted that, if the expression 'freedom of contract' were to be substituted for 'freedom of testation', in a passage dealing with a contractual dispute in the future, then, the South African courts would have a sound and firm doctrinal and practical substratum on which to develop this area of the law – see also para 123-5.

742 See *Barkhuizen v Napier* para 28-36.

be relied upon not only in determining the legal convictions of the community and whether a contract is against public policy or not, but also in establishing whether the contract was validly entered into or terminated. This is because, as the foundational value, *ubuntu* now requires the courts to infuse 'the elements of grace and compassion into the formal structures of the law'.[743] This means, in effect, that the courts can, *mero motu*, raise the question of the practical effect of applying *ubuntu* to a particular case.[744] If the law on that particular point (as it relates to *ubuntu*) is not settled yet, the courts should always insist that they should be addressed on it by counsel, particularly where the pleadings and other court processes do not raise it. If, as discussed above, *ubuntu* is an integral part of the Constitution, and if, as further argued, the Constitution applies to all law, then no rule, principle or doctrine of South African law is beyond the reach of *ubuntu*. The South African law of contract has to 'move away from formalism towards substantive fairness'.[745] In other words, *ubuntu* should now be constitutive and determinative of validity – and enforceability – in respect of all contracts in South Africa. Moreover, the common law on contracts is largely judge-made law. It is susceptible to changes in the mores, politics and economics of the country, particularly in the light of the provisions of section 39(2) of the Constitution.[746]

4.3 The function and purpose of public policy in the law of contract

As indicated above,[747] the common law, as it relates to contracts, is a mixture of principles from Roman law, Roman-Dutch law and English law.[748] However, some of the principles and concepts on which this *corpus* of law is based, have been abrogated or abolished for ideological reasons, rather than on jurisprudential

743 See *PE Municipality* para 37.

744 This is what Davis J did in *Combined Developers v Arun* 225-6. Even though counsel had not raised the constitutional point sufficiently, the judge dealt with the impact that the Constitution has had on the law of contract in South Africa.

745 See para 207; see also *King NO v De Jager* para 203 where the judge expresses a similar view.

746 However, see Margo 292. Clearly, there was, under the pre-1994 constitutional order, very little room, if at all, for 'judicial enterprise … to accommodate developments in the social, economic and financial order'.

747 See 3.3 above.

748 Van Huyssteen *et al.* 1-3.

principles.[749] What Bennett refers to as *bellum juridicum* had a lot to do with this, with judges cherry-picking which sources were relevant at a particular time.[750] This *bellum* was more pronounced where good faith and public policy were concerned.[751] Even after the advent of constitutional democracy, *Magna Alloys & Research (SA) v Ellis*[752] still remains the legal standard where public policy and contracts are concerned.[753] *Ubuntu* is merely referred to for the sake of adding a meaningless flourish to the judgment.[754] For instance, one would have expected that *Beadica*

749 Van Huyssteen *et al*. 2-3.

750 See *AB v Pridwin* para 128-129 and the authorities cited thereon; see also Bennett TW *'Ubuntu: An African Equity'* (2011) *PER/PELJ* 50; Biko H Africa *Re-imagined* 90-94, and Kerr 637-66. However, cf. see *Beadica v Oregon Trustees* para 61-70; see also *Potgieter v Potgieter and Others* 2012 (1) SA 637 (SCA) para 34-6 (on the role of public policy, good faith and other similar principles); see also Sharrock R 'Unfair enforcement of Contract: A Step in the Right Direction? Botha v Rich; Combined Developers v Arun Holdings' (2015) *SA Merc LJ* 174, 189-90; see also *Eskom Holdings SOE Ltd v Masinda* 2019 (5) SA 386 (SCA), which dealt with the appropriateness of *mandament van spolie* - the spoliation order - where the respondent had sought an order compelling the appellant to restore electricity to her house, despite its having been illegally connected to the national grid. In the last-mentioned case, Brand JA seems to have mischaracterised the rights involved, and confused the circumstances in which the spoliation order may be granted with the nature of the possessory rights concerned. For that reason, the learned judge of appeal missed out on an opportunity to develop the still-nascent 'right to electricity' which the Constitutional Court has already couched in constitutional and Bill of Rights terms – see para 16-25; see also *Joseph v Johannesburg City Council* para 32-34, and Bilchitz 46, 51.

751 In this regard, see Lewis C 'The uneven journey to uncertainty in contract' (2013) 76 *THRHR* 80 93-4 where she argues that it is important that parties know beforehand what their intended bargain is, and that the infusion of *ubuntu* into the fabric of the law of contract would bring about uncertainty which would, in turn, discourage investment and development.– para 40. For that reason, the learned judge took the following factors into account: (1) The lessees were unsophisticated business people who did not understand the contractual provisions - and their niceties and complexities; (2) the purpose of the (franchise agreement) was to promote black economic empowerment (BEE); (3) a strict application of terms of the contracts would be inimical to the empowerment project; (4) the franchisees would inevitably lose their businesses if they were to be evicted from the premises;(4) the leases were tied to the franchise agreements; and that the two agreements were 'inextricably bound to each other'. In other words, there is no practical – or doctrinal - impediment to the contemporaneous existence and continuation of the two contracts. This '*judisiele broedertwis'* is intriguing if one considers that the common law has always been touted as being a flexible system of rules which is amenable to fairness and justice.

752 1984 (4) SA 784 (A); see also *Beadica v Oregon Trustees* 21-8, 42.

753 See Beadica v Oregon Trustees para 27 (fn 51).

754 See 3.2.2 and 3.2.3; see also *Dikoko v Mokhatla* para 112-3 where Sachs J said:

> In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem … *Ubuntu*/*botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised

231 CC and Others v Trustees for the time being of the Oregon Trust and Others[755], a decision that came immediately after *AB v Pridwin*, would have helped to clear up the jurisprudential prevarication on contractual matters. After all, the law of contract, and mercantile law in general, are not beyond the reach and scrutiny of the Constitution. Of course, this contention should not be taken to mean that 'equity and justice trump illegality'.[756] In other words, all the factors at play at a particular time should be considered dispassionately.[757]

In that case, the court was required to determine whether a contract between the applicants and the respondent was lawful. The contract contained a 'renewal clause', in terms of which the applicants, who were lessees on the premises that were owned by the respondents, had to indicate in writing their intention to renew the contract six months prior to the end of the then current contract. The contract was predicated on broad-based black economic empowerment, which is intended to help emerging entrepreneurs, like the applicants, who came from disadvantaged

society to overcome and transcend the divisions of the past. These judicial and jurisprudential sentiments, it is submitted, apply to all law; and should not just be confined to the Law of Defamation.

755 2020 (5) 257 (CC).

756 See *Resnick v Government of the Republic of South Africa* 2014 (2) SA 337 (WCC) and the authorities cited therein – Resnick v Government of the Republic of South Africa and Another (A536/2011) [2012] ZAWCHC 395; 2014 (2) SA 337 (WCC) (12 October 2012) (saflii.org). For an intricate balance of the interests of the parties in the application of the provisions of the Prevention of Illegal Unlawful Occupation of Land Act 19 of 1998, see also *Shevel v Alson Development Sea Point (Pty) Ltd* [2021] All SA260 (WCC) para 47-55. The case demonstrates how the courts should balance the interests of the affected parties where the applicable statutes implicate the rights enshrined in the Bill of Rights – and are already infused with *ubuntu*. In that case, the Western Cape High Court considered an appeal by the appellant (the lessee) against an order made by the Magistrate's Court, at the instance of the respondent (the lessor), for the eviction of the former. In making the order, the court considered the fact that the appellant had already been in unlawful occupation of the premises for more than a year when the order was granted. The court was also mindful of the fact that the order had already been granted, when Level 3 of the State of Disaster was declared in terms of the Disaster Management Act 57 of 2002 (and the Regulations made thereunder). Reg 37(1) of these Regulations placed restrictions on the demolition and eviction of dwellings during the State of Disaster. The court reached the conclusion that the lessee had already been in unlawful occupation of the leased premises even before the State of Disaster was declared. The court also stated that it would not be fair and equitable to suspend the court *a quo* until the suspension of the State of Disaster by the President of the country. The court then ordered the appellant to vacate the premises four months after the granting of its own order.

757 See *Resnick* above.

backgrounds. The applicants' contention was that they were not sophisticated and versed in the workings of the law, that the strict application of the terms regulating the cancellation of the contract was against public policy, and that it violated their right to equality. They further contended, on the basis of the principles of proportionality, as enunciated in *Botha v Rich NO*,[758] that cancellation, as a sanction, was disproportionate in the circumstances of the case. And, relying largely on the pre-Constitution jurisprudence on contracts and Ngcobo J's judgment in *Barkhuizen v Napier*,[759] the majority dismissed the application. The thrust of the judgment was that for a party to escape the consequences of a contract that he or she had voluntarily entered into, he or she would have to show that the enforcement thereof is against public policy. Based on the fact that the applicants were businessmen and were aware of the consequences of not complying, the majority concluded that the applicants were aware of the consequences of not renewing the contract as stipulated. The appeal was dismissed. In this regard, the majority judgment of the Constitutional Court was in agreement with the Supreme Court of Appeal: that the 'principle of proportionality was "entirely alien"'[760] to our law, and that 'its recognition would undermine the principle of legality'.[761]

758 2014 (4) SA 124 (CC) para 41-5. However, as indicated below, her Ladyship ignored the emphasis, by Nkabinde J, on the injunction of the Constitution to the courts 'to promote the spirit, purport and objects of the Bill of Rights' when interpreting legislation, and on 'the notions of justice, reasonableness and fairness which historically informed good faith in contract'. Nkabinde J also said that good faith contains the necessary flexibility to ensure fairness (which, like justice, reasonableness and equity, is a component of *ubuntu*).

759 It should be remembered that Moseneke J did not agree with the majority judgment's 'primary reasoning and conclusion' (para 93). Also, Sachs J stated that Ngcobo J's judgment 'did not go far enough' (para 124).

760 See *Barkhuizen v Napier* para 38.

761 See para 12, 56-60; see also *Trustees, Oregon Trust v Beadica 231 CC* 2019 (4) SA 517 (SCA)
para 25, and *Resnick v Government of South Africa*. In the last-mentioned case, the appellant had entered into a lease agreement with the Department of Public Works, represented by the regional manager. In terms of that agreement, she was to pay R800 for staying on property that was earmarked by the Department for use by the Equestrian Unit of the South African Police Service. She defaulted on the payment of the rental, and eviction proceedings were initiated. At the time of the proceedings she was living with her two children, who were high school pupils in Cape Town. The court said that *ubuntu* should not be perceived to be encouraging lawlessness. The court ordered that Ms Resnick be permitted to continue occupying the premises for a period of six months from the date the court order was made. In the course of his judgment, Davis said that *ubuntu* 'promotes a normative notion of humanity, of human beings who recognise the "other", of values of solidarity, compassion and respect for human dignity' – Resnick v Government of the Republic of South Africa and

This view is, it is submitted, untenable. It seems to consider commercial certainty as more important than the contractual justice and equity that *ubuntu* demands.[762] The Constitutional Court should set the tone and pace in this regard and infuse this area of the law with the values embodied in the Bill of Rights which is, itself, reflective of *ubuntu*.[763] Alternatively, the doctrine could be expanded and developed in such way as to resuscitate the *exceptio doli generalis* or *laesio enormis* without even mentioning them by name.[764] These two remedies were, after all, intended to ensure fairness in circumstances that would otherwise have precipitated unfairness and contractual injustice; and fairness is what South Africa's contractual jurisprudence is yearning for.[765][766] It is submitted that the judgment of Nkabinde J in *Botha v Rich NO* was not intended to be restricted to the facts of that case.[767] What follows below is an illustration of how *ubuntu* could be applied in order to remove the taint from these two concepts.

A contract is a special kind of agreement.[768] It is an agreement that must have been concluded with the serious intention of creating rights and duties for both parties.[769] In addition to all the other (common law) requirements,[770] the parties must have

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Another (A536/2011) [2012] ZAWCHC 395; 2014 (2) SA 337 (WCC) (12 October 2012) (saflii.org).

762 If that does not happen soon, contractual injustices will be perpetuated; economic freedom will be stalled; and the equitable distribution of the wealth and resources of the land would be unduly delayed. In the words of the Constitutional Court said, per Nicholls AJ, in *AB v Pridwin* para 82, the law of contract 'cannot be enclaves of power immune from constitutional obligations (and scrutiny)'; see also Bhana D & Piterse M Bhana D & Piterse M 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited (2005) SALJ 865 895, where the learned writers say that 'to justify the subordination of consensus and good faith on the basis of the generic by-products of an emphasis on established rules of law is unsettling. This dogmatic adherence to legal rules (at the expense of open-ended standards such as good faith and equity) for the sake of certainty strips the common law of its inherent potential and accordingly frustrates legal and social transformation'.

763 Van Huyssteen *et al.* 366-8.

764 See Olivier JA minority judgment in *Eerste Nasionale Bank v Saayman NO* 1997 (4) SA 302 (A) 323.

765 See Van Huyssteen *et* al. 366-370; see also Kerr 638-52, and *Eerste Nasionale Bank v Saayman* 318-23.

See Van Huyssteen *et* al. 366-370; see also Kerr 638-52, and *Eerste Nasionale Bank v Saayman* 318-23.

767 As suggested in *Beadica v Oregon Trustees* (SCA) para 38; see also Lewis C *Uneven Journey* 92-4, and Wallis M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545, 557.

Bradfield 10-1; see also *Conradie v Rossouw* 1919 AD 279 320.

769 Bradfield 10-1.

770 Contractual capacity, legal possibility, physical possibility, formalities (where these are required for validity).

reached consensus on all the material terms of the contract they intend to enter into.[771] In addition to the parties being 'of one mind' or *ad idem*, there are two other legal principles that need to be considered: (1) the freedom of contract; and (2) the sanctity of contracts. As already stated above, good faith is not a requirement for the validity of a contract in South Africa.[772] Its role, although not quite clear in the period under consideration,[773] seems to have been merely interpretative or hermeneutic in nature.[774] The juridical purpose and function of *ubuntu,* on the other hand, is not in doubt.[775] As will be demonstrated below, it contains the seeds of contractual justice and industrial peace for South Africa.[776]

4.3.1 The freedom of contract

The freedom to contract is a western concept which is premised on individual autonomy.[777] It means that human beings are free to regulate affairs that pertain to the assets in their estates the way they deem it fit.[778] In the words of Coleman, the principle of contractual freedom and autonomy 'is a libertarian doctrine

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771 Not just the *essentialia* thereof.

772 Du Plessis H 5; see also *Brisley v Drotsky* para 93-94; *Potgieter v Potgieter* para 32-36, and *Beadica v Oregon Trustees* para 58-60.

773 As indicated in 3.3.1, it seems to be one of those Roman-Dutch principles that were either abolished or abrogated by disuse for ideological and political reasons. Had it been left intact, in its original Roman Law potent form, it is submitted, the South African law of contract would have been completely different from what it has been, and would have served the interests of everyone in the country – see Du Plessis H 6; 15-9.

774 Du Plessis H 6, 15-9.

775 See Van Huyssteen *et al.* 257. However, cf. Du Plessis H 2-8.

776 See Ch 5.

777 See *Barkhuizen v Napier* para 57 where Ngcobo J describes 'self-autonomy' as the right to organise one's own affairs, even to one's detriment, and as 'the very essence of freedom, and a vital part of dignity, [which] should be weighed against other constitutional rights, such as the right of access to the courts of the land'. In this context, he was in agreement with the Supreme Court of Appeal – see *Napier v Barkhuizen* para 13; see also *v Oregon* para 71-5. Whatever reference there is to *ubuntu*, it is terse and tangential. It is just lumped with 'reasonableness', 'fairness', 'good faith' and equity. There is no concrete indication, or citation of works by African jurists or writers cited, as to how *ubuntu* could practically help to change the law of contract. Instead, courts are warned 'against overzealous judicial reform … the power held by the court to develop the common law must be exercised in an incremental fashion as the facts of each case require' – para 76. This branch of the law requires a fundamental change in order to ensure the contractual fairness and justice that many South Africans are yearning for. Nor can *ubuntu* be referred to as an 'abstract value'. No South African normative value can be more concrete – cf. *Beadica v Oregon Trustees* para 79; 109-13.

778 See in general, Hutchison D & Pretorius C (eds) *The Law of Contract in South Africa* (2017) 21-7; see also *Barkhuizen v Napier* para 57.

enmeshed in the ideas of an open market economy, and flows from the concept of individual/personal autonomy'.[779] He says that it reflects 'the liberty private individuals have to regulate their affairs … in a manner that promotes their interest without governmental direction, interference or inhibition'.[780]

However, it is important to caution against unbridled individual autonomy.[781] The reason is that if parties were left completely to their own devices, particularly given South Africa's history, the result would be a myriad of contractual injustices.[782] It is disappointing that there is judicial dissonance and academic prevarication where this matter is concerned.[783] The courts, and particularly the Supreme Court of Appeal, seem content to retain the constitutional *status quo ante*.[784] The dictum of Ngcobo J in *Barkhuizen v Napier* sought to continue on that course, despite the change of those at the helm of the country's judiciary.[785] His view seemed to be that there was no need to complicate simple matters of contract by directly invoking the provisions of the Constitution and the concomitant Bill of Rights.[786] Accordingly, the enforceability of any contract has to be determined in the light of public policy

779 Coleman TE 'Reflecting on the Role and Impact of the Constitutional Value of *ubuntu* and Contractual Freedom and Autonomy in South Africa' (2021) *PER/PELJ* 1.

780 See Coleman 1; see also Bernard-Naude 253-4, who seems to elevate 'freedom of contract' above *ubuntu*, both in terms of import and significance. The learned author says: '[F]reedom of contract' is the signifier that carries the greatest amount of libidinal investment in our discourse of contract. It is no coincidence that we refer to the "*sanctity* of contract" as an expression of freedom of contract'.

781 Coleman 1.

782 See Coleman 1; see also Bernard-Naude 254-258.

783 However, cf Barnard-Naude 256, where he says that public policy has always been 'defined With reference to 'freedom of contract'.

784 See *Barkhuizen v Napier* para 28-36; see also *York Timbers Ltd* para 27, and *Potgieter v Potgieter* para 32-4.

785 Para 28-30. In that case, the applicant had entered into a contract of insurance with Lloyds of London through a South African representative. In terms of that contract, the respondent was to be at financial risk in respect of damage or loss of the applicant's car. The contract further provided, in terms of clause 5.2.5, that if the risk insured against occurred, and the claim was submitted by the applicant but rejected by the respondent, the applicant would have 90 days within which to institute legal proceedings in court. As fate would have it, the car in question was involved in a collision. But, because, the applicant had, at all material times, been using the car for business, not personal purposes, as he had undertaken to the respondent, the claim was rejected. Two years after the claim was rejected, the plaintiff instituted court proceedings. The thrust of his contention was that the clause was in conflict with s 34 of the Constitution and that he was being prevented from approaching the courts of the country for redress. However, in the Constitutional Court, the contention was that the clause was contrary to the public policy in that it denied him access to the courts of the land, in contravention of s 34 of the Constitution.

786 Para 30.

as infused with *ubuntu*.[787] *A fortiori*, a contract which is in conflict with public policy will automatically not be enforceable.[788] The courts, particularly the Appellate Division (now the Supreme Court of Appeal), have continually emphasised the point that judicial power in this regard should be exercised sparingly, and only in the clearest of cases.[789]

For that reason, the right to dignity and individual autonomy of the one party should not be stretched beyond its limits - to the point of unfairness and unconscionability in relation to the other party.[790] The exercise thereof has to take place within the parameters of the Constitution.[791] As the Constitutional Court stated in *AB v Pridwin*, where a contract between a private school and the parents seeks to interfere with the interests of the children, the school (and the children's parents) cannot easily enforce or terminate such a contract.[792] This is because the Constitution circumscribes the circumstances and parameters within which such autonomy is to be expressed.[793] It all depends on the nature of the rights and duties involved at a particular time.[794] Ordinarily, freedom to contract recognises the ability and capacity of each and every individual person to take decisions about how to control and manage what property or assets comes into or leaves his or her estate.[795] To that extent, the common law may appear to be in accordance with the Constitution, particularly sections 22 and 25.[796] The exercise of autonomy, in this context, also involves the exercise of the constitutional rights to dignity and privacy in terms of

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787 See *Brisley v Drotsky* para 93-4; see also; *Barkhuizen v Napier* para 30, 57; *AB v Pridwin* para 27, and *Beadica v Oregon Trustees* para 35-8.

788 In this regard, see *Barkhuizen v Napier* 28-36.

789 See *Beadica v Oregon Trustees* 35-8.

790 This is one of the contentions that was made by the appellants in *Beadica v Omega Trustees*. However, it was difficult for the SCA in particular to accept it, with the court saying that these are black men who had worked for the entities that were owned by respondents, and had risen through the ranks. It should be noted, though, that there is a marked difference between doing what your managers tell you to do and comprehending the intricate legal lexicon that is used in couching court process – see para 38.

791 See *Beadica v Oregon Trustees* 35-8.

792 Para 89-91; 147-53.

793 See the provisions of s 10, 12, 13, 14, 18, 21, 22, 23, 26 and 28 of the Constitution. As indicated above, these provisions will have to be read in conjunction with section 8, 36 and 39 (2) thereof.

794 See section 8 (2) of the Constitution.

795 See *Barkhuizen v Napier* para 57.

796 The 'Property Clause' of the Constitution. For the exposition of the freedom of contract and its parameters, see *Barkhuizen v Napier* 57, 87.

section 10 and 14 of the Constitution respectively.[797] However, such exercise should not impact negatively on the other party's constitutional rights, such as the right to equality (and not to be discriminated against),[798] dignity, property and the right follow a trade, occupation or trade of one's choice.[799] In other words, it is possible for a contract which ensures the protection of the dignity of one of the parties to fall foul of section 9 of the Constitution, which guarantees every person's right to equal protection and benefit of the law. It may, indeed, be in contravention of section 24, which protects the right of everyone to seek redress in the courts of the country.[800] And, indeed, the Constitution exists precisely for all the private persons who find themselves in this kind of predicament.

For present purposes, it should be remembered that, during the colonial and apartheid periods, the levels of illiteracy among South Africans were high. For that reason, 'freedom to contract' meant very little, if anything, to the majority of the citizens of the country.[801] Their state of poverty, illiteracy and desperation often compelled them to waive their freedom to contract in return for minimal or nominal benefits.[802] The point is made more relevant by the fact that the previous state of

797 See *Barkhuizen* para 57, 87.

798 See *King NO v De Jager* [2021] ZACC 4. The Constitutional Court, per Jafta J, for the majority, made an analogy between freedom of testation and freedom to contract, as against the right to equality. The Constitutional Court was called upon to determine the validity and enforceability of a clause in a will. The court said that there seemed to be a clash between the right to privacy (s 14), human dignity (s 10), and property (s 25), on the one hand, and the right to equality, on the other. In other words, one party cannot, in the exercise of the right to property, interfere with another party's right to equality and property – para 89-94; see also *Botha v Rich NO* para 45-6.

799 See *Barkhuizen v Napier* para 87 where Ngcobo J explains the application and limits of the *pacta sunt servanda* principle*:* [T]he general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy … [C]ourts have recognised this and our Constitution re-enforces it.' See also *King NO v De Jager* 45-6, albeit in the context of succession.

800 A contract may also not interfere with the right to privacy (s 14); the right to freedom of movement; the best interests of the child (s 28); and the right to basic education (s 29).

801 See *Barkhuizen v Napier* para 31-7; see *Beadica v Oregon Trustees* para 52, and *King NO v De Jager* [2021] ZACC 9 para 123-5. The last-mentioned case, involved the interpretation of a *fidei commissum* clause of a joint will which sought to exclude the female descendants of the testators from inheriting thereunder. Whilst conscious of the parallels between freedom of testation and freedom to contract, the Constitutional Court intimated that even though some contractual rights may be consonant with one party's right to dignity, they cannot be exercised in a manner that infringes the other's constitutional rights (such as the right to property in terms of section 25 (1)).

802 In this regard, see Hoppe H-H *A Theory of Socialism and Capitalism* (2010) 19-20 where the author says the following with regard to the nature of choice:

affairs has not changed significantly, particularly where the contract falls outside of the purview of consumer protection legislation.[803] It has led in turn to this class of people performing tasks that are demeaning and humiliating to them. Their right to equality and dignity ended up being infringed, and the common law left them without any adequate redress. For South Africa, it was not just a question of the difference in the bargaining power of the parties to a contract.[804] As indicated above, the suitable remedies, such as the *exceptio doli generalis*, had already been abolished or abrogated through court judgments or lapse of time. Good faith and public policy – which were themselves tainted by racial considerations – took their place.[805] As a result, there is a lot of ambivalence and uncertainty where the law of contract is concerned.[806] The delay in the promulgation of the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act has exacerbated the problem.[807] Freedom to contract presupposes a country where there is a very high standard of education, and substantive and structural equality, not just equality.[808] Therefore, the unlettered in South Africa need to be provided with some juridical protection – which is founded on *ubuntu*. This process

> [C]hoosing, preferring one thing or state over another, evidently implies that not everything, not all possible pleasures or satisfactions, can be had at one and the same time, but rather that something considered less valuable must be given up in order to attain something else considered to be more valuable. Thus choosing always implies the incurrence of costs: foregoing possible enjoyments because the means needed to attain them are scarce and are bound up in some alternative use which promises returns valued more highly than the opportunities forfeited.

803 See s 8 of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 1998; see also Naude & Lubbe 461-63, and *Afrox Healthcare* para 12 where the Supreme Court of Appeal said that the fact that the imbalance in the bargaining power is skewed in favour of the stronger of the contracting parties does not, in and of itself, make the contract contrary to public policy

804 Hutchison & Pretorius 24-7.

805 See Bennett *African Equity* 50.

806 See Lewis C *Uneven Journey* 93-4; see also Van Huyssteen 256-8, and Naude & Lubbe 442-3.

807 See South African Law Commission *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47, 1998).

808 See *Mohamed Leisure Holdings (Pty) Ltd) v Southern Sun Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para 23-5. However, see *Barkhuizen v Napier* para 104 where the Moseneke DCJ, for the minority, said that the approach should be to examine the arrangement of the clause in question, and its tendency or likelihood to deprive the other party of his or her constitutional rights.

could include adopting *ubuntu* as *ius cogens*, a non-derogable but implied term of every contract in South Africa.[809]

4.3.2 The sanctity of the contract

This principle is encapsulated in the maxim *pacta sunt servanda*.[810] This principle means that every agreement that has been entered into with a serious intention of creating rights and duties between the parties is binding.[811] The principle is founded on the dictates of public policy. According to the legal convictions of the community, it is in the interest of the public[812] that all contracts freely entered into be fulfilled.[813] Even before 1994, public policy was the common-law determinant of fairness[814] where the validity and enforceability of a contractual term was in dispute.[815] But, as indicated above, only the legal convictions of a small section of the community were taken into account for this purpose.[816] For that reason, the concept did not serve as an equitable yardstick for this purpose.[817] It was, in truth, difficult to speak of real

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809 See Naude & Lubbe 454. For an International Law analogy, see Dugard J *International Law: A South African Perspective* (2011) (4ed) Cape Town: Juta 38-40 and the authorities cited therein.

810 See *Barkhuizen v Napier* para 87.

811 See *Conradie v Rossouw* 1919 AD 279 288, 320; see also *Mohamed v Leisure Holdings* para 23-4 (where Mathopo JA refers to this phenomenon as the 'privity and sanctity of contract'). Hutchison & Pretorius 21, and Low AM 'Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can We Banish the Law of the Jungle: While Avoiding the Elephant in the Room (2013) *PER/PELJ* 612, 617, where the author succinctly captures this complicated and complex conundrum which, ironically, was brought about by the Constitution.

812 In this context, 'public interest' refers, not to the community's sense of justice, but to the social utility of a particular activity; or the benefit that the community is likely to derive from it — Van Huyssteen 211-12.

813 *Barkhuizen v Napier* para 15. However, cf. *Barkhuizen v Napier* para 140-1.

814 Barnard-Naude describes it, together with 'good faith', 'consensus' and 'misrepresentation, as 'signifiers', in the context of contracts, in South Africa – see 250.

815 See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7-9 where the validity of a clause in a deed of cession involving a discounting (of debt) agreement was in dispute. Beukes challenged the clause on the basis that it was invalid and that it should be declared invalid or excised from the contract.

816 See *Barkhuizen v Napier* para 28, 141.

817 See Van Heerden HJO & Neethling J *Unlawful Competition* (1995) 8 where the authors describe the concept in the following terms: 'The fundamental principle in the nineteenth century was: '*laissez faire, laissez aller, le monde va de lui même*.' (Loosely translated, the expression means: 'One can only achieve the best in the world by working hard on his own.') Trade and industry should thus work out their own salvation without interference from the state. Freedom of economic development is, however, not only an economic postulate, but also one of natural law It is ironic that the *laissez faire* approach to the common law of contract, which was a powerful tool in the evolution of political freedom at that time, is now at variance with, and inimical to, the foundational value of the South African Constitution,

contractual sanctity in that context. Had that been the case, the more (financially) powerful of the contracting parties would have been able to denude a particular contract of its juridical essence with the ease with which they are currently doing it.[818] As the Constitutional Court stated in *Barkhuizen v Napier,*[819] 'all law, including the law of contract is now subject to constitutional control'.[820] The implication is that public policy now has to be informed by the notions of reasonableness, fairness and justice,[821] and that it is now an integral component of the concept of *ubuntu*, which 'takes into account the necessity to do simple justice between individuals'.[822]

In that case, the court had to determine the fairness and validity of a time clause in an insurance contract. The starting-point for the court was that fairness was to be determined by examining two other factors: (1) whether the clause was, itself, unreasonable; and (2) whether it was reasonable to enforce the clause in the circumstances of the case.[823] However, as with the curt but powerful judgment of Langa CJ in *Barkhuizen v Napier*,[824] the import and purport of Mathopo JA's dictum in *Mohamed Leisure Holdings (Pty) Ltd) v Southern Sun Interests (Pty) Ltd*[825] has been fully grasped. In that case, which revolved around the lawfulness of the cancellation of a contract of lease by Mohamed Leisure (the appellant) after failure

ubuntu. Not only is *ubuntu* relational, but it is also humane and conciliatory – see *Barkhuizen v Napier* 16; 151; see also *Dikoko v Mokhatla* para 112-3. However, cf. *Beadica v Oregon Trustees* para 80-85 where the majority seemed to prefer 'legal certainty' over justice and equity. It is submitted that, as demonstrated in *PE Municipality* para 36-38 and *Dikoko v Mokhatla*, *ubuntu* can guarantee both the required certainty and justice. This makes the remarks by Theron J in *Beadica v Oregon Trustees* para 80 somewhat contradictory: 'that courts should not shrink from their constitutional duty to infuse public policy with constitutional values[and] should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution'.

818 See Naude & Lubbe 455. However, cf. *Afrox Healthcare* 33-4.

819 2007 (5) SA 323 (CC).

820 See *Barkhuizen v Napier* para 15.

821 *Barkhuizen v Napier* para 48-51; see also *AB v Pridwin* para 61.

822 Para 51-2. However, see Van Hyssteen et al. 257, and Christie RH 'The Bill of Rights and the Law of Contract' in De Beer (ed) *Bill of Rights Compendium* (1999) 3H7-3H8 who argues that public policy is a question of fact, not law, and that the Constitution should not be treated as the last word on matters of public policy. The author argues that would defeat the purpose of public policy (a) in ensuring the individual's utmost freedom to contract; and (b) in taking into account the necessity to do simple justice. It is submitted that no contract is beyond the reach and impact of the constitution. After all, the Constitution and relevant pieces of legislation now constitute 'public policy'.

823 Para 56.

824 Para 186.

825 2018 (2) SA 314 (SCA).

to pay rent by Southern Sun (the respondent). Even though the Gauteng Local Division, Johannesburg, came to the conclusion that Southern Sun was in breach of the contract, it declined to grant the order for eviction as sought. The rationale was that the cancellation clause was manifestly unreasonable, unfair and offended public policy. The conclusion was that the common law principle of *pacta servanda sunt* should be developed by importing or infusing the principles of *ubuntu* and fairness in the law of contract. The learned judge of appeal said that the fact that a term in a contract 'is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution',[826] and that there are instances where 'the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue'.[827] The tenor and timbre of his judgment is different from similar judgments from that court. It places the Constitution (and *ubuntu*) – not the pre-Constitution precedent – as the centre-piece of the contract laws of South Africa. It is, therefore, not surprising that Mathopo J also emphasised the bargaining power of the parties as an important factor to be considered in this regard.

It is difficult, or even impossible, to speak of a 'serious intention to contract' where one of the parties does not even understand the obligations (rights and duties) that are purportedly being created.[828] This problem is not just about the skewed bargaining power between the parties concerned, and who is more powerful in terms of status, wealth and influence; it is also about the lack of knowledge on the part of the other who is less educated and powerless.[829] It is true that common-law

826 Para 30; see also Moseneke DCJ in *Barkhuizen v Napier* para 94-6. However, cf. *York Timbers Limited* para 27.

827 Para 30.

828 See Bradfield 10-1; see also Hutchison & Pretorius 24-5 who emphasise the point that the assumptions on 'serious intention' and the bargaining power are 'simply not correct [and rest] on rather shaky foundations'.

829 See Du Plessis H 17-9; see *AB v Pridwin* para 63 which is now authority for the view that where the interests of the children are involved, the right to freely enter into a contract is much more restricted. Their interests are paramount and should be taken into account. Nicholls AJ stated that contracts that deal with the education of the children (particularly at private or independent schools) 'cannot be equated with standard commercial contracts such as a lease'. She also said that these are contracts 'of a different species in that there are markedly different considerations at stake'. This is because, as the Constitutional Court emphasised, the interests of the affected children are paramount; it is not just an agreement between the school and the parents.

mechanisms have been built into the law of contract to protect the parties' interests.[830] However, most seem to have been conceived with 'educated' and sophisticated people – in a Eurocentric sense – in mind.[831] The mechanisms have only encouraged exploitation and financial ruin where the other party is uneducated.[832] One such mechanism is the 'quasi-mutual assent' doctrine.[833] It is of English origin and a by-product of the objective theory, in terms of which a contract comes into being based on the conduct of the other party who is sought to be held liable.[834] According to this doctrine,[835] one of the parties is actually held liable merely on the basis that he or she has – despite his or her lack of education or sophistication – created an impression that he or she was binding himself or herself in terms of the agreement.[836] The theory is meant to be supplementary to the will theory, which requires that there be a meeting of the minds or concurrence of wills.[837] However, it makes it easy to hold contractually liable someone who does not know the implications of what they are saying or doing in the circumstances of the case.[838] He or she might not even have the money to engage the services of a lawyer.[839] For that reason, 'reasonable impression', in this context, seems to be a

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830 This includes applying the *caveat subscriptor* rule, or determining whether, in the particular circumstances of the case, there has been a misrepresentation (negligent or fraudulent), mistake, duress or undue influence – Bradfield 14-5.

831 Du Plessis H 18-9.

832 This is because, as Naude & Lubbe put it, 'common-law devices for controlling exemption clauses are few in number and of limited scope' – see 442. Even though the authors do not seem averse to inclusion of exclusion clauses in contracts, they are at pains to indicate how contractual justice could be achieved in this context. The authors also say that, while a contract that destroys the original essence of the contract is problematic, 'public policy is an open norm' which requires the weighing up of the interests of the parties involved. Therein lies the danger. As happened in *Afrox Healthcare*, the commercial interests of the hospital were placed above those of the patient. *Ubuntu* – which is an integral part of the Constitution – should have been relied on to ensure full protection of the patient's right to dignity, equality and security (which includes psychological integrity) – see sections 9. 10, 12 of the Constitution.

833 *Pieterse & Co v Salomon* 1911 AD 121 130.

834 See Naude & Lubbe 442.

835 It is also considered part of the *justus error* doctrine, according to which a party can only be excused from contractual liability if the mistake which led to the conclusion of the contract was reasonable – see Van Huyssteen et al. 31-35; see also Naude & Lubbe 442, & Kerr 102-5. However, see *Afrox Healthcare* para 35 where the court was not prepared to accept that Mr Strydom, the patient, should not be held liable merely because he did not expect a clause such as 2.2 in the contract between himself and the hospital.

836 See Bradfield 11-2.

837 See Naude & Lubbe 460-1; see also Bradfield 11-2.

838 Bradfield 11-2.

839 *Barkhuizen v Napier* para 135-6.

misnomer in the South African context.[840] Many entrepreneurs and businesspersons have taken advantage of the lack of knowledge on the part of consumers from disadvantaged communities.[841] Even consumer protection laws have been of very little or no help in these instances.[842] The reason for this was, as indicated above, the nebulous place and role of 'good faith', 'public policy'[843] and 'reasonableness' in the South African law of contract.[844] The concepts could not extricate the weaker of the parties from a contract which, but for a lack of money and concomitant poverty, he or she would not have entered into.[845] Nor would they have directed their individual will towards the fulfilment of the obligations under such a contract.[846] A large number of people in South Africa found themselves in that position, not because of their own choice, but as a result of ideological, political and racial segregation and economic exclusion.[847] Such a situation would not have been countenanced within a constitutional framework whose foundational value is

840 See *Barkhuizen v Napier* 15; see also *Afrox Healthcare* 13, 20-4. In reality, it does not make any juridical sense to dice up contractual protection, in this regard, between 'commercial' and 'bodily', with a higher notional threshold being accorded to the latter. In reality, a contract cannot, and should not, allow for the violation of any constitutional rights, be it the right to equality and property or the right to human dignity and freedom and security. However, cf. Naude & Lubbe 460-1.

841 The majority of them were not educated and it was easy to speak over their heads – Otto JM & Otto R-L *The Credit Act Explained* (2016) 2-3. However, it is submitted that the majority of people would not have entered into the agreements that they are currently party to. Also, the National Credit Act 34 of 2005 itself does not go far enough in this regard. It provides that the documents pertaining to credit agreements should be in the language that the consumer can read (not speak) or understand – s 63 (1) thereof; see also *Barkhuizen v Napier* 65-66. However, the Consumer Act 68 of 2008 seems to cast the protective net much wider, particularly to 'vulnerable [or] low-income communities from exploitation and hazardous or unsafe products'. Also, consumers can no longer be coerced into indefinite or perpetual contracts that they do not wish to be bound by – see Melville NJ *The Consumer Protection Act Made Easy* (2011) 1-2; see also section 16-20; 51, 54 and 64 of the Act. However, discussion of the National Credit Act and the Consumer Protection Act falls beyond the scope of this thesis.

842 Melville 1-2.

843 See Naude & Lubbe 442.

844 See Du Plessis H 14-9 -

845 See *Barkhuizen v Napier* para 135-8.

846 Schulze H; Manamela T; Stoop P; Manamela E; Hurter E; Masuku B & Stoop C *General Principles of Commercial Law* (2009) 53 where the writers emphasise the point that the parties must have (1) had the serious intention to be contractually bound; (2) had a common intention or the same commitment; and (3) made their intention know by means of a declaration.

847 See Mbeki (2011) *Advocates for Change* 6; Ngcukaitobi 249.

ubuntu.[848] The courts are now required to consider the impact of contractual stipulations on the parties in order to ensure justice.[849]

For instance, in *Barkhuizen v Napier*,[850] Sachs J said that, even though the concept of the sanctity of contract and the accompanying maxim *pacta sunt servanda* are so 'axiomatic, and indeed mesmeric', their 'virtue and reach have come to be severely restricted in open democratic societies'. He said that in appropriate circumstances, a case could be made out that 'clauses in a standard contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom'.[851] The learned justice expressed the view that the product of agreements concluded under such circumstances and conditions was questionable.[852] The justice's view was that the agreement involved the imposition of the will of the stronger party on the weaker one,[853] and the tendency of the provisions to be unreasonable, oppressive or unfair, should be a major factor in this context.[854] This is a case that involved the interpretation of an exclusion clause, which he referred to as a 'contract of adhesion'.[855]

Moseneke J, in his separate, minority judgment, also bemoaned the fact that the majority[856] had adopted too narrow an approach in determining the unreasonableness of a clause in the mold of Clause 5.2.5.[857] He seemed to prefer an objective, full factual inquiry, saying that the test should have nothing to do with the wealth or status of the person involved (the insured party, in this case),[858] and

848 See para See also Naude & Lubbe

849 See *Botha v Rich NO* 28, 45-6; see also *Barkhuizen v Napier* 97, 104; see also *AB v Pridwin* para 60 where the Constitutional Court said that 'problem here lies not with the facial terms of the contract, but with the effect of its enforcement'.

850 2007 (5) SA 323 (CC).

851 Para 141.

852 Para 138.

853 Para 138.

854 See *Botha v Rich NO* 28, 45-6; see also *Barkhuizen v Napier* 97, 104.

855 Para 138. -

856 According to Ngcobo J, who delivered the judgment, the provisions of the Constitution only applied indirectly to contracts entered into between citizens. In his view, public policy – as infused with *ubuntu* and other values of the Constitution – was to be the only determinant of whether a contract was enforceable or not – see para 33-36.

857 Para 95-6.

858 Para 96.

that there was nothing wrong with making a full, factual inquiry into the matter.[859] In his view, the question should not be whether the clause was unreasonable to a particular person, but whether, objectively, it had the tendency or likelihood to deprive the other party of his or her constitutional rights.[860] In other words, the learned justice was calling for a hybrid approach which would ensure contractual justice irrespective of whether a person is rich or poor; sophisticated or unsophisticated.

Sachs J also seemed to favour this approach; and the question to be asked is whether the term or clause in question was unconscionable, oppressive or unreasonable. He was also of the view that, even the wealthy, too, deserve justice.[861] For that reason, after expressing his disagreement with Cameron JA,[862] also cautioned against declaring all the clauses that are couched in the same manner as 5.2.5, unconstitutional.[863] A balanced approach, which ensures fairness, particularly in a democratic society, is required.[864]

However, he emphasised that any contract that is dense, voluminous and comprises many pages, and whose content has not been discussed with, disclosed to, or signed by the person concerned, should be declared unreasonable.[865] Sachs J also went on to state that public policy actually seeks to achieve 'reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition'.[866] A

859 Para 95-6.

860 Para 104; see also *Combined Developers v Arun* 235-6; see also Sharrock 189-90. In essence, public policy and good faith, as viewed from South Africa's constitutional normative perspective, should not be coloured by race or based on the views of a few.

861 Para 149.

862 That the time-clause in the agreement under consideration did not offend constitutional values.

863 Para 146.

864 Para 146.

865 Most of what Sachs J says in his judgment seems to have found its way into consumer protection laws of the country, such as the National Credit Act and the Consumer Protection Act 34 of 2005, which came into full operation on 7 May 2007, and the Consumer Protection Act 68 of 2008.

866 Para 174.

contractual clause of that nature requires a clear balancing of constitutional rights, while bearing in mind that the Constitution is the supreme law of the land.[867] For that reason, rights that derive from the common law (such as the freedom to contract) cannot trump those that flow from the Constitution (such as the right to equality, dignity and property).[868] He therefore came to the conclusion that 'Clause 5.2.5 in and of itself offends against public policy in our new constitutional dispensation and should not be enforced'[869].

This approach could be particularly apposite where, for example, the provisions of the Insurance Act[870] are to be interpreted, in order to decide whether the insurer should accept or repudiate a particular insured person's claim. Insurance companies have, in recent times, been leaning towards a very legalistic, if literalist, approach in this regard, much to the prejudice of the insured parties or their dependents.[871] Clearly, that approach is inimical to public policy and the notions of fairness and justice as subsumed under *ubuntu*.[872] The submission is grounded on the fact that nothing short of *ubuntu*-infused principles of contract will suffice.[873] Nor will any

See *King NO v De Jager* para 90-1.

868 *King NO v De Jager* para 90-1.

869 Para 183.

870 Act 18 of 2017.This Act came into operation on 1 July 2018. For short-term and long-term insurance purposes, see the Short-Term Insurance Act and the Long-Term Insurance Act 52 of 1998.

871 It is for this reason that there has been a lot of public dissatisfaction with many of the decisions of the insurance companies – and the Office of the Ombud – to repudiate seemingly compliant claims on purely technical grounds – see section 53 of the Short-Term Insurance Act 53 1998, and section 59 of the Long-Term Insurance Act 52 1998; see also 'Momentum changes life insurance policy after customer outrage', available at https://businesstech.co.za/news/finance/285756 (accessed 23.07.2020).

872 This, it is submitted, may require that public opinion be considered, in the same way that a court would consider it in determining how prevalent a particular crime is, in order to impose an appropriate sentence. In other words, public opinion could be relied on to ensure that public interest and public policy – the legal convictions of society – are not determined only by the views of a certain class of people. See *Minister of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 196 (CC) para 51-2; see also *S v Zuma and Others* 1995 (2) SA 642 (CC) para 15. However, cf. *S v Makwanyane* 1995 (2) SA 391 (CC) 87-9 where Chaskalson P cautioned against over-reliance on public opinion.

873 See Coleman 30-33.

proposition – even the relational theory of contract – shorn of the values of *ubuntu*, serve the interests of justice.[874]

The relational theory of contract seems to enjoy prominence in the United Kingdom and the United States of America.[875] There is, however, emerging research and literature in this nascent area of South African law.[876] It is interdisciplinary[877] in nature and origin, and is founded on the premise that 'the relationship and context' are paramount to any contract.[878] The theory teaches that the emphasis in interpreting contracts should not just be on doctrinal aspects, but also on the surrounding social and economic circumstances in which the agreement was concluded.[879] However, the relational theory is likely not to find favour with the South African courts. First, it has very strong English historical, legal and judicial roots which will be very difficult to shrug off; and it will soon be on a collision course with the values that underlie the relational ethic of *ubuntu*.[880] In many ways, it in line with European and American *laissez faire*, free-market approach to contracts.[881] Secondly, there is a very strong transformative jurisprudence that is emerging from the South African courts whose purpose and purport it is to ensure equity and justice in this area of the law.[882]

874 See Coleman 38-9; see also Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication (2017) *SALJ* 296, and 401.

875 Hutchison (2017) 292.

876 Hutchison 296; see also Hutchison A & Sibanda N 'A living customary law of commercial contracting in South Africa: some law-related hypothesis (2017) SALJHR 380 401.

877 See Hutchison 299; see also Coleman 30-3.

878 Hutchison 296.

879 Hutchison 299.

880 See the minority judgment of Yacoob J in *Everfresh* para 22-3.

881 See the remarks of Sachs J in Barkhuizen v Napier para 151-7.

882 See *Beadica v Oregon Trustees,* para 204-208; see also *King NO v De Jager* para 203-4 where Victor AJ says that 'there is an overemphasis on the use of individualist, libertarian and neo-liberal definitions of freedom of [contract] as opposed to a definition founded on the countervailing principles of equality and *ubuntu*'. The learned acting justice also said that there is 'a failure to consider the appropriate context and the distributive consequences of freedom of [contract]'.

Thirdly, the thrust of the theory seems to be in the direction of 'economic certainty'.[883] As indicated above,[884] the phrase seems to be a euphemism for the preservation of economic power in the hands of those South Africans it has always rested in since 1652.[885] Fourth, its application is confined to long-term contracts, to the exclusion of once-off ones.[886] That exclusion begs the obvious question: What happens where a once-off contract is founded on an unfair, unreasonable or unconscionable term or condition? It submitted that resorting to *ubuntu* would not only be apposite in this regard, but it would also ensure an equitable result.[887] Fifth, the theory is only concerned with maintaining the business practices and trade customs of a particular community.[888] The implication is that all people who are not part of that community will be left with no satisfactory recourse and a sense of injustice.

Sixth, even though it appears to be conducive to flexibility at a practical level, its doctrinal foundations make it contrary to *ubuntu*. Nor is the 'three-dimensional analysis' of the theory, as proposed by Hutchison and Sibanda, apposite for this purpose.[889] The analysis, is founded on three pillars:[890] (1) the terms of the contract itself, be they written or oral; (2) the economic considerations that underlie the contract, and (3) the human element. One would have expected some reference to *ubuntu,* or some indication of what role the analysis can play in the proper exposition of its juridical and constitutional essence. The first pillar refers to the determination of consensus. The second one, though couched in utilitarian terms,[891]

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883 See Hutchison 307; see also Lewis 93-4, and *Beadica v Oregon Trustees* para 40 where Davis J refers to the concept as a 'shibboleth' – an excuse to perpetuate contractual injustice and economic inequality.

884 See 4.3 above.

885 The year in which white people arrived in South Africa.

886 See Hutchison 299-300; see also Coleman 31.

887 It is clearly for that reason that the Constitution demands, *inter alia*, that equality be substantive; and 'advance more than merely formal or *de jure* equality' – see *King v De Jager* para 195.

888 Hutchison 306.

889 Hutchison & Sibanda 401.

890 Hutchison & Sibanda 401.

891 This is a philosophy that was first propounded by Jeremy Bentham, but altered and developed by John Stuart Mill. The theory teaches that the morality efficacy of any action or rule should be based on whether it 'produced the greatest amount of happiness to the largest

does not seem helpful in the amelioration of the principle of individual autonomy, on which the freedom of contract is founded. In the South African context, it is likely to leave the common law of contracts intact and the economic imbalances not righted.[892] The third pillar seeks to ground the theory on the personal-relational element, as between the parties.

According to Hutchison and Sibanda, a contract must be interpreted and enforced in the light of 'extraneous circumstances of the non-legal variety'.[893] There is something that commends the third pillar to an *ubuntu*-inspired law of contract jurisprudence. However, as indicated above, *ubuntu* is not merely concerned about the relationality of human interaction in the context of contract. It is mainly about humaneness, fairness and equity in that sphere – largely unfamiliar to many South Africans.[894] It does not seem capable, in its current formulation, of catapulting *ubuntu* into a substantive concept of contract law in South Africa.[895] Instead, it is likely to perpetuate individual autonomy and its twin principle – *pacta servanda sunt*. Unsophisticated and uneducated parties are likely to continue to be at the contractual mercy of wealthy and powerful individuals.[896] The happiness will only percolate among those who are already happy, financially or economically; and the rest of the population will remain in a perpetual state of poverty and penury.

It has always been possible, in terms of the South African law of contract,[897] for a more powerful or dominant party to add to a contract a clause that has more adverse consequences than what Clause 5.2.5, in *Barkhuizen v Napier,* was intended for.[898] The practice was prevalent in the pre-Constitution era.[899] The objective of such a clause would have been to 'compel' a debtor to accept the jurisdiction of a

number of people affected by [that action or rule]' – Kleinman P *Philosophy 101: From Plato to Socrates; Ethics and Metaphysics* (2013) 94.

892 *King NO v De Jager* para 202-14; see also Louw 57.

893 Hutchison & Sibanda 401.

894 *King NO v De Jager* para 202-14; see also Louw 57.

895 See Hutchison 325.

896 Louw 57.

897 Where a contract falls outside the purview and scope of the National Credit Act and the Consumer Protection Act.

898 See 1.1 above. As to the difference in role between the *essentialia* (which give a contract its 'essence'), and the *naturalia* (which give it its 'nature', see Naude & Lubbe 446-50.

899 See s 45, 57, 58 and 65 of the Magistrates Court Act 32 of 1944.

court other than that of his or her place of residence, business or employment.[900] Frequently, even the amount owing by the debtor to the creditor falls far below the substantive jurisdiction of the High Court, for the proceedings to be instituted in that forum in the first place.[901]

4.3.3 The Constitution, contracts and court process[902]

The process of infusing the law of contract with *ubuntu* has necessitated fashioning new court process, procedures and forms[903] that are in accordance with the values of the Constitution. Where there is no such statute in place – as in the case of common law contracts – those statutory provisions are often considered in determining the content and force of public policy at a particular time.[904] Without *ubuntu* suffusing them, the advent of constitutional democracy would have been in vain.[905] The concepts, doctrines and principles pertaining to a particular branch of law provide counsel with the aspects of the appropriate substantive law.[906] The court rules and forms help him or her to adopt the appropriate format or procedure in preparing, and delivering, court process.[907] A sound grasp of both substantive and procedural law will always help counsel and his or her client to avert the pitfalls of the 'once and for all' rule,[908] and avoid the consequences of being served with a

900 See s 45 of the Magistrates Court Act 32 of 1944 (as amended).

901 Now, s 90 (2) (k) (vi)(aa) of the National Credit Act prohibits the insertion of such a clause into a credit agreement. Consumers who have concluded credit agreement with credit providers can no longer be unconscionably mulcted in legal costs and other related expenses.

902 Chapter IX – s 61 to 81 – of the Magistrate Court contains provisions that are intended to regulate the execution of judgments. There are, also, rules that were formulated in order to create procedures and forms for these purposes. Except for credit agreements which fall within the purview of the National Credit Act, the Magistrates Court Act (and the rules and the forms made thereunder) were – and still are – part of an intricate web of laws that regulate the granting of credit, and enforcement of payment, in South Africa.

903 These are statutory templates that have to be followed by counsel in drafting pleadings and court process, and by court functionaries performing their function in that regard.

904 In this regard, see the provisions of s 45, 57 and 58 of the Magistrates Court Act 32 of 1944; see also the dictum of Sachs J in *Barkhuizen v Napier* para 169-177. However, cf. Wallis 550-1

905 Hence the maxim *ubi ius ibi remedium*: whenever a law creates rights, correlative court process will have to be created.

906 On what needs to be stipulated in support of his or her client's cause of action and claims thereunder.

907 In this context, 'delivery' means having court process (pleadings and notice) issued (assigned an official number and stamped by the clerk of the court), and served on the defendant (in case of action proceedings) or respondent (in case of motion proceedings), and proof thereof provided to the plaintiff or applicant.

908 The rule compels counsel to ensure that all claims which arise from the same cause of action

special plea of (extinctive) prescription.[909] Many of the pre-Constitution court rules and procedures are likely not to pass constitutional muster.[910] As indicated below, many of the statutes, such as the Magistrates Court Act[911] that created most of these rules and procedures, have already been challenged in court, and, where appropriate, declared unlawful and unconstitutional.[912] Most of those statutes and rules set out the procedure on, for example, how the defendant (debtor) should express his or her consent to the jurisdiction of a particular court, in writing;[913] or to consent to the clerk of the court 'entering a judgment'.[914] Some of the rules provided for the arrest of the debtor who was, on reasonable suspicion, on the verge of leaving the country in order to avoid paying his debts.[915] Section 65(1) provided for the arrest and detention of a judgment debtor, for contempt of court, or for failing to pay his or her debt. Until it was declared unconstitutional and invalid by the Constitutional Court,[916] section 65(1) legitimated the criminalisation of poverty and penury.

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are included in the same set of pleadings, and are prosecuted in the same proceedings. In other words, an unsuccessful plaintiff cannot approach a court on a claim he could have included in the original pleadings and proceedings, but omitted to do so – see *Neethling J Potgieter JM & Visser PJ Law of Delict* (1999) 225-7.

909 That is the time within which the claim had to be instituted (with summons issued and served) – see Harms LTC *Amler's Precedents of Pleadings* (1989), Third Edition, Butterworths, Durban 248-51.

910 For a historical and pre-Constitution perspective on Civil Procedure in South Africa, see Van Winsen LV & Thomas JD, The Civil Practice of the Superior Courts in South Africa (1973), Second Edition, Juta & Co Ltd; HJ Erasmus &Van Loggerenberg DE *The Civil Practice of the Magistrates' Courts in South Africa* (1988) Eighth Edition, Volume I: The Act, Juta & Co, and HJ Erasmus &Van Loggerenberg DE *The Civil Practice of the Magistrates' Courts in South Africa* (1991) Eighth Edition, Volume II: The Rules, Juta & Co.

911 Act 32 of 1944 (as amended).

912 For survey and impact of the pre-Constitution Magistrate Court Act and accompanying Rules and Forms, see the minority judgment of Jafta J in *University of Stellenbosch v Minister of justice* para 74-89.

913 S 45 of the Magistrates Court Act. Part of the problem is that the 'consent' in this regard was often not valid, as the debtor lacked appropriate knowledge intended for that purpose.

914 See the provisions of s 58, which must be read with those s 58, which permit the clerk of the court to 'enter judgment [against the defendant (debtor) in favour of the plaintiff (creditor) for the amount of the debt and the costs … .'

915 As indicated above, this procedure is known as the *tamquam suspectus de fuga*.

916 In *Matiso v Commanding Officer, Port Elizabeth and Others* 1995 (4) 631 (CC). In that case, Mr Matiso, who had been imprisoned in terms of the provisions of 65A-65M, challenged the validity of these provisions on the basis that they were unconstitutional and invalid, in that they permitted imprisonment without a fair trial, in contravention of s 11 (1) and 25 (3) of the interim Constitution (now section 12 and 35(3) of the Constitution). Many applicants in a similar predicament joined Mr Matiso in these proceedings against their respective creditors. In his majority judgment, Kriegler J held that these provisions violated the

This is what happened in *Nedbank & Others v Gqirana and Other Similar Matters*[917] and *Nedbank v Thobejane and Related Matter*s.[918] In *Gqirana* and *Thobejane*, the Gauteng and Eastern Provincial Divisions of the High Court dealt with the question of whether the litigants, particularly the banks and other financial houses, could approach the High Court even in instances where the Magistrate's Court had jurisdiction.[919] Clearly, the cases dealt with the crucial question of access to justice, especially for the previously disadvantaged members of society, who have no money to pay legal fees and other related costs.[920] In *Thobejane*, the Full Bench of the Gauteng High Court held that the High Court had the power to regulate its own process and to develop the common law; and that that included insisting on the matter being abandoned, or being referred to the Magistrate's Court if it fell within the jurisdiction of that court.[921] There is also the process of rescinding a default

judgment debtors' 'right to security of the person' and 'the right to a fair trial', and that their operation could not be justified in terms s 33 (now s 36 of the Constitution. For that reason, any reference to 'committal to prison for failure to pay a debt' in the provisions of s 65. The justice said: 'The system at issue is used most often for the collection of small debts usually of those who are poor and either illiterate or uninformed about the law or both. In the nature of things they do not enjoy legal representation. Imprisonment can and has been ordered without the debtor ever having notice of the original judgment or the notice to appear at the hearing. It can also be ordered without the uninformed or illiterate debtor having sufficient knowledge about the possibility of raising defences or the means of doing so' – para 8. However, cf. para 20 where Didcott J, in his separate but concurring judgment, sets out the conditions on which he would permit this debt-collection to be retained.

917 2019 (6) SA 139 (ECG).

918 [2018] ZAGPPHC 692.

919 See s 92 and 172 (2) of the National Credit Act; see also the provision of s 28 and 29 of the Magistrate's Court, and section 22 of the Superior Courts Act 10 of 2013.

920 This is because, in terms of s 45 of the Magistrates Court 32 of 1944, some of the contracts used to contain a clause which, unbeknownst to the consumer, was intended to confer jurisdiction of a particular court on him or her, irrespective of its distance from the place of residence, employment or business of the consumer (whether as defendant or respondent). On the objectives of the National Credit Act in general, and s 29 thereof in particular, see *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [2016] ZACC 32 para 15-32.

921 Para 69-70 of the judgment; see also the minority judgment in *Nedbank v Gqirana* para 82-86. However, cf. the majority judgment in the latter case, by Lowe JP, where the judge president said that the relief granted by the Gauteng High Court, in *Thobejane*, was cast too wide. The approach adopted in *Thobejane* (and by Jolwana J in *Gqirana* is to be preferred. It is in accordance with values of the Constitution (which include *ubuntu*). Those values also include access to justice, equality before the law, and the power of the High Court (and the Constitutional Court) to develop the common law - and to regulate its own process. Besides, s 29 (1) (e) of the Magistrates Court Act 32 of 1944 (read with s 172 (2) of the National Credit Act 34 of 2005), gives exclusive jurisdiction and power to the Magistrate's Court where the matter concerns 'credit agreements', irrespective of the amount involved.

judgment.[922] It is, by nature, a very costly exercise. This is because the procedure demands that certain requirements and jurisdictional facts to be complied with.[923]

Thankfully, the courts seem to be adopting a generous *ubuntu*-induced approach when dealing with cases of this nature.[924] The reason could be that many of the people who are trapped in this web of laws and rules, largely, belong to the previously disadvantaged groups. For instance, in Absa Bank Limited v Mare and Others,[925] the Northern Gauteng High Court held that where there was no proper service on the defendant (or respondent) any court judgment that results therefrom will be null and void and can be rescinded in terms of Rule 42(1) of the Uniform Rules of Court. The reason was that the sheriff had not served the statutory notice properly in terms of 129 (1) of the National Credit Act 34 of 2005. He claimed that he served it by affixing it to the main gate of Ms Mare's property (which she had chosen as her *domicilium citandi et excutandi*). However, Ms Mare told the court that there was no gate on her property. Moreover, she was present on the date that the purported service took place. Also, with regard to the summons, the return of service stated that the sheriff had effected the service by 'affixing it to the grass' on Ms Mare's property.

The court considered all these factors – including the fact that attaching the summons to the grass was not appropriate[926] and declared the purported sale in execution of Ms Mare's property null and void, and ordered the re-registration of the mortgage bond against the property. The court emphasised the point that any property that has been purchased at an auction cannot be vindicated from a *bona*

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922 In terms of Rule 49 of the Magistrates' Court Rules or Rule 41 of the Uniform Rules of Court.

923 For example, the applicant must show that (1) failure to appear in court was not as a result of fault on his or her part; (2) and that he or she has a *bona fide* defence to the plaintiff's (respondent's) claim.

924 For a purposive and contextual approach to the interpretation of procedural statutes which are likely to affect the rights of citizens and denizens, see the judgment of Moseneke DCJ in *Nkata v Firstrand Ltd* [201
6] para 92-100 (and the authorities cited therein). In that case, the Constitutional Court dealt with the manner in which the provisions s129 (4) of the National Credit Act – pertaining to the reinstatement of a consumer's credit agreement after default – are to be interpreted. However cf. the minority judgment by Cameron J, where the learned justice emphasises that fact that the NCA also accords creditors some protection – para 62-8.

925 2021 (2) SA 151 (GP)

926 Para 27.

fide purchaser, unless it can be shown that there was no judgment, or that the judgment on which the sale was based is null and void, either on the basis that the preliminary statutory steps were not properly followed; or that the statutory rules pertaining to the sale and registration of immovable property were not adhered to.[927]

It is argued that both Rule 9 of the Magistrates' Court Rules and Rule 4 of the Uniform Rules of Court should be amended. That step would ensure that the dignity of litigants, particularly defendants or respondents in underdeveloped or rural areas are protected. That objective can be achieved by repealing (deleting) any reference 'attachment to the main gate of the defendant's or respondent's property', or adding another mode of service to the existing ones - and allowing for service of summons by registered mail (as in the case of divorce matters in the Family Courts). The changes suggested will be both in line with the common-law principle of *ubi ius ibi remedium*, and will ensure adequate protection of both the constitutional and contractual rights of denizens. The National State of Disaster has demonstrated to all of humanity that there have always been technological and scientific devices that could be deployed in cases of need.[928] Such devices should now be put to good use in order to serve the interests of justice.[929] Persons on whom court process is to be served should be accorded the respect, dignity and privacy that they deserve. The Return of Service, as rendered by the relevant sheriff, should mention the full appellation and title of the person on whom it was served. The question of service is often raised *in limine*, and the judicial officers and counsel should insist on respect for human rights, even in these innocuous instances.

As indicated above, Parliament has been making laws which are in accordance with the spirit, purport and objects of the Bill of Rights.[930] This development has resulted

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927 Para 14-5 and the authorities cited therein.

928 Is has now become possible, in many places in the world to conduct lectures, or to hold conferences or seminars through the medium of the internet.

929 Depending on the circumstances and nature of the case, court process can now be 'delivered' electronically, and proceedings conducted 'virtually' or online through the medium of the internet. Unfortunately, many parts of South Africa do not have continuous, reliable supply of electricity, much less the requisite technological devices.

930 Such as the Extension of Tenure Act 62 of 1997; Prevention of Illegal Eviction from and

in many appropriate remedies – court process, rules, forms and procedures – being fashioned in accordance with the provisions of the Constitution and the Bill of Rights.[931] Some of these remedies and procedures resulted from the courts insisting on being involved, for instance, in the granting and enforcement of default judgments[932] and emolument (garnishee) orders.[933] Although the applicable court rules and related procedures have not been completely abolished, they are being interpreted in accordance with the spirit, purport and objects of the Bill of Rights – and *ubuntu* that it is a reflection of.[934] For that reason, the courts have begun to

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Unlawful Occupation of Land Act 19 of 1998; Rental Housing Act 50 of 1999; National Credit Act 34 of 2005, and the Consumer Protection Act 68 of 2008. For an exposition of the significance of socio-economic rights and access to justice on the continent of Africa, see Lawson D; Dubin A; Mwambene L, Woldemichael B 'Engendering access to justice for the poorest and most vulnerable in Sub-Saharan Africa' in Lawson, D; Dubin A; Mwambene L (eds) Gender, poverty and access to justice: Implementation in Sub-Saharan Africa (2021) 1-8.

931 For instance, in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 59, the Constitutional Court held that the provisions of section 66(1)(a) of the Magistrate's Court Act were unconstitutional and ordered that the words used therein be read into the section to the effect that a warrant for attachment of immovable property on receipt of a *nulla bona* return in respect of movable property, could only be issued by a 'court after consideration of all relevant circumstances'; see also the minority judgment of Jafta J in *University of Stellenbosch v Minister of Justice* para 74.

932 See Otto & Otto 124-7; see also *African Bank Ltd v Additional Magistrate Myambo* 2010 (6) 298 (GNP). However, see the minority judgment of Jafta J in *University of Stellenbosch v Minister of Justice* para 22-32. The judge was of the view that s 58 of the Magistrates Court Act does not apply to credit agreements entered into in terms of the Credit Agreements Act. This approach is preferable, and it is hoped that a purposive and generous interpretation will be adopted in cases that fall outside of the ambit of the National Credit Act. The reason is that s 58 still allows for the granting of a judgment, by the clerk of the court, on the strength of the consent of a judgment debtor. Even Rule 12 of the Magistrates Court Rules, which regulated the granting of these orders, was amended in order to ensure judicial supervision.

933 In this regard, see the majority judgment of Zondo J in *University of Stellenbosch v Minister of Justice* para 163. The case involved the constitutionality or otherwise of the provisions of s 65 (J) (2) of the Magistrates' Court Act 32 of 1944. Those provisions allowed the clerk of the court, after application by a judgment creditor, to issue an order in terms of which a portion of the salary of a judgment debtor by his or her employer be paid over to the judgment creditor. It should be noted that, in addition to infringing on the individual's right to have his or her legal disputes adjudicated by the courts, the original provisions of s 65 J (2) were also open to abuse by unscrupulous business persons (creditors). As happened in *University of Stellenbosch v Minister of Justice*, the documentation was not a true reflection of what the debtor had agreed to, owing to their lack of education and sophistication. Also, the amounts that were to be deducted from their already low wages were exorbitantly high. The Constitutional Court found the provisions, as they stood, to be invalid and unconstitutional. The majority ordered that some words be deleted, and new ones be read into them. The effect of the exercise was to ensure that there would be judicial intervention and supervision, and that the emolument order against a judgment debtor would be just and equitable – para 90-203.

934 In effect, emolument orders can now only be granted by a court – not a clerk or registrar – if it is satisfied that it is just and equitable to do so. – para 204-10.

insist on judicial oversight[935] before orders of this nature can be enforced. The power and authority of making a determination in this regard now lies with the magistrates and the judges; and not with registrars or clerks of the different courts.[936]

4.4 The role of good faith in determining the validity of contract

As indicated in the previous chapter, good faith was supposed to be the equivalent of the Roman concept of *bona fides*.[937] It is, historically, an off-shoot of *aequitas* (or equity),[938] and was intended to ensure trust and trustworthiness between parties to a particular contractual transaction. It was supposed to ensure that reasonable expectations that had come to be associated with a particular contract should be met, and that either party would do what is right, fair and just in terms of the contract.[939] It was a mechanism that was available to the Roman *praetor* whose

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935 The expression has been defined by the Constitutional Court in *Jaftha* in the following terms:

> Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act – (see para 59).

936 See *University of Stellenbosch v Minister of Justice* para 31-2.

937 See Kaser 15-20; see also Du Plessis H 2-10; see also Louw 82-101.

938 See Kaser 35.

939 See Proverbs 1:3 that people should learn to do 'what is right, fair and just' to one another; see also Kaser 15-20; Du Plessis H 8-17. In other words, there was an additional, implied term which precluded the parties from relying on in enforcing an unreasonable or unconscionable term or condition of the contract. Nor was he or she allowed to exact a price, benefit or advantage, from the other, which was not originally intended. As was demonstrated in *Botha and Another v Rich NO and Another* 201 (4) SA 124 (CC) para 46, that is what *ubuntu* is all about: that the parties to a contract should not pursue their interests so selfishly as to adversely affect the interests of the other party. For a critique of *Botha v Rich NO*, see Bhana & Meekotter 499-510, particularly with regard to the suitability of the *exceptio non adempleti contractus* as against the rights of the seller, as set out in s 27 (3) of the Alienation of Land Act 68 of 1981. The view of the writers, 503-4, is that the Constitutional Court, per Nkabinde J, conflated what is in essence a common law contractual defence with a statutory right. However, it is important to point out that the courts have an obligation to interpret the provisions of any statute, or to develop the common law (or customary law), in accordance with s 39 (2) of the Constitution. Also, as stated by Victor AJ, in *King NO v De Jager* 188-198, when a particular statutory provision implicates a right contained in the Bill of Rights (in this case the right to property, in terms of s 25), then the Constitution should be applied, not directly, but indirectly, in accordance with the principle of subsidiarity, particularly where those provisions are not in conflict with the Constitution.

function it was to apply the laws of that country and dispense justice between citizens themselves and between citizens and foreigners (or between foreigners).[940] In that context, good faith represented what all right-thinking people (or businesspeople) had reasonably come to expect to be done in respect of all contracts.[941] Its importance was not only confined to the existence of consensus in a particular case, but also extended to the preceding negotiations and the performance of the terms of that contract.[942] For that reason, parties were not only under a duty to honour the undertakings they had made under a particular contract, but were also expected to act in particularly conscionable way towards each other (and other people who were likely to be affected by it).[943] In order to ensure good faith (and justice) in the context of contractual relations, the Romans fashioned out a flexible remedy: the *judicium bonae fidei*.[944]

As indicated in chapter 3[945], the South African law of contract and most of its underlying principles, such as good faith, have been contested territory.[946] The place

940 As indicated below, that is what the purpose of *ubuntu* has always been.

941 Kaser 18-9.

942 Kerr 301-2.

943 Such as consumers of the product or invitees to a building that is the subject-matter of the contract.

944 The remedy or action applied to contracts such as sale, lease and employment, partnership and mandate – see Kaser 19.

945 See 3.3 above.

946 In this regard, see Van Hyssteen *et al*. 257; see also Hutchison D 'From bona fides to *ubuntu*: The quest for fairness in the South African law of contract' (2019) *Acta Juridica* 99 101-4; Sharrock 174, 189-190; Kerr 637-66; *Van der Merwe v Meades* 5-8, and *Saayman* 318-23. For the position in the United Kingdom, see Fenwick E https://www.fenwickelliott.com/research-insight/annual-review/2016/principle-good-faith-english-law (Accessed on 17.11.2020); see also https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/good-faith-english-law-uae-civil-code (accessed 18.11.2020); see also https://www.eversheds-sutherland.com/documents/services/construction/ConstructionGoodfaithinEnglishlaw.pdf (Accessed 18.11.2020); *Yam Seng Pte Limited v. International Trade Corporation Limited* [2013] EWHC 111 (QB); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 6*; Petromec Inc v Petroleo Brasileiro SA Petrobras* (No. 3) (2005) EWCA Civ 891, and Article 2 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Com/2011/0635final-2011/0284 (COD). In Continental Europe, there are different codes whose provisions regulate contractual relations between the parties in a particular situation. Concepts such as good faith – and their impact on the parties – are defined in, and regulated by, these codes. In other words, the contract itself has to stipulate what good faith entails and what the rights and duties of the parties are. However, in English law – one of the historical sources of South African law – the position is different. Good faith is a product of precedent (judge-made law) and is merely a factor to be considered amongst others in the interpretation of the particular contract. But, as Fenwick puts it, the courts there seem to be adopting a 'fairly broad and purposive approach

and role of good faith have been all but clear; it has been fluid at best, and opaque at worst.[947] As indicated above, this development was influenced by ideological considerations.[948] The development is similar to the metamorphosis that public policy or *boni mores* underwent in the 1980s.[949] It did not play the ameliorative role that it played under Roman law (as administered by the *praetor*).[950] It did not help in the dispensing of contractual justice and in ensuring social coherence among South Africans.[951] It was merely a factor, amongst many, to be considered in determining the validity of a contract.[952] It was not, in itself, a requirement for that purpose.[953] The judges were concerned more with precedent and certainty[954] than with fairness and justice, thereby creating a vacuum.[955] As a result, the expression 'commercially acceptable consequences' came to mean a result that flowed from

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regarding the circumstances in which good faith obligations might be implied, raising expectations that the courts were open to an overarching duty of good faith being implied more widely'. As already indicated in respect of South Africa, because of the value of *ubuntu* that undergirds the constitution, judges should not have any discretion in this matter. *Ubuntu* should now be the overarching principle which imposes a duty on parties to all contracts to act with due consideration for all the interests of the other party – not just economic ones.

947 See Van Huyssteen et al. 257; see also Kerr 637-66.

948 What Bennett refers to as the *bellum juridicum* – the South African judicial 'Cold War' – see *Equity* 50/351.

949 See *Minister van Polisie v Ewels* SA 1975 (1) 590 (A); see also Corbett MM 'Aspects of the Role Policy in the Evolution of our Common Law' (1987) *SALJ* 52, and Davis D; Chaskalson M & De Waal J in 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Van Wyk D; Dugard J; De Villiers B & Dais D (eds) *Rights and Constitutionalism: The new South African Legal Order* (1993) 1, and *S v Makwanyane* 1995 (3) 391 (CC) para 88. Dikgang Moseneke, the former Deputy Chief Justice of South Africa, made the similar point during a webinar organised by the University of Johannesburg to promote his latest book, *All Rise*, on 19 October 2020: that public policy was determined, not by the general populace of South Africa, but depended essentially on the sentiments of white males 'among whom the common law was common'. For that reason – and because of the politico-legal set-up of the time – they had the privilege to impose their value system on the entire populace and to discard whatever normative African values were in existence.

950 See Kaser 15-19; see also Bennett *African Equity* 50, and Hutchison (2019) *Acta Juridica* 99 101-3.

951 The same thing that *ubuntu* was supposed to do – *Dikoko v Mokhatla* 2006 (6) SA 325 (CC) para 69 that *ubuntu* is more about conciliation and making sure that human relations are not ruptured, but are maintained and sustained.

952 See Bennett *African Equity* 50; see also *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 22, and *Acta Juridica* (2019) 102-3.

953 See Bennett 50; see also *Brisley v Drotsky* para 22, and Hutchison 102-3.

954 See Hutchison *Acta Juridica* (2019) 106 and authorities cited therein.

955 A concern expressed by Jansen JA in *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) 616. As indicated above, this is the vacuum that *ubuntu* (and the accompanying maxims) is intended to fill in.

strict adherence to the rules, however inequitable. It did not matter whether financial ruin resulted from the enforcement of the terms of the contract.

It seems to have been this consideration that led Nkabinde J in *Botha and Another v Rich NO and Others*[956] to say that contracts are cooperative ventures that are intended to produce performances for the benefit of both parties, and they 'cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests'.[957] In reality, this is what the notions of reasonableness, fairness and good faith – as infused with *ubuntu* – should be about: ensuring contractual justice.[958] Otherwise, if unchecked the 'distributive consequences' of the South African law of contract would continue to perpetuate contractual inequality and injustice.[959]

In addition – and contrary to its original Roman law version – good faith was diced up into *uberrimae fidei* and *bona fides* proper for the purposes of the law of contract.[960] While *uberrima fides*[961] applied in respect of those contracts that were deemed to exact a greater standard of honesty,[962] *bona fides* proper existed for the rest of the contracts. This was the position until the Appellate Division in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality*[963] held that, by definition, all contracts involved an element of good faith[964] - and that there were no degrees of good faith.[965] However, the Appellate Division did not cover the whole distance. Joubert JA merely said that the 'the duty to disclose is not common to all types of contract', but only exists in respect of those contracts, such as insurance, where it

956 2014 (4) SA 124 (CC). For a critique of the judgment, see Sharrock 174, 189-90.
957 Para 46.
958 See the minority judgment of Victor AJ in *King v De Jager NO* para 198; see also *Beadica v Oregon Trustees* para 106, 163-68. In other words, the economic power relations can only change if the applicable body of common law is transformed.
959 Ibid. For that reason, the courts should now start 'relying on both [their] constitutional competence to make just and equitable orders, and the common law discretion to avoid undue hardship in making orders …' – see *Beadica v Oregon Trustees* para 169.
960 Particularly where the contract of insurance and partnership were concerned.
961 The concept meant that the particular type of contract was like an agreement between brothers (or siblings); and was based on a higher level of mutual trust and confidence – see *Wagner v Surgeson* 1910 TPD 571-579; see also *Truter v Hancke* 1923 CPD 43 49.
962 Such as partnership agreements, insurance contracts, a contract of agency and one between a director and his company.
963 1985 (1) SA 419 (A).
964 433.
965 433.

is required '*ex lege*'.[966] This could be the situation where the one party involuntarily relies on the other for crucial information in respect of the contract.[967] However, this dictum of the Appellate Division (now the Supreme Court of Appeal) did not help to restore good faith to its full Roman origin – as an integral requirement for validity for all contracts.[968] It would seem as though, under the current constitutional dispensation, good faith has to be infused with the values of *ubuntu* – the founding value of the Constitution.[969] That would ensure that all contracts yield fair, just and equitable consequences for the parties.[970] The Constitutional Court has acknowledged that good faith has always been part of South African law, and that it has helped in regulating contractual relations between individuals.[971] However, unlike its Roman Law version which was all-pervasive, in South Africa good faith is 'not a self-standing rule, but an underlying value that is given expression through existing rules of law'.[972]

Despite *obiter dicta* and literature to the contrary,[973] is not completely clear how and when good faith is likely to transform the law of contract at a practical level.[974] The prevailing judicial and academic ambivalence might lead to legal or commercial certainty being just a hollow concept.[975] Surely that is not a reliable way through which to ensure justice, reasonableness and fairness?[976] It is for that reason that the Constitutional Court has intimated that good faith demands that even pre-contractual negotiations be fair and conscionable.[977] It is during these pre-contractual negotiations and discussions that the unfair and unconscionable conduct

966 433.
967 433. However, cf. *Standard Bank of South Africa Ltd v Prinsloo (Prinsloo Intervening)* 2000 (3) SA 576 (W) 585.
968 Kerr 301-2; Kaser 16-8; 33-6.
969 Van Huyssteen *et al.* 256-8.
970 Van Huyssteen *et al.* 256-8.
971 See *Barkhuizen v Napier* 2007 (5) 323 (CC).
972 Para 80. See also Brisley v Drotsky para 22-5.
973 Para 109-13. In this regard, see also Van Huyssteen et al. 256-7; see also *Combined Construction v Arun* 234-5 and the authorities cited therein. However, cf. Lewis (2013) 93-4.
974 That is why displacing 'freedom of contract' with good faith will not serve that purpose. Instead, it is likely to subvert the South Africa's constitutional project– see *S v Makwanyane* para 224, 308; see also Rautenbach 28-30. However, cf Bernard-Naude 266-8.
975 See Van Huyssteen *et al.* 256-8 see also *Combined Construction v Arum* 234-5.
976 See also Combined Construction v Arum 234-5.
977 See Kerr 301-2; see *Everfresh* para 22-3, 71-4; see also *Barkhuizen v Napier* para 31-6.

takes place.[978] Good faith – in its original form and import – can also be resorted to in order to ensure contractual justice and industrial peace.[979] In other words, it should no longer be superfluous, serving only a confirmatory interpretative role. It must now be one of the constitutive (implied) terms of all contracts. It can now, also, be buttressed by *ubuntu,* which should rightfully take the place of the *exceptio doli generalis* as a catch-all remedy.

As demonstrated above, *ubuntu* is all-encompassing; both good faith and public policy stand to be infused with the ethos of *ubuntu* in order to serve the interests of justice under the current constitutional dispensation. Not only is *ubuntu* an overarching constitutional concept, but it is also the foundational value that undergirds the Constitution itself. It will ensure that all contracts, and their consequences, are 'fair and constitutionally compliant',[980] and that no one is deprived of his or her property or the right to earn a living on the basis of an oppressively unfair or unconscionable contract. The most appropriate African maxim in this context is *o seke wa e nametsa thaba e tlhotsa*.[981] In other words, one of the parties to a contract should not, in pursuit of some financial gain, condemn the other to financial ruin.[982] His or her financial condition should not be made more unbearable than it already is, and he or she should be allowed to work another day, and earn a living and pay his debts.[983] Even though the majority in *Barkhuizen v*

978 See Kerr 301-2; see also *Everfresh* para 71-2.

979 Particularly in instances where individuals are excluded from certain facilities because the admission fee that is demanded is so exorbitant as to be unfair, unconscionable, extortionate - and against public policy – see Klare & Davis 412; however, cf. *Mohamed Leisure Holdings (Pty) Ltd) v Southern Sun Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para 23-6; see also *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 57 where Harms DP, with reference to judgment of Ngcobo J in *Barkhuizen v Napier* para 75, sought to draw a distinction between 'an innocent contract', which does attract invalidity on the basis of inconsistency with the Constitution, and all the other contracts which could rendered unenforceable for being in conflict with the Constitution. However, Harms DP missed a crucial point. Even a so-called 'innocent contract' is amenable to all the Constitution-compliant common law principles such as *lex non cogit ad impossibilia.* The personal circumstances and conditions under which a contract was entered into by the parties has to be evaluated, in order to avert contractual injustice.

980 See *Botha v Rich NO* para 24.

981 In Sotho-Tswana languages, it means 'never place an unreasonably heavy load on an already limping ox/donkey'.

982 See *Botha v Rich NO* para 21-4; see Naude & Lubbe 442-3. However, cf. *Afrox Healthcare* 3*,* 20-24 where, in effect, the Supreme Court of Appeal said that the parties could, by means of an exemption clause, excuse virtually any form of wrongdoing.

983 *Botha Rich NO* 21-4.

Napier acknowledged that good faith *still* plays a limited role in the country's law of contract,[984] the question of whether that is exactly what the Constitution requires was left open.[985] Even the majority in the recent case of *Beadica v Trustees* left this question open, and, as in *Barkhuizen v Napier*,[986] adopted the pre-Constitution in matters of this nature.[987] It is submitted that an *ubuntu*-inspired good faith would not just be a *lex imperfecta* (a dead letter), whose contribution to the protection and promotion of the interests of justice is completely non-existent. In fact, there is fertile constitutional ground for good faith to not just be a 'vague concept', but to become a 'settled' principle of contract.[988]

The Constitution is the supreme law of South Africa; it is the source of *all law* – including the law of contract.[989] As indicated above, it is the *Grundnorm* of the country's normative framework.[990] The law of contract is not a separate, and independent set of rules that can only be deployed by certain people against others who have less economic power or financial muscle than themselves. Ultimately, all contracts, and their constituent terms, derive their validity from the Constitution.[991] The opposite would continue to feed into the identitarian kind of politico-legal set-up that South Africa is trying hard, through the courts, to extricate itself from. The indications are that soon any contract which has been preceded by negotiations that took place under oppressive, unconscionable or unfair conditions (and the resultant terms) will be declared invalid on that basis.[992] This will, in some way, be a resuscitation of the *exceptio doli generalis* which was, after all, abolished on thin and weak authority.[993] As the foundational value, *ubuntu* should, in reality, be the

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984 See para 82. However, cf. *Eerste Nasionale Bank van Suid-Afrika Beperk v Saayman* 302 (SCA) 323-31, and Low 47-52, 82.

985 Para 82.

986 Para 27-30.

987 Cf. para 159-60 of the judgment.

988 See the minority judgment of Froneman J para 156 where he said that the Supreme Court of Appeal has 'uncritically adopted the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy'.

989 S 2 of the Constitution.

990 See 1.5 above.

991 See s 2 of the Constitution.

992 Public policy does not have the same potency and reach as *ubuntu* for this purpose – see Bennett *African Equity* 45.

993 It is for that reason that in *Sasfin (Pty) v Beukes* 1989 (1) SA 1 (A) 8 the Appellate Division

overarching and all-encompassing remedy. It should be short-hand for all those contractual remedies that are intended to prevent injustice and inequity: estoppel, rectification and *exceptio doli generalis*.[994] In that case, good faith – and the resuscitated version of *the exceptio doli* – would not just be an interpretative aid in the context of contracts, but would actually be a constitutive element of all contracts and also be a determinant of validity in all instances.[995] The time seems opportune; all that remains is the urgent stamp of approval from the apex court of the land.[996]

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[997] the question that arose for consideration was whether the common law of contract needed to be developed in accordance with the spirit, purport and objects of the Bill of Rights. The case involved the termination, by Shoprite, of a lease agreement that it had with Everfresh and the subsequent ejectment proceedings. In the High Court, Pietermaritzburg, KwaZulu-Natal, Everfresh argued that Shoprite had no right to terminate the lease agreement, contending that it had exercised the option under that lease to renew it. In the alternative, Everfresh argued that Shoprite was obliged to make a *bona fide* attempt to negotiate the rental for the renewal period.

The High Court rejected this contention and granted an ejectment order, stating that, according to South African law, an option to enter into an agreement on terms still to be agreed upon by the parties is not binding, and the application was dismissed. Everfresh approached the Supreme Court of Appeal, which dismissed the appeal. In the Constitutional Court, Everfresh introduced a constitutional dimension to its case for the first time. It argued that the common law ought to be developed in accordance with the provisions of section 39(2) of the Constitution. This, it contended, would help to determine the validity of a lease concluded subject to

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said that agreements 'which are clearly inimical to interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience … will not be enforced'; see also Kaser 15-9, 33-6, and Hutchison *Acta Juridica* (2019) 107-9.

994 See *Eerste Nasionale Bank v Saayman* 318-31. However, cf. *Friedman v Standard Bank of SA Ltd* 1999 (3) SA 928 (SCA) para 25.

995 However, cf. *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 26 and *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) 514 (A) 536-7.

996 See Hutchison *Acta Juridica* (2019) 123-4; see also *Beadica v Omega Trustees* para 128-43 for Froneman J's dissenting judgment.

997 2012 (1) SA 256 (CC).

'reasonable rental'. Yacoob J, in his minority judgment, accepted that Everfresh was raising a genuine constitutional matter that required consideration by the Constitutional Court. He said that the issue of good faith in contracts 'touches the lives of many ordinary people in our country',[998] and that the values embodied in *ubuntu* were crucial 'in determining the spirit, purport and objects of the Constitution'.[999] He also said that these values applied to juristic persons as well.[1000] The Constitutional Court justice made these remarks after lamenting the weaknesses and inadequacies of Roman-Dutch Law.[1001] Yacoob J should not be understood to be saying that the Roman Law and Roman-Dutch Law were in themselves inadequate. He was referring to the legislative, distorted, and impure version of it. It is for that reason that the development of the common law in terms of section 39 includes extracting from the country's store of legal knowledge all the legal gems that would help to put the country's constitutional well-being in good stead.[1002]

However, Moseneke DCJ, in the main judgment, bemoaned the fact that Everfresh's case had changed and mutated with every forum it went to, and that in certain instances it had changed even in the same forum. He pointed out that Everfresh had not raised any constitutional matter in the High Court or the Supreme Court of Appeal, and that it raised such a matter for the first time only in the Constitutional Court. He stated that the Court could not just develop the common law on this point without prejudicing Shoprite.[1003] He then proceeded to set out the factors that he had considered before coming to his conclusion. He pointed out this 'was a commercial dispute of considerable monetary value';[1004] that Everfresh itself had

998 Para 22.

999 Para 23.

1000 Para 24. This is because these entities are themselves managed and controlled by human beings.

1001 See Corbett 66-9. However, South Africa was, then, a country characterised by racial segregation and economic exclusion. The conception and application of public policy in the resolution of legal disputes, was coloured by racial prejudice. As indicated in chapters 2 and 3, there was also a thick overlay of legislation which was influenced by the political ideology of the time.

1002 This statement applies with equal force to *ubuntu*, and the language and values that it is founded on.

1003 Para 50. His view was that 'it would not be in the interests of justice for a litigant to adjust its case as it goes along to the prejudice of an opposing litigant'.

1004 Para 66.

not 'pleaded any dire consequences, commercial or otherwise, that would ensue if the lease were not renewed';[1005] or that it had no alternative premises on which to continue its business operations.[1006] Nor did Everfresh demonstrate any vulnerability which might have been engendered by any unequal bargaining power between the parties.[1007] He also said that there was nothing to suggest that Everfresh lacked proper legal representation, or that it was given wrong advice.[1008] However, the Deputy Chief Justice introduced a rider, and said that if the case had been properly pleaded, the Constitutional Court would definitely have infused the applicable common law with the values of *ubuntu*, which are an 'integral part of our constitutional compact'.[1009] In other words, the common law maxim *ubi ius ibi remedium*[1010] would be considered to mean that whatever right is created by the common law should, if needs be, be developed and protected in accordance with the spirit of the Bill of Rights.[1011] The Deputy Chief Justice then proceeded to state that where there is a contractual obligation on the parties to negotiate in good faith, 'it would be hardly imaginable that our constitutional values would not require that the negotiations be done reasonably with the view to reaching an agreement in good faith'.[1012] The clear inference to be drawn is that *ubuntu* is not just a 'free-floating' concept but an integral part of South Africa's law of contract. Nevertheless, counsel will always be required to make out a proper case for it to find appropriate application.

It is for this reason that one receives the majority judgment in *Beadica v Oregon Trustees* with some trepidation. With respect, Theron J does not seem to have given the factual complex due consideration.[1013] Had her Ladyship done so, she would have acknowledged that the social and political history of the country has tainted

1005 Para 66.
1006 Para 66.
1007 Para 66.
1008 Para 66.
1009 Para 72; see also *Beadica v Oregon Trustees* para 156-60.
1010 The Latin maxim means that where there is a right, there is (or should be) a remedy.
1011 See Van Hyssteen *et al.* 370-1; see also sections 9, 10, 25, 26, 36 and 39 (2) of the Constitution, in accordance with which all South African contracts should be interpreted.
1012 Para 72.
1013 See *Barkhuizen v Napier* 104; 133-6.

the morality of the South African law of contract,[1014] and that *ubuntu* is now an 'established value'[1015] which makes it a 'necessity to do simple justices between individuals'.[1016] The learned justice would also have considered the fact that the applicants were not conversant with the intricacies and complexities of the law. She would not have given undue primacy to technical, procedural niceties and complexities over constitutional, substantive matters. She would have been able to appreciate the fact that the applicants were just emerging entrepreneurs, who belong to a previously disadvantaged group.[1017] While the termination of the contract in the circumstances meant a great financial loss to them, the respondents stood to lose virtually nothing.[1018] After all, the applicants, and their communities, had been excluded from such economic opportunities for a long time. Theron J's judgment is just a rehash of the pre-Constitution era – without noticing that the constitutional and jurisprudential ground has shifted;[1019] the judgment is just content to relive the *bellum juridicum* that South Africa can ill afford.[1020]

Despite what Theron J said in *Beadica v Oregon Trustees*,[1021] the infusion of *ubuntu* is intended to ensure that equity and fairness – and *ubuntu* itself – do not just remain 'free-floating'[1022] concepts but become a real and substantive part of any contract in South Africa.[1023] This is more significant because South African Courts have tended to give more prominence to the common law[1024] and have preferred

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1014 See para 110, where Froneman J says that the manner in which the law of contract of any country is perceived and developed is influenced by 'its social, political and economic history'. In the case of South Africa, racial segregation and economic exclusion have always loomed large.

1015 Para 156-7.

1016 Para 201.

1017 Para 197.

1018 Para 202.

1019 Para 156-7.

1020 See *Barkhuizen v Napier* para 156-7; see also Brand FDJ 'The Role of Good Faith Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) *SALJ* 71-2.

1021 Para 58-9. In fact, her Ladyship was at pains to state whether the 'proportionality principle' is part of South Africa's law of contract which, itself, is in dire need of what Bhana and Meekotter call 'communitarian construction' of constitutional principles as they relate to that branch of the law.

1022 On the approach of the courts, particularly the Supreme Court of Appeal, in this regard see Van Huyssteen *et al*. 272-3.

1023 See Bhana & Meekotter 510. This would endear the law of contract to a more communitarian approach, as required by *ubuntu*.

1024 In relation to fairness in contracts, Bhana and Meekotter say that the concept 'must be

to ignore the provisions of the Constitution, particularly where the statutory formalities of contracts are concerned.[1025] In truth, this is a pre-Constitution approach and deviates from the court's constitutional duty to infuse into the law of contract the spirit, purport and objects of the Bill of Right.[1026] This result can still be achieved by invoking the provisions of section 25 of the Constitution and applying the principle of subsidiarity or avoidance only to comply with all the constitutional injunctions.[1027] After all, many contracts involve a transfer of a portion of the estate of the one party to the estate of the other.[1028] While some judges are opposed to the introduction of new concepts into the country's law of contract,[1029] there are those who are calling for a complete transformation of this branch of the law.[1030]

There is yet another group whose views on the matter are somewhat ambivalent.[1031] Brand[1032] represents the last-mentioned group. First, he seems to reject the influence brought into the common law by those lawyers and judges who were trained in England. Secondly, he insists that good faith, reasonableness and fairness are mere underlying, legitimating rules, but that they should not be regarded as 'active' or 'creative'.[1033] He also agreed with Cameron JA in *Drotsky,*[1034] despite

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grounded in policy considerations, constitutional values and/or enumerated rights. The authors also say that 'it must operate *through* (as opposed to overriding) established legal rules, standards and mechanisms of contract law' – 508. However, it is important to remember that *ubuntu* is the foundational value of the Constitution. Put otherwise, the Constitution is the embodiment of *ubuntu*; injustice inherent in this branch of South African law can only be eradicated by applying the Constitution directly. Moreover, most of the pre-Constitutional statutory provisions have not been subjected to rigorous analysis. This means that most of these enactments may, in all probability, be *prima facie* unconstitutional - Bhana & Meekotter 500-1.

1025 See Bhana & Meekotter 499-501.

1026 See Bhana & Meekotter 499-501.

1027 See Bhana & Meekotter 500-1.

1028 Obviously, the contract of employment involves the 'sale' of one's labour to an employer – Van Niekerk A & Smit N *Law@Work* (2014) 85. For more on this topic see Ch 5 below.

1029 See *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*2018 (2) SA 314 (SCA) para 24, 30; see also *Beadica v Oregon Trustees* (SCA) para 39 Lewis C 'The uneven journey to certainty in contract' (2013) *THRHR* 80 93-94; and Wallis M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 546-551. However, see *Beadica v Oregon Trustees* para 110, where Froneman J warns against turning a blind eye to the country's past socio-economic disparities and the residual effects that still persist to this day.

1030 In this regard, see Sachs J in *Barkhuizen v Napier* para 131, 136-42.

1031 See Brand 86.

1032 A former senior counsel who is now a judge of the Supreme Court of Appeal.

1033 See *York Timbers Limited* para 27; see also *Potgieter v Potgieter* para 32-4.

1034 In para 91-3, with regard to the role of dignity and freedom in determining the validity and

changing his mind later.[1035] Thirdly, the writer says that German and Dutch authorities on this point would not be any more helpful. The irony, however, is that the law of those jurisdictions, on this point, has largely been influenced by Roman Law. This *corpus* of law, as indicated above, would certainly have assisted in shaping the South African law of contract on this point. He also seems to agree with what Moseneke DCJ, said in *Everfresh*: that where *ubuntu*, if properly included in the pleadings, it will certainly be considered in adjudicating a particular matter.[1036]

Brand opines that had counsel in *Afrox Healthcare Services v Strydom*[1037] averred and argued his client's case, not on the unreasonableness or otherwise of the exemption clause in question, but on the death or injury that the clause sought to justify, the outcome would have been different.[1038] As Naude and Lubbe put it, the *essentialia-naturalia* model was the 'ultimate theoretical foundation' for the SCA's approach in that case;[1039] and that it allows the more powerful of the parties to limit the *naturalia* of a particular contract beyond recognition, and to the detriment of the weaker one.[1040] While the learned authors are not necessarily averse to exclusion clauses, their view is that sight should not be lost of the different types of contract, and the various policy considerations that apply to them.[1041] It must, also, be pointed out that cases such as *Afrox Healthcare* are clamouring for the infusion of *ubuntu* into the law of contract.[1042] The reason is not hard to find: this branch of the law is

enforceability of contracts. He now holds the view that these two concepts are too vague for this purpose.

1035 See *South African Timber Co Ltd v York Timber Ltd* 2005 (3) SA 323 (SCA) para 22-32 where he, in his capacity as a judge of appeal, held that the notions of fairness, reasonableness and good faith did not impose a duty on the parties to a contract to act in a particular way. The notions, he held, was only relevant for the purposes of interpreting the contract. However, cf. Sharrock 174, 189-90.

1036 Para 72.

1037 2002 (6) SA 29 (SCA) 40-1 where the learned judge of appeal said that judges had no discretion but to apply the recognised and already-established principles of contract.

1038 However, it is important to note that the purported exclusion of any statutory, public-benefit protection would be against public policy – if not completely unlawful – see s 48 and 51 of the Consumer Protection Act 68 of 2008, and Regulations 44 (2) and 44 (3) thereunder.

1039 See Naude & Lubbe 443-4.

1040 Naude & Lubbe 454.

1041 As in the case of commercial contracts, and those in terms of which medical services are rendered. In *casu*, the authors say, the commercial interests of Afrox were given more weight, at the expense of those of the patient, Strydom.

1042 See Van Huyssteen *et al.* 257 where the authors acknowledge that *ubuntu* is the foundational value of the Constitution but that it is not a ground on which the parties can rely on for relief should they be aggrieved.

in great need of fundamental transformation.[1043] *Ubuntu* should no longer be treated as a tangential value which is merely intended for the development of public policy.[1044] It should now be a constitutive – not just implied or tacit - term for all contracts in South Africa.[1045] In that way, all exclusion clauses whose effect it is to render nugatory the rights - and correlative duties - of the parties, would be null and void.[1046] Brand encourages judges to engage in judicial activism – cautiously – in order to develop the law for a new.[1047]

It is now time that *ubuntu*, as the new juridical reality, is crafted into the law of contract. That would help to fill up the vacuum that was left open by the abolition of the *exceptio doli,* a substantive defence based on the sense of justice of the

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1043 See *Beadica v Omega Trustees* 207-8. However, that begs the question: What good is the Constitution? It also strengthens the argument that Nkabinde J's *ratio*, in *Botha v Rich NO* para 40, 43, be not restricted to the facts of that case but extend to all similar contractual circumstances. This is because one of the objectives of the Constitution is that parties be treated with equal worth and concern; they should not, through the terms of the contract, be allowed to pursue their interests to the detriment of the other.

1044 See Barkhuizen v Napier 28-30.

1045 See Beadica v Oregon Trustees para 206-9.

1046 Beadica v Omega Trustees para 208-9.

1047 See Liberty Group Ltd and Others v Mall Space Management CC [2019] ZASCA 142. This involves a dispute with regard to the termination of a verbal contract of agency in terms of which the Malls Space was given a mandate by the Liberty Life Group to market and advertise space for Liberty Life and other entities, and to conduct marketing and promotional events at certain chosen malls. Liberty Life's contention was they were not getting good returns on their investment in this regard, particularly with regard to the Eastgate Mall in the east of Johannesburg. The contract of mandate was terminated, and Malls Space Management applied for an interdict in order prevent Liberty Life and related entities from terminating the contract, and directing them to grant Malls Space Management space to conduct promotional events and exhibitions, to keep the contract intact for six months after the order sought had been granted, and preventing an entity known as Excellerate from engaging in unlawful competition by marketing, promoting and coordinating promotional events and exhibitions. Counsel for Malls Space Management argued that it was against *ubuntu* and fairness to terminate the contract on five days' notice. Counsel for Liberty Life argued that reliance on ubuntu was just a distraction, and that that contention was unsound, as it was not reflective of the principles of the law of contract. The court accepted counsel for Mall Space Management's contention, and granted the order. Liberty Life and the other entities appealed against the decision. This is one case where counsel should have clearly made out a case for *ubuntu*. For instance, he could have relied on Dikoko (para 68) and *PE Municipality* (para 35-7) perhaps, and indicated that ubuntu demands the maintenance, not rupturing, of relations, including economic ones. Because the contract in dispute was not written, there was ample room for counsel for Malls Space to manoeuvre and invite the Supreme Court of Appeal to develop the common law in a manner that is inspired by *ubuntu*. However, Zondi JA's judgment can be criticised for creating the impression that there was no contractual term in dispute and that there was just a termination of the mandate of Malls Space. By definition, a mandate is created by means of a contract of agency, which is amenable to incorporation of implied terms and tacit terms (which include trade customs).

community, on very weak authority.[1048] The Supreme Court of Appeal no longer has the final word on matters such as this one.[1049] After all, there is now one legal system, with the Constitution as the supreme law of the land. For that reason, any judgment – like the minority judgment of Olivier JA in *Eerste Nasional Bank van Suidelike Afrika Beperk v Saayman*[1050] – which accords with the values enshrined in the Constitution – has to be given due consideration in this regard.[1051] Rigid insistence on *stare decisis* would defeat the purpose of ensuring fairness and contractual justice in cases such as this.[1052] Nor should the import of the judgment of Nkabinde J, in *Botha v Rich NO*, be misconstrued - and its precedential impact unduly limited - to the facts of that case.[1053] Moreover, pre-Constitution precedent should be approached with caution. This, unfortunately, is the doctrinal (and practical) pitfall that the Constitutional Court keeps falling into.[1054] Theron J did not

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1048 See Brand 74-5; see also *Bank of Lisbon* 617. However, cf. Kerr 637-51, and Froneman J's minority judgment in *Beadica v Oregon Trustees* para 127-43.

1049 For a concise description of the relationship between the High Court, Supreme Court of Appeal and the Constitutional Court, see *Mahlangu and Another v Minister of Labour* para 13-7 and the authorities cited therein. There are matters in respect of which the Constitutional Court has final and supervisory jurisdiction. For that reason, its judgments, on the nature, content and effect of *ubuntu* on the law of contract, cannot just be ignored anymore.

1050 1997 (4) SA 302 (SCA) 321-31.

1051 See Brand 76 and the authorities cited therein.

1052 See Van Huyssteen *et al.* 272-3.

1053 See *Beadica v Oregon Trustees* 202, 228. The facts in *Botha v Rich NO* are that Ms Botha, the applicant, bought immovable property from the respondents, the Trust, through a close corporation, of which she was the sole member, for R240,000. The purchase price was payable in monthly instalments of R4,000. Ms Botha was required to insure the property against all possible risks and would pay the premiums in respect thereof; Ms Botha would not be entitled to lease the property without the Trustees' prior written permission. At some point, Ms Botha defaulted on her payments. The Trustees instituted proceedings against Ms Botha and judgment was granted in their favour. It is important to note that she had already paid in excess of half of the purchase price. However, before her assets and tools of the trade could be attached, she applied for an interdict to prevent that. In the interim, she applied for an order transferring the property to herself.

1054 As demonstrated by the majority judgment, per Ngcobo, in *Barkhuizen v Napier* para 28-36, and *King NO v De Jager* para 37-42. In the latter case, Mhlantla said:

> Since time immemorial, courts have considered the common law rule that clauses that are contrary to public policy are unlawful and are unenforceable. Our law reports are teeming with examples of what is against public policy and therefore unenforceable. These matters are not limited to unfair discriminatory issues. It would be remiss of us to take a detour and neglect engaging with this body of jurisprudence and not attempt to bring it in line with a constitutionally infused common law approach. In my view, there is no bar to applying the common law – para 41.

consider the 'disproportionate unfairness' between the conduct of the respondents against that of the applicants.[1055] She also did not consider the entire fact complex closely, including the legislation on broad-based black economic empowerment. In other words, that piece of legislation ought to have been interpreted in accordance with the spirit, purport and object of the Constitution.[1056] This would have ensured contractual fairness and justice. The learned justice intimated that a party cannot escape the consequences of a contract with another merely because its termination would be disproportionate to the consequences of the breach.[1057] However, this kind of reasoning is no longer sustainable.[1058] As stated by Froneman J, in the minority judgment, equity and justice are being sacrificed at the altar of commercial certainty.[1059] There are, in reality, no objective rules in this context.[1060] What is often relied on by the courts, ostensibly to shut out 'abstract concepts' such as reasonableness, justice, equity and good faith, is in itself, not a set of rules of law.[1061]

Strictly speaking, the law of contract is, itself, a set of abstract standards that depend largely on the ideology and idiosyncrasies of the judges.[1062] They must also 'suffer

It did not matter that the justice had two powerful options that the case was clamouring for: to directly apply the provisions of the Constitution, or those of the Promotion of Equality and Elimination of Unfair Discrimination Act 4 of 2000 ('the Equality Act').

1055 See *Beadica v Oregon Trustees* para 202, 228.

1056 Section 39 (2) of the Constitution.

1057 Para 12, 59.

1058 See *Barkhuizen v Napier* 104 and 168-9.

1059 Para 160-9, 197-8; see also Klare & Davis 404-10.

1060 Para 160; see also *Moseneke All Rise* 5-16. As indicated above, 'reasonableness' and 'public policy' have always been determined from the perspective and world-view of white male judges.

1061 Para 160. In this regard, see Corbett MM 'Aspects of the Role Policy in the Evolution of our Common Law' (1987) *SALJ* 52 62 where the learned former chief justice of South Africa said that 'since public policy reflects the mores and fundamental assumption of the community, it stands to reason that the perceptions, of what is or is not contrary to public policy may vary from era to era'.

1062 See Corbett 64 where he said that the courts may introduce 'new categories of public policy or abandoned or restrict old ones'; see also Margo C 'Reflections on Some Aspects of Judicial Function' in Kahn E (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) Johannesburg 282 284 where the former South, Africa judge says that 'the background and personality of the judges [does] from time to time influence developments [in the law]'. Despite South African judges being aware, at the time, that public policy was not universally uniform in the country, they did not do enough to understand what lay on the other side of the racial divide. The residual injustices of that approach still continue to bedevil the development of common law, in particular – see Corbett 68.

the same vice' as the abstract concepts.[1063] The continued characterisation of these rules as 'not self-standing' helps to perpetuate residual[1064] contractual and economic injustice.[1065] After all, these 'abstract' principles are, in effect, subsets of the all-encompassing phenomenon of *ubuntu* which is intended to ensure a human, legal and economic system that benefits all the citizens of the country.

It is for that reason that Froneman J reminds us that the morality of the South African law of contract has been tainted by the country's history of social engineering and economic exclusion.[1066] In his view, there is a great deal of overlap between good faith and public policy.[1067] Fairness and reasonableness are the point of contact between these concepts.[1068] The divergence between them lies in the purpose to which they are to be put.[1069] While good faith is intended to help in developing or modifying a legal rule, public policy is aimed at invalidating the purported enforcement of a contractual term. It is also for this reason that Victor AJ, in the course of her judgment, stated that the matter called for what she referred to as 'transformative adjudication' which is 'context-sensitive' and would lead to a constitutionally transformative result'.[1070] In her view, putting the position of the applicants in proper context would lead to a fair and just outcome.[1071] Unfortunately, Victor AJ, also, does not provide the practical mechanics which would ensure such an outcome.

There has been some criticism of the majority judgment in *Everfresh*.[1072] Mupangavanhu, for instance, is of the view that the Constitutional Court missed an opportunity to develop the common law of contract, particularly the concept of good

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1063 Para 160.

1064 The National Credit Act and Consumer Protection Act have begun to address some of these concerns.

1065 See *Beadica v Oregon Trustees* para 156 where the learned justice laments the old, rigid approach of the courts, in this area of the law.

1066 Para 110.

1067 Para 189.

1068 Para 189.

1069 Para 191.

1070 Para 206.

1071 Para 228.

1072 See Mupangavanhu B 'Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* [2011]' (2013) *Speculum Juris* 149 164. He seems to be in agreement with Yacoob J's minority judgment.

faith,[1073] which has been in dire need of development since the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa Ltd v Ornelas*.[1074] This, he says, would have helped to fill in the gaps and ensure contractual justice in this area of the law.[1075] He also says that failure on the part of the courts to recognise the existence of a duty to negotiate, in cases where there is no deadlock-breaking mechanism, seems to work in favour of recalcitrant parties who can easily argue that 'a promise to negotiate in good faith is too illusory or too vague to enforce'.[1076] Mupangavanhu cannot be faulted: the common law of contract on this point needs to be developed. This is because the *exceptio doli generalis*, which provided a remedy against the enforcement of unfair contracts, or the enforcement of contracts entered into under unfair circumstances, is no longer available to protect vulnerable parties.[1077] Good faith itself, as a concept, has been in need of a new constitutional sheen and ridding itself of the ideological and racial taint of yesteryear.[1078] It would also ensure more legal impetus and give force to good faith.[1079] As Yacoob J put it, the issue of good faith in contract 'touches the lives of many ordinary people in our country'.[1080] It is also true that the transformation of the common law of contract is 'a matter of considerable public and constitutional importance';[1081] and that it would need to be infused with 'the values embraced by an appropriate appreciation of *ubuntu*'.[1082]

1073 149.

1074 1988 (3) SA 580 (A) at 607, where Joubert JA said: 'All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as superfluous, defunct anachronism. *Requiescat in pace*.' As indicated above, this conclusion was based on thin or weak authority. For an analysis of the historical developments in this regard, see Kerr 637-66; see also *Meades* 5-8, and *Saayman* 318-323.

1075 149. He laments the court's 'fixation on avoiding prejudice to Shoprite without balancing this with an adequate assessment of potential contractual injustice to Everfresh'.

1076 158.

1077 Bradfield 14–5. It is also important to note that not every consumer enjoys the kind of protection envisaged in the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. This, therefore, calls for an *ubuntu*-inspired development of the concept of good faith to the point of resuscitating the *exceptio doli generalis* in some form or other.

1078 See Bennett *African Equity* 45.

1079 See Van Hyssteen et al. 370-1.

1080 See Yacoob J's minority judgment in *Everfresh* para 22.

1081 Para 22-3.

1082 See para 23; see also *Everfresh* para 69-72. For an illuminating perspective on this point, see Moseneke D 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3; see also *Violetshelf Investment (Pty) Ltd v Chetty (Unreported:24858/18*[Gauteng, Johannesburg Local Division) para 8-9, where the court

However, Mupangavanhu – like Yacoob J – seems to ignore the procedural aspects and factors already mentioned above, which constrained Moseneke DCJ from 'tackling the wide-ranging intricacies related to renewal clauses in leases'.[1083] Another factor that Moseneke DCJ considered is that Everfresh had, ironically, benefited from prolonged litigation, which ensured its continued occupation and use of the leased premises.[1084] In *Roazar CC v Falls Supermarket CC*,[1085] the Supreme Court of Appeal sought to place a restrictive rider to the Moseneke DCJ's dictum in *Everfresh* on the relevance and purpose of *ubuntu*.[1086] Tshiqi JA said that 'it is difficult to conceive how a court, in a purely business transaction, can rely on "*ubuntu*" to import a term that was not intended by the parties, to deny the other party the right to rely on the terms of the contract to terminate it'. Needless to say, the mere mention of *ubuntu* by one of the parties should not tilt the scales of justice in their favour. A clear case would have to be made out, based on the facts and applicable law. Regrettably, the judge of appeal's rigid approach is indicative of the continued attempt to insulate private law – of which the law of contract is part – from judicial scrutiny, and the positive impact of *ubuntu* and its inherent flexibility.[1087] It is for that reason, it would seem, that Tshiqi JA was not persuaded by counsel's invitation to develop the common law on this point.[1088] Counsel for Falls Supermarket CC sought to demonstrate that good faith does permit negotiation to take place between the parties, even where there is no deadlock-breaking mechanism provided for in the contract.[1089] In *Roazar v Falls Supermarket CC* the dispute turned on whether the one-month period referred to in the lease agreement

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adopted the same line of reasoning. Nor is Kroeze's view, in this regard, correct: that it is inappropriate to apply *ubuntu* where the common law is applicable – Kroeze IJ 'Once More *ubuntu* again: A Reply to Radebe and Phooko (2020) *PER/PELJ* 1 10 (fn 61). As indicated above, *ubuntu*, as a value, is part and parcel of the Constitution; and the common law is subordinate to it. Therefore, the common law on contract should be perceived through the lens of the Constitution, and all its underlying value. As indicated in 1.4 above, the reason is that African maxims are not to be treated the same way as the common law maxims, which cannot apply in the face of a clear statutory injunction. African maxims are an expression of *ubuntu* which, itself, is the foundational value of the Constitution.

1083 Para 64.

1084 Para 64.

1085 [2017] ZASCA 166.

1086 Para 69-72.

1087 Para 23-4.

1088 Para 15-6, 19-22.

1089 Para 15-6.

between the parties was intended to be utilised by Falls Supermarket CC to indicate the intention to renew the agreement, or for the purposes of negotiating the terms of the renewed agreement.

As in *Everfresh*, the case of *Makate v Vodacom (Pty) Ltd*[1090] involved a *pactum de contrahendo* – an agreement to enter into a contract at a future date. Makate, the applicant, was an employee of the respondent, Vodacom. He averred that, while in the employ of Vodacom, he developed an idea which was used to create a product now known as 'Please call me'. The product enables a subscriber who has no money to make a call to send a message to another subscriber, asking him or her to call. In its practical, implemented form, the idea generated a great deal of revenue for Vodacom. Makate averred that he had discussed the idea with his mentor, Lazarus Muchenje, who, in turn, referred him to one Grissler, the Director of Product Development and Management. In the course of the discussions with Grissler, Makate indicated that he wanted to get 15 per cent of the revenue. However, the parties agreed that the negotiations on the exact amount be deferred to a later date and that in the event of a dispute, the matter be referred to the Chief Executive Officer, Allan Nott-Craig. Makate never received his share of the revenue. Unbeknown to Makate, Grissler and Nott-Craig suddenly changed the narrative, and took all the credit for the development of the product.

Makate then approached the Southern Gauteng High Court, Johannesburg for an order directing Vodacom to honour its obligation under the parties' verbal agreement. In the alternative, he asked that the court develop 'the common law of contract and infuse it with constitutional values such as *ubuntu* and good faith'. Vodacom responded by contending that Grissler had no authority, actual or ostensible, to bind it in this regard. It also argued that, because Makate was an employee of Vodacom at the time when the product was conceived, the product belonged to Vodacom, and that he was not entitled to any compensation at all. Vodacom also raised a special plea, contending that Makate's claim had prescribed. The High Court dismissed Makate's claim. He then lodged an appeal with the

[1090] 2016 (4) SA 121 (CC).

Supreme Court of Appeals. The Supreme Court of Appeals dismissed his appeal, and confirmed the judgment of the High Court. Makate then approached the Constitutional Court, where he took the matter a step further. He asked the court to invoke the provisions of section 39(2) of the Constitution when interpreting the Prescription Act,[1091] saying that, as it stands, the Act is against *ubuntu* and limits his right to access the courts.

On the question of whether *pacta de contrahendo* were binding on the parties, Jafta J stated that an agreement 'to negotiate in good faith in the future, is enforceable in our law, if the agreement provides for a deadlock-breaking mechanism, in case the parties fail to reach consensus'.[1092] However, Jafta was at pains to explain whether there was any obligation to negotiate in good faith even in instances where there was no deadlock-breaking mechanism, saying that this 'remains a grey area of our law'.[1093] This, it would seem, is because the courts have not been unanimous on this point. For instance, in *Premier of the Free State Provincial Government v Firechem (Pty) Ltd*,[1094] the court said that such an agreement was enforceable because of 'the absolute discretion vested with the parties to agree or to disagree'.[1095]

However, in *Southernport Sawmills v Transnet Ltd*,[1096] the court came to a different conclusion.[1097] As stated above, the Constitutional Court said, in *Everfres*h, that where there is 'a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values (of *ubuntu*) would not require that negotiation be done with the view to reaching an agreement in good faith'.[1098] This approach is preferable. It is not premised on any arbitrary consideration. It is flexible enough to ensure fairness, and to prevent 'contractual injustice'[1099] between the parties. The court, seemingly influenced by the need for conciliation – and to nurture

1091 Act 68 of 1969.
1092 Para 97.
1093 Para 100.
1094 2000 (4) SA 413 (SCA).
1095 Para 35.
1096 2005 (2) SA 202 (SCA).
1097 Para 8.
1098 Para 72.
1099 Mupangavanhu 171.

relationships – referred the parties back to the deadlock-breaking mechanism that they, themselves, had agreed upon. It is important to note that *ubuntu* is about equity and fairness of the contract in its purport and effect.[1100] The courts are called upon to ensure that, whilst the one party to the contract receives what is due to him or her, the other party should not be driven into financial ruin.[1101] Mr Makate is definitely entitled to some compensation for the product of his intellect. However, the capacity of Vodacom to continue playing its role, both as an employer and significant player in the growth of the economy of South Africa, should not be stunted or ruptured.[1102] It is just a pity that the majority left the question of prescription and its relationship with *ubuntu*, open. Mr Makate was intent, not on enforcing a 'debt' as defined in section 10 (1) of the Prescription Act, but compelling Vodacom to negotiate with him in good faith.[1103] As indicated above, there is no such a thing as prescription in customary law (which invariably encompasses *ubuntu*).[1104]

4.5 Conclusion

The South African law of contract has taken a long time to change in accordance with the values of the Constitution. It is clear that this is because the law of contract lies at the core of economic power, which is far greater than political power. For that reason, it will take much longer for judicial opinion to shift. The courts, particularly the Supreme Court of Appeal, supported by some academics, have been slow in infusing the law of contract with the values of *ubuntu*, which is the only legitimate source of all the country's laws. Even among the Constitutional Court justices themselves, there are discordant views: some follow the conservative route of relying on the Constitution only in relation to what public policy is at a particular time. Also, public policy seems, still, to be under the shackles of 'freedom of contract'

1100 See *Botha v Rich NO* para 40-1.

1101 See *Dikoko v Mokhatla* para 68. Even though this case dealt with delictual (tortious) liability, the sentiment expressed therein is also relevant in this context.

1102 See *Dikoko v Mokhatla* para 68-9.

1103 Act 68 of 1969. For a perspective on the relevance of prescription in customary law, and its impact on choice-of-law rules, see *Maisela v Kgoloane* 2002 (2) 370 (T) 276-7.

1104 The appropriate maxim is '*molato ha o bole*' (in Sesotho); or '*icala aliboll*' (in isiZulu). The significance of both maxims is that, in customary law, there is no prescriptive period after the lapse of which a debt is extinguished.

There are also those agitating for all the provisions of the Constitution to be brought directly to bear on all contracts that are concluded between private citizens. As stated in *AB v Pridwin*, section 8(2) and (3) do not prevent the application of any of the provisions of the Constitution. The difference only lies in the mechanics of how each of them should be applied.

However, there is still a missing link. Despite the context-sensitive transformative adjudication displayed in *Everfresh* and AB v *Pridwin*, contractual justice and fairness seem to be a distant dream.[1105] The courts have not, as yet, explained what role *ubuntu* is supposed to play in giving content and meaning to the terms of a particular contract; or how the accompanying procedures and processes are to be fashioned out with the view to providing practical meaning and effect to the terms. For that reason, it is suggested that *ubuntu* be treated as a non derogable, 'general implied term' for all common law contracts in the country. And, if the term is not specifically pleaded in the court papers, then, the courts should raise it themselves and ask counsel to address them on that point. Conciliation, communitarianism and communality should play an important role in ensuring contractual justice.

As demonstrated in chapter 5, this development could – and should - be extended, as far as possible, to the 'unregulated' work spaces.-. That development would ensure that inter-personal relations (as between employers and workers) are founded on *ubuntu*; and are fostered and nurtured – and not acrimoniously destroyed.

[1105] See *King v De Jager* para 202-10.

CHAPTER 5

THE PRACTICAL EFFECT OF *UBUNTU* ON THE SOUTH AFRICAN COMMON LAW CONTRACT OF EMPLOYMENT

5.1 Introduction

In the previous chapter, it was demonstrated how *ubuntu* can be relied on to transform the South African common law of contract. The outcome of that development, it was posited, would be to ensure that there is contractual justice and industrial peace in the workplace. It was also indicated above that the primary aim of this work is to demonstrate that *ubuntu*, in addition to its communitarian appeal, is also a concept laden with values of empathy, sympathy, fairness, compassion and justice. It was further suggested that ensuring contractual justice should not be limited to looking at the terms (and conditions) of a contract, but should also consider whether these consequences are equitable and engender mutual respect, social co-existence and cohesion.[1106] The view that was expressed is that the 'proportionality principle', as propounded by Nkabinde J, in *Botha v Rich NO*,[1107] should not just to be limited to the facts of that particular case.[1108] Nor should the judgments of the Supreme Court of Appeal be considered as binding authority only insofar as resolving common-law contractual disputes is concerned; and those of the Constitutional Court, restricted, merely to disputes arising from consumer law.[1109] Moreover, the Constitutional Court has, albeit *obiter*, acknowledged the potency of Nkabinde's ground-breaking dictum.[1110]

In this chapter, it will be demonstrated that *ubuntu* can be a transformative tool even in the South African workplace, particularly in instances that fall outside of the purview of collective bargaining, and legal instruments that often result from that

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1106 See *Everfresh* para 72-4.

1107 2014 (4) SA 124 (CC) para 45-51.

1108 Boonzaier L 'Rereading Beadica' (2020) *SALJ* 1 10 where the author seems to question 'the judgment's precedential reach'.

1109 In this regard see Coleman TE Reflecting on the Role and Impact of the Constitutional Value of *ubuntu* on the Concept of Contractual Freedom and Autonomy in South Africa (2021) *SALJ* 1 26.

1110 See *AB v Pridwin* para 66.

process, such as collective agreements and bargaining collective agreements[1111] It will also be shown how the already existing rich labour jurisprudence[1112] could be cobbled together, relying on *ubuntu*, in order to create a *humane* workplace. In other words, what will be considered is whether, and to what extent, *ubuntu* can play a role in the incremental development of the common law as pertains to the workplace.

5.2 The relationship between the common law contract of employment and the Constitution, ubuntu and other legislation

5.2.1 Preliminary points

The common law contract of employment is one in terms of which the one party (the worker or employee) places his or her personal services at the disposal of another (the employer).[1113]

For that reason, four factors need to be considered in the context of the South African workplace, insofar as the Constitution and relevant pieces of legislation are concerned.[1114] First, the contract of employment is not just about turning workers into human machines that live merely to make money for the employer. It is about ensuring that their dignity and bodily integrity are protected.[1115] For that reason, the common law can benefit from the primacy that African law - and *ubuntu* – places on co-operation equitable division of labour.[1116] Secondly, as the foundational value

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1111 This is a legislative mechanism, which may also involve government institutions and functionaries, through which employers are encouraged to negotiate with workers, in good faith, for better working conditions and benefits – Van Niekerk A & Smit N Law @ Work (2015) 385.

1112 See Van Niekerk v Smit 385-411; see also Du Toit D; Woolfrey D; Murphy J; Godfrey S; Bosch D, Christie S *The Labour Relations Act 1995* 3-41.

1113 Van Niekerk & Smit 85.

1114 The Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998. However, an extensive discussion of these pieces of legislation falls outside the scope of this thesis.

1115 Section 10 and 12 of the Constitution. Due to cultural bias or dislocation, one worker may be allowed to take a day or two leave of absence from work, in order to attend to a sick dog or cat; but another one may be prevented from taking a few days in order to attend to the performance of necessary cultural rituals.

1116 See https://biography.yourdictionary.com/abd-al-rahman-ibn-muhammad-ibn-khaldun

of the Constitution, *ubuntu* proscribes the unfair practices that are so commonplace in many workplaces in the country. It also protects workers from being coerced into performing work or tasks that are 'not constitutionally permissible'.[1117] Thirdly, the International Labor Organization has suggested that a 'human-centric approach' be adopted, by State Parties, in order to ensure a better workplace.[1118] As indicated above, the influence of the sub-Saharan African ethos of *ubuntu* and its underlying message is that of the interconnectedness of all humanity irrespective of race, colour or national background.[1119]

Lastly, a significant number of South Africans are employed in sectors or industries that are not regulated by legislation. This class of employees includes vendors,[1120] most of whom are not educated enough to understand the level of exploitation they are subjected to. It also encompasses domestic workers whose predicament cannot just be left to 'the internal dynamics of management-labour relations, nurtured by judicial officers schooled in the culture of abstentionism'.[1121] The abuse and exploitation that this group has to endure requires that this branch of law be infused with the tenets of the Constitution and *ubuntu*.[1122] As indicated above, the South African community – including employers and judges – cannot complain about the 'juridification'[1123] of Labour Law, or any other branch of law for that matter. This is because South Africa is a country where the Constitution is the supreme law; and where *ubuntu* has effectively been 'constitutionalised'.[1124]

1117 Like forcing them to remove a dangerous animal such as a snake from the premises without the necessary paraphernalia or protection – see Du Toit D Labour Law and the Bill of Rights (1999) 4B14-4B16; see also Van Niekerk A & Smit N *Law @ Work* (2015) 93-4; see *Mahlangu v Minister of Labour and Others* [2020] ZACC 24 para 1-5, 102.

1118 The approach focuses on three areas of action: (a) increasing investment in people's capabilities; (b) increasing investment in the institutions of work, and (c) increasing investment in decent and sustainable work – htttps://www.ilo.org/about-th-ilo > centenary-declaration > lang-en (accessed 04.12.2019). In sum, the approach is fundamentally about ensuring social justice in the workplace, across the world.

1119 See Ch 2.

1120 This term is used in this context to refer to persons who sell or distribute newspapers, magazines, leaflets and pamphlets for publishing houses; those who sell artefacts for another person (natural or juristic).

1121 Du Toit *Bill of Rights* 4B15.

1122 Du Toit *Bill of Rights* 4B15.

1123 Du Toit *Bill of Rights* 4B14.

1124 As indicated in 4.2.2, *ubuntu* is the foundational value of the Constitution, and the founding document is a true embodiment of it.

Also in a similar predicament, despite higher levels of education and sophistication, are actors, television and radio presenters, musicians, dancers and roadies or other crew members. The value, worth and remuneration of the last-mentioned category of workers is often determined by the executive producers and directors of the productions they are involved in. This type of work forms part of what has come to be known as the 'gig economy'.[1125] The irony is that, despite being better educated and more sophisticated,[1126] most artists do not enjoy the benefits of collective bargaining and other legislative forms of protection.[1127] Whatever they receive as benefits is dependent on the generosity of their employers or executive producers, as the case may be.[1128] They work for many and irregular hours, sometimes under inhumane conditions.[1129] The desire for fame and celebrity seems to be both a blessing and a curse for this class of workers. Many of them are popular, but live a life of near-servitude.[1130] For this group of people, work does not provide that 'fundamental definition of self',[1131] nor does it ensure any 'status, esteem and meaning' to them.[1132] The reasons for this quagmire could be a lack of legal knowledge or appropriate professional assistance.[1133] The fact that some of them are freelancers, or independent contractors, seems to exacerbate their circumstances. Even those who are reasonably educated still cannot navigate the

1125 These are persons who are employed on a temporary basis by the individuals or organisations or institutions – https://www.whatis.com.techtarget.com > definition > gig-economy (accessed 04.12.2019).

1126 The assumption could be that they can negotiate for a suitable remuneration deal for themselves. The reality is that they need a legislative and regulatory safety net.

1127 The term means a process whereby employers or their organisations, on the one hand, and employees or their unions, on the other, are obliged by law to discuss or negotiate on whatever matter is likely to ensure industrial peace and productivity and mutual satisfaction – see Nagel CJ Kuschke B (eds) *Commercial Law* (2019) 989.

1128 These employees are not, as a matter of law, entitled to royalties, residuals for their work much less for re-broadcasts thereof – see the Performing Arts Bill (2018) Copyright Amendment Act Bill (2019).

1129 See Performing Arts Bill (2018) and the Copyright Amendment Act Bill (2019); see also actress Vatiswa Ndara's letter addressed to the Minister of Arts and Culture 'Vatiswa Ndara's letter to Nathi Mthethwa: 'Stop exploiting actors', available at *https://www.iol.co.za/entertainment/tv/local/vatiswa-ndaras-open-letter-to-nathi-mthethwa-stop-exploiting-actors-34292050* (accessed 01. 06.2022)

1130 See Performing Arts Bill (2018) and the Copyright Amendment Act Bill (2019).

1131 See Van Niekerk & Smit 3.

1132 Van Niekerk & Smit 3. The fear of indefinite boredom is far greater than the meagre wage or salary that is depleted by transport costs. Some workers have to use up to three modes of transport in order to get to their places of work.

1133 This could involve the services of an experienced agent or manager.

maze of legal jargon contained in their contracts with production and publishing companies.[1134]

Secondly, in the same way that the law of contract is generally about the consensual transfer of a portion of one's estate to that of another, the contract of employment involves the 'sale'[1135] by the employee of his or her labour to the employer. The situation therefore presupposes an agreement, or a meeting of the minds, between the employer and the employee. Despite it being a special commercial contract, the contract of employment is founded on the general principles of the law of contract.[1136] However, sight should not be lost of the fact that the fairness and conscionability of such a contact depend largely on the bargaining power between the parties involved. In the South African context, this is a concept which had (and still has) a hollow ring to it.[1137] This is because the levels of literacy among the country's workers were, and still are, very low.[1138] But, despite all these educational limitations, black workers have, for almost three centuries, been agitating for contractual justice and industrial peace.[1139] This development included a demand for respect for their dignity; that they should not be made to perform tasks that

1134 Recently, Florence Masebe, the veteran actress, made submission to the parliamentary Portfolio Committee on Sports, Arts and Culture – see 'Florence Masebe pleads with Parliament to protect actors', available at b *https://www.iol.co.za/entertainment/tv/local/florence-masebe-pleads-with-parliament-to-protect-actors-470fe0f6-5a19-42c9-bcca-9d8d21a66055* (accessed 01.06.2022).

1135 Even though this element of the contract distinguishes it from slavery, in the pre-democracy South African context, it was almost impossible to tell it apart from servitude – Grogan 1.

1136 Such as contractual capacity, consensus, legality, possibility of performance and formalities (in certain instances). A verbal contract of employment is valid; and no formalities need to be complied with – Van Huyssteen et al. 1-287; see also Nagel & Kuschke 41-111.

1137 Thompson L A *History of South Africa: From the Earliest Known Human Inhabitation to the Present* (2014) 154-7; see also Du Plessis H 18.

1138 Du Plessis H 18.

1139 Du Toit et al. 1-43.

were demeaning to them;[1140] and that they should be paid wages that were commensurate to the work that they performed.[1141]

Thirdly, there was – even in the throes of apartheid and political repression – a welcome shift in ideology and interpretative approach to labour legislation.[1142] This shift was much more palpable in the period between 1979 and 1994. During that time, the Industrial Court[1143] enjoyed a very wide discretion to deal with a large range of labour issues without being unduly bound by a strictly legalistic approach to the law.[1144] This development was made possible by the amendments to the Industrial Relations Act;[1145] and the Industrial Court being granted a wider discretion under the rubric of 'unfair labour practice'. The court was able to develop a labour jurisprudence that promoted – almost prophetically - the kind of values that would, later, be encapsulated in the Constitution, and the accompanying ethos of *ubuntu*. This development even necessitated the 'constitutionalisation' of labour rights under the post-1994 constitutional dispensation in order to preserve the gains that had been made and to ensure that social justice prevailed in the workplace. The unfair labour practice served as 'a useful expedient to overcome employer resistance to the unionisation of African workers, adding considerably to democratising the workplace'.[1146]

1140 Like being made to wash soiled adult underwear or the bathtub. Ashley Raphala, whose professional moniker is '*D J Shimza*', one of South Africa's popular musicians and producers, is alleged to be coercing the domestic worker in his employ to wash his, and family's, under-garments – see 'Shimza longs for his helper to back (from Christmas holiday) and wash his socks', available at https://briefly.co.za/entertainment/celebrities/118133-shimza-longs-his-helper-come-back-wash-his-socks-peeps-slam-his-post (accessed 19.01.2022). The fact that he bought her a car does not take away the ignominy that he, and his family, is putting the worker through.

1141 Du Toit 367-449.

1142 However, this positive development did not include the categories of employees under discussion herein.

1143 Which is now the Labour Court in terms of the Labour Relations Act 66 of 1995 (as amended).

1144 See Du Toit *et al* 3-41.

1145 Act 28 of 1956.

1146 Du Toit *et al* 3-41. However, this approach, sometimes referred to as the 'juridification of the workplace' or 'collective *laissez faire*', caused some consternation among employers, who argued that it was giving too much power to unelected judicial officers to strike down the laws of the country – see Du Toit D 'Labour and the Bill of Rights' in De Beer C (ed) *Bill of Rights Compendium* (1999) 4B-13.

Currie and De Waal[1147] describe the role of *ubuntu* in the workplace as follows: 'Therefore, *ubuntu*, which invariably subsumes equity, is concerned not merely with the mechanical, impersonal legalistic application of the law, but also with doing justice between human beings – and ensuring continued social cohesion and peaceful co-existence."[1148] Reference to the historical background is necessitated by the need to properly understand the provisions of section 22 and 23 of the Constitution. For instance, section 22 provides that every South African has the right to choose a trade, occupation or profession of his or her choice, and the practice of such a trade, occupation or profession may be regulated by law.[1149] Section 23, in turn, provides that '*everyone* has a right to fair labour practices'. This is a major step when one considers that good faith, let alone equity, was not part of the requirement for the validity of any contract, including the *locatio conductio operarum* (contract of employment)[1150] under the common law.[1151] In pre-democracy South Africa, which was characterised by high levels of illiteracy and economic exclusion of black people, it did not matter how unfair or inequitable a contract between the employer and employee was.[1152] Under apartheid when unscrupulous employers [took] people into service under onerous conditions and at exploitative wages',[1153] black employees practically signed away most of their human rights, particularly the rights to equality and human dignity[1154] when they

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1147 See Currie I & De Waal J *The Bill of Rights Handbook* (2013) 476-7. In an earlier edition (2005) 503, the writers say the following:

> When granted its 'unfair labour practice' jurisdiction, the Industrial Court initially chose not to define precisely what it is understood by the concept 'fairness', or its synonym, 'equity'. What it did say, however, was that fairness was something more than lawfulness. This meant that even though conduct was lawful, it was not necessarily fair.' Whether conduct is fair or not necessarily involves a degree of subjective judgment. However, this does not mean that the assessment of fairness is unfettered or a matter of whim.

1148 This is not very different from what Nkabinde J said in *Botha v Rich NO* para 45-6; see also *AB v Pridwin* para 66.

1149 This relates to the constitutionality or legality of the work that is performed by sex workers, a topic which is dealt with at 5.5.2.

1150 The common law contract of employment.

1151 Grogan J *Workplace Law* (2020) 3; see also Du Plessis H 14-19. The irony is that *bona fides* were an important component of South Africa's common law contract of employment or services (*locatio conductio operarum and locatio conductio operis*) – see Kaser 42.

1152 See Grogan *Workplace Law* 3.

1153 Grogan *Workplace Law* 3.

1154 Black men were often subjected to dehumanising medical examinations – including exposing

entered into a contract of employment,[1155] and nor could they have the right to follow a trade, occupation or profession of their own choice.[1156] It was a period of racial discrimination, political oppression and industrial exploitation and restlessness. As indicated above, part of the problem was that the relevant aspects of Roman Law and Roman-Dutch Law, which could have served as a bulwark against the exploitation of black workers, were distorted, abrogated or abolished through ideologised pieces of legislation.[1157]

While the position of those workers who fall within the framework of collective bargaining has been improving progressively, the situation of those who find themselves outside of it is changing at a snail's pace.[1158] This is because, as indicated above, the common-law contract of employment is at the centre of the real power relations – relations. As a result of the humanising impact and influence of the Constitution (and the Bill of Rights entrenched in it), workers are now largely conscious of their rights and no longer prepared to perform those tasks, duties and functions that are demeaning and impugning to their dignity.[1159] *Ubuntu* is, therefore, the yardstick that all employers – particularly those who fall outside of the bounds of collective bargaining – should be governed by. This is because its ethos requires them to do much more than what the common law of employment provides for; or to anticipate or pre-empt the legislature and do what is likely to bring dignity and respect to their employees, not just in monetary terms. The process would include considering, and incorporating into the contracts of these employees, the provisions of all labour laws, including the Labour Relations Act,[1160]

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their genitalia – before being considered fit for employment. See s 10 (1) (a), (b) and (c) of the Urban (Blacks) Act 25 of 1945.

1155 See Grogan *Workplace Law 3*.

1156 A South African socio-legal ill that s 22 of the Constitution seeks to remedy. It is for this reason that s 27 of the interim Constitution contained a radical proclamation: 'Everyone shall have the right to economic activity'.

1157 See chapters 3 and 4.

1158 There are various Ministerial Determinations on the minimum wage for domestic workers, farmworkers, and children involved in the arts – see the Minimum Wage Act 9 of 2018.

1159 Such as being expected to wash a soiled toilet and stained adult undergarments. In other words, it would not be an act of insubordination to defy the employer's instruction under the circumstances. This is because such instructions would be unlawful and unreasonable.

1160 Act 66 of 1995.

the Basic Conditions of Employment Act,[1161] and the collective agreements and ministerial determinations entered into or made under them, as the case may be.

5.2.2 The common law contract of employment

As indicated above, the constitutional and legal matrix in which the common law contract of employment was recognised and nurtured was characterised by racial segregation and an 'enclave economy'.[1162] It was also shorn of most of its original, protective elements, such the right to equality before the law. Not only were notions such as good faith not requirements for the validity of a contract, but they were also viewed from a European or Western perspective. Black people were excluded from the mainstream economy, and there was a deliberately low absorption of this group into the labour market.[1163] The common law contract of employment is one in terms of which the one party, known as the employee,[1164] agrees to place his time and labour at the disposal of another, known as the employer.[1165] In addition to taking into account the freedom of the individual to enter into contract, the general common law requirements for validity still have to be met.[1166] The contract also has its own *naturalia* (the implied terms).[1167] These are stipulations originally unexpressed by the parties that are imposed on the parties by the law, be it the common law or statute.[1168] The latter kind comprises the provisions of existing legislation – and the Constitution itself – which may be incorporated by reference into a common law contract of employment.[1169] Also, the courts in South Africa have an obligation to develop the common law and customary law in accordance with the spirit, purport and object of the Bill of Rights.[1170]

1161 Act 75 of 1997.
1162 Mbeki *Advocates for Change* 6.
1163 Mbeki *Advocates for Change* 6.
1164 For the purposes of this chapter, 'worker' is preferred to 'employee'. This is partly because most of the people discussed herein do not fit snuggly into the definition of 'employee' in terms of s 213 of the Labour Relations Act 66 of 1995.
1165 Unless otherwise indicated, this rubric refers to the relationship between a domestic worker (including a gardener, chauffeur or butler) and an employer.
1166 These are (a) consensus, (b) capacity, (c) legal possibility, (d) physical possibility, (e) and formalities, such as writing, where required – Van Niekerk & Smit 89-90.
1167 See Currie & De Waal 480-481 see also Grogan *Workplace Law* 28-9.
1168 Currie & De Waal 480-1 see also Grogan *Workplace Law* 28-9.
1169 Currie & De Waal 480-1 see also Grogan *Workplace Law* 28-9.
1170 Section 39 (2) of the Constitution.

For that reason, employers have an obligation to act with honesty and good faith towards workers, and to protect their material and financial interests for the duration of the contract.[1171] They also have a duty to protect the constitutional rights of the workers, such as their right to dignity, privacy, freedom and security of the person, and bodily and psychological integrity.[1172] On the other hand, the worker is supposed to (a) report for duty and render competent services;[1173] (b) be respectful and obey lawful instructions;[1174] and (c) to render such services in good faith.[1175] For many workers (such as domestic workers and farm workers), being paid a wage or salary seems to be about the only right or benefit that the employee has in terms of this contract.[1176] Very little else counts in their favour. Most of them work in circumstances that are near-servitude because the employers 'treat them like they would their inanimate machines … with no real concern for them as fellow human beings'.[1177] However, it would seem as though the biblical injunction that employers pay their employees on time, and not take advantage of them,[1178] has found its way into the hearts and consciences of some employers, both black and white.[1179]

The 'no work, no pay' principle still remains a powerful weapon in the arsenal of a vindictive employer, and can be invoked even in circumstances that were beyond the particular worker's control – as in a case where there have been protests and civil strife in the country.[1180] Nor will the worker be entitled to any remuneration in case of injury, illness, or pregnancy in the case of a female worker[1181]And, because there is no collective agreement to speak of, in this instance, female workers do not

1171 Van Niekerk & Smit 94-5.
1172 Section 12 (2) of the Constitution.
1173 In other words, he or she has to place his labour at the disposal of the employer at the time and place, and for the duration, agreed upon between the parties.
1174 In this regard, the employee cannot be made to perform tasks that are inherently dangerous and pose a risk to life and limb.
1175 It would seem as though the worker is expected to protect the commercial interest of the employer. This is borne from the fact that he cannot make profit for himself or herself furtively – Van Niekerk & Smit 89.
1176 See Van Niekerk & Smit 92-3; see also Grogan 2, and Barnett V *Marx* (2009) 45.
1177 Van Niekerk & Smit 92-3; see also Grogan 2.
1178 Deuteronomy 1: 16-7 and 24:14-5.
1179 See Van Niekerk & Smit 92-3; see also Grogan 2.
1180 Van Niekerk & Smit 92-3; see also Grogan 2.
1181 Van Niekerk & Smit 92-3; see also Grogan *Workplace Law* 3.

receive their wages or salaries for the period of absence during pregnancy and after the birth of the child.[1182] Whatever benefit or privilege is extended by the employer to the worker would be dictated by the conscience or humanity of the former, or his or her partner or children.[1183] *Stricto sensu*, the employer can demand of the worker to work his or her fingers to the bone, for any number of hours, for a nominal or negligible amount of money. In the absence of collective bargaining, and the protective benefits that flow from it, abuse and exploitation are likely to thrive undetected.[1184] There is even authority for the view that there is no duty on the part of the employer to ensure fairness in his relationship with the workers that are in his or her employ.[1185] The employer can even pay the worker in kind; and in that case, food (whatever its quality) and even alcohol as substitute for money.[1186] For that reason, *ubuntu* can be resorted to: either to appeal to the sense of justice of the individual employer, or to transform that sphere of employment by reading the relevant statutory provisions[1187] into the common law contract of employment.

Despite the common law requiring a safe working environment, and that workers be treated with dignity and respect, workers still continue to be exposed to dehumanising and demeaning conditions.[1188] In certain instances, they are even exposed to the elements and dangerous animals, as when they are expected to

1182 See Van Niekerk & Smit 105-6; see also Grogan 82-3, and s 23 of the Unemployment Insurance Act 63 of 2001.

1183 This conclusion is drawn from the fact that the contract is, by nature, loaded in the employer's favour; and the employee is to be paid only for work done – Van Niekerk & Smit 92.

1184 Van Niekerk & Smit 92.

1185 See *SA Maritime Safety Authority v McKenzie* (2010) 5 BLLR 488 para 57-8; Currie & De Waal 481, and Van Niekerk & Smit 97-8. However, it is important to note that s 39 (2) requires that the common law be developed in accordance with the spirit, purport and objects of the Bill of Rights – see *Fedlife Assurance Ltd v Wolfaardt* (2001) 12 BLLR 1301 (SCA) para 27 where the Supreme Court of Appeal stated that the right not to be unfairly dismissed had been incorporated into the common law contract of employment between the parties. See also *Boxer Superstores, Mthatha & Another v Mbenya* (20070 8 BLLR 693 (SCA). On that basis alone, therefore, the dictum in *McKenzie* should be limited to the facts of that particular case.

1186 See Larkin A 'Ramifications of South Africa's Dop System', available at *https://www.sahistory.org.za/article/ramifications-south-africas-dop-system-alexandra-larkin* (accessed on 01.06.2022).

1187 As implied terms.

1188 Like being made to wash the soiled laundry and toilet bowl which has been so left by an able-bodied person, who is young enough to be his or her child or grandchild – see in slightly different context, Habib A *Rebels and Rage: Reflection on # Fees Must Fall* (2019) 25.

work during heavy thunderstorms or remove poisonous snakes from the employers' premises even if they are not professionally trained to perform that task.[1189] This is because, in addition to the economic disparities in the country, there is also desperation among this category of workers – who are often viewed as a social underclass.[1190] It is true that the position of the employer is not the same as that of the insurer who undertakes to indemnify the insured party should the event insured against occur. However, *ubuntu* – of which the Constitution is a reflection – would require that the physical, psychological and material well-being interests of the worker be equitably balanced against the commercial or business interests of the employer. This equitable balancing of these correlative interests is a species of sharing, which is the hallmark of *ubuntu*.[1191] In other words, the process should no longer be just about the rigid and mechanical application of the common law principles, but should also be about ensuring compassion and social justice as between human beings.[1192]

Respect and safety in the workplace should not be determined by who has more money and resources, but by the human inter-connectedness between the employer and the worker.[1193] In certain instances, the money paid to the workers, as remuneration, is often disproportionate to the detrimental effect that the work he or she does has on his or her body, soul and dignity.[1194] In order to illustrate the impact of the Constitution on the common law contract of employment, three areas of the South African labour law jurisprudence will be examined with the view to

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1189 As when a farmer dismisses workers in his employ for refusing to look for a snake which has slithered onto the premises.

1190 This in spite of the provisions of s 23 of the Constitution and other pieces of legislation, such as the Employment Equity Act 45 of 1998, and the Promotion of Equality and Elimination of Discrimination Act 4 of 2000. The irony is that these laws are reflective of *ubuntu*.

1191 As indicated above, *go fa ke go fega* means 'by giving one qualifies to receive (a reciprocal benefit)'.

1192 It is for that reason that the elders in black households will always insist that a contractor who is doing work on their own or son's, daughter's, nephew's or niece's premises be provided with food and means of transport for the duration of the project.

1193 See Du Plessis H 17-8.

1194 There is even anecdotal evidence which indicates that workers suffer exploitation and humiliation at the hands of black employers. However, there are also counter-accusations that black workers do not display the same respect and loyalty to their black employers. The reason for this phenomenon could be a lack of confidence to face up to their white (even coloured or Indian) employers – see in general Tolla T 'Black women's experiences of domestic work: Domestic workers in Mpumalanga' (2013), an unpublished MA Thesis with the Department of Psychology, University of Cape Town.

illustrating this point. For that purpose, the position of actors and actresses, and of sex workers will be discussed; and the legal and constitutional nature of restraint of trade clauses will be examined.

5.2.3 Actors, musicians, roadies and other workers in similar conditions

Unlike domestic workers and farmworkers,[1195] who enjoy a measure of statutory protection, actors, musicians, roadies and other cognate workers do not enjoy the protection of the country's labour laws. Subject to what is discussed below, this group comprises independent contractors[1196] and their only refuge is the common law on contracts as discussed above, and the generosity that the heart and conscience of the executive producer or director dictate.[1197] It would also seem as though, just like the mining and credit industries in South Africa, the entertainment industry has been thriving on the ignorance and vulnerability of black South Africans in particular.[1198]

Needless to say, the basic concepts such as *pacta servanda sunt* and the freedom of contract apply to this category of workers as well.[1199] Because the contracts that these workers have with the respective production houses are governed by the common law, the parties can include any stipulation conceivable as part of the particular contract.[1200] This is, by its nature, not a contract of equals.[1201] The one party is desperately in need of gainful employment in order to earn a living; the other is financially more powerful, and will set the terms and conditions that allow

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1195 Often by way of 'sectoral determinations' – which are akin to t bargaining council agreements and collective agreements in the context of collective bargaining – see Van Niekerk & Smit 92.

1196 For a distinction between an 'ordinary' employee and an 'independent contractor', see Van Niekerk & Smit 58-60

1197 In this regard, see Van Niekerk & Smit 85-100; see also Nagel & Kuschke 644-63.

1198 The dictum of Kriegler J in *Matiso v Commanding Officer, Port Elizabeth Prison*1995 (4) SA 631 (CC) para 8, with some necessary modification, is also apposite in this regard. This is because many of the actors, musicians and roadies 'are poor and either illiterate or uninformed about the law or both'. In the nature of things, 'they do not enjoy legal representation'. They only seek the services of lawyers when they receive letters, notices and other court process from other lawyers threatening them with litigation.

1199 See Grogan *Workplace Law* 3; see also Nagel & Kuschke 644-5.

1200 See Grogan *Workplace Law* 3; see also Nagel & Kuschke 644-5.

1201 See Nagel & Kuschke 644.

him to exploit the other.[1202] For that reason, such a contract is 'free from the considerations of equity and fairness'.[1203]

For many years, South African actors, particularly those who are black,[1204] have raised a lot of concerns with regard to the conditions under which they have to work[1205] and the often-unreasonable demands and expectations of the producers and executive producers. Their main concern is that they have to work for very long hours, and provide their own wardrobe and means of transport (or scrape and scour for bus-fare or taxi-fare).[1206] Some of them are compelled (by financial necessity and a strong desire for fame and concomitant benefits) to perform dangerous, uncoordinated stunts or to act out romantic scenes with persons who are known for poor oral hygiene.[1207] In other words, it is a combination of ignorance, lack of education and sophistication, and poverty that makes them enter into oppressively one-sided and unconscionable contracts.[1208] There also seems to be a developing

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1202 See Nagel & Kuschke 644; also '*IGazi'* actress Vatiswa Ndara pens an open letter to the Minister of Arts and Culture alleging unfair treatment of SA actors' available at https://www.news24.com/channel/TV/News/igazi-actress-vatiswa-ndaras-open-letter-to-minister-of-arts-and-culture-claims-unfair-treatment-of-sa-actors-2019100 (accessed 19.01.2022). In that article, Ms Ndara, a veteran actress, complains about, inter alia, 'poor remuneration, alleged unfair contractual agreement, alleged unfair treatment by producers, bullying and intimidation in the industry…'

1203 See Nagel & Kuschke 644. However, it is important to note that 'freedom of contract' cannot be exercised in such manner as to violate the other party's constitutional rights, such the right to equality (and not to be discriminated against) in terms of s 9; the right to human dignity in terms of s10; the right to follow one's trade, occupation or profession in terms of s 22, and the right to property in terms of s 25 – see *King NO v De Jager* para 124-5 where the Constitutional Court, in dealing with freedom of testation – which is, in many ways, similar to freedom to contract – said that whilst that right is founded on one's right to dignity (and the right to property), it cannot be exercised in manner that is 'unlawful' – contrary to, or impermissible in terms of, the supreme law of the country.

1204 Due to past economic and social disparities in South Africa, and the residual impact that lingers on, it is those who belong to this social stratum or demographic who are likely to experience these hardships.

1205 See Adrian Galley 'Protection of Performers Bill', available at *www.saguildofactors.co.za/PPA-bill-2016* (accessed 24.11.2021); see also 'Florence Masebe Pleads with Parliament to protect actors' available at, *https://www.iol.co.za/entertainment/tv/local/florence-masebe-pleads-with-parliament-to-protect-actors-470fe0f6-5a19-42c9-bcca-9d8d21a66055* (accessed 01.06.2022).

1206 In many instances, they have to use many modes of transport for a one-way trip to the production set.

1207 Production houses are now required, by trade custom, to provide an expert to co-ordinate stunts or romantic scenes.

1208 It has been described as a 'take it or leave it' industry, where the workers are, in reality, 'compelled' to sign away their rights to royalties and residuals – see Adrian Galley 'Protection of Performers Bill', available at www.saguildofactors.co.za/PPA-bill-2016 (accessed 19.01. 2022).

(or nascent) practice in the entertainment industry in terms of which all prospective actors and actresses are required to demonstrate to the executive producers how big their digital footprint, or following on social media platforms, is.[1209] The practice seems to be unreasonable and unfair, and is likely to lead to contractual injustice and industrial strife. This is because it is not all aspirant actors and actresses who have access to technology. Strictly speaking, the practice amounts to discrimination on the basis of social background and origin,[1210] and the country's constitutional ethos (which encompasses *ubuntu)* would not countenance such a situation.[1211] With specific regard to singers, royalties seem to be the only benefit that is guaranteed to them by law.[1212] The pay-out these performers receive, as royalties, depends largely on the controlling members of the regulatory body. Their predicament is exacerbated by the fact that most of them are not trained for that particular type of work.[1213] With regard to singers and actors, royalties seem to be the only benefit that is guaranteed to them by law.[1214] The pay-out these performers receive, as royalties, depends largely on the controlling members of the regulatory body.[1215] There are also strident attempts, by those who have interest in this sector – including the Department of Labour and Sports, Culture and Recreation – to ensure that there is equity and justice for all involved.[1216] As with female performers abroad, particularly in the United States of America,[1217] South African performers

1209 These include Facebook, Instagram or Twitter – see '"Game of Thrones" star Sophie Turner says she beat out a "far better actress" for a job because she has millions of social media followers"', available at https://www.insider.com/game-of-thrones-star-sophie-turner-says-she-got-role-due-to-social-media-following-2017-8 (accessed 19.01.2022). This phenomenon also exists in the South African entertainment industry.

1210 See section 9 (3) and (4) of the Constitution.

1211 See section 9 of the Constitution.

1212 See the Copyright Act 98 of 1978; see also the Copyright Amendment Bill of 2015, and https://policynotes.arl.org/?p=1896, particularly with regard to the likely interpretation of the expression 'fair use' – as it relates to recorded and literary works – by the courts.

1213 Most of them rely on their natural, God-given talent. They do not have any university degree, diplomas or certificates in dramatic arts or music. Non-governmental organisations such as the South African Roadies Association offer some short on-the-job courses to their members – see https://www.gautengfilm.org.za/industry-development/training-a-development (accessed 24.03.2020).

1214 See the Copyright Act 98 of 1978; see also the Copyright Amendment Bill of 2015, and https://policynotes.arl.org/?p=1896, particularly with regard to the likely interpretation of the expression 'fair use' – as it relates to recorded and literary works – by the courts.

1215 These bodies include the South African Music Rights Organisation (SAMRO) and the Recording Industry of South Africa (RISA).

1216 See Adrian Galley 'Protection of Performers Bill' www.saguildofactors.co.za/PPA-bill-2016.

1217 The most prominent example in this regard is the veteran actress Hunter Tylo. She appeared

are often dismissed merely for daring to exercise their constitutional right to bodily and psychological integrity as provided in section 12 of the Constitution.[1218] This right also includes the power to exercise control over their reproductive capacity.[1219] Because of the usually short-term nature of this kind of contracts, a number of actors, radio and television personalities have often found themselves in something akin to a legal no-man's land. For instance, Keke Mphuthi[1220] and Zandile Mfenyane[1221] are alleged to have been dismissed, by Ferguson Films (Pty) Ltd, on the basis that they were pregnant at the time when they were supposed to be on set reading and rehearsing their lines or performing. S'phelele Mzimela also suffered the same fate at the hands of Stained Glass (Pty) Ltd.[1222]

One would have expected that telenovelas, because of their inherent element of longevity, would have engendered a proper, functional employer-employee relationship. It would also not be unreasonable to expect that the contracts include all the attendant benefits and financial security for actors and crew members alike.[1223] However, the opposite holds true.[1224] Most of these actors and musicians do not even know that they are, or ought to be, entitled to royalties or residuals for their recorded works that may be on display,[1225] repeatedly, on radio or television

in two popular soap operas in the 1990s – *Melrose Place* and *The Bold & the Beautiful*. Whilst filming some episodes for Melrose Place, she informed the producers at Spelling Entertainment Group and Spelling Television Incorporated that she was pregnant and was dismissed from the production. She instituted legal action alleging discrimination on the basis of pregnancy and economic loss. In a *cause celebre* which was touted as a 'victory for every woman' the court awarded Ms Tylo about $4m for discrimination, and $894.601 for economic loss; available at https://cnn.com/SOWBIZ/9712/22/melrose/lawsuit/would-be-melrose-actress-wins-nearly-five-million-dollars.html (accessed 07.04.2020).

1218 In this regard, see also 'A former "The Throne" actress opens up about alleged mistreatment by Ferguson Films', available at *https://www.timeslive.co.za/tshisa-live/tshisa-live/2019.10.08-former-the-throne-actress-opens-up-about-alleged-mistreatment-by-ferguson-films.html*. (accessed 07.04.2020).

1219 Section 12 (2) (a) of which Act of the Constitution.

1220 She was part of the *dramatis personae* of *The Throne* which has been shown on *Multichoice's* Channels 161 and 163.

1221 Who was, at the time, part of the cast of *The Queen* on *Multichoice's* Channels 161 and 163. The matter seems to have been resolved; and she has resumed her previous role.

1222 She was part of the cast of another popular telenovela, *Uzalo*, which is currently shown on SABC 1 – one of the Channels of the South African Broadcasting Corporation.

1223 Galley 'Protection of Performers Bill' www.saguildofactors.co.za/PPA-bill-2016.

1224 Galley 'Protection of Performers Bill' www.saguildofactors.co.za/PPA-bill-2016.

1225 As it is the case in other jurisdictions, such as Australia, the United Kingdom and the United States.

– both inside the country and abroad.[1226] Nor is the Minimum Wage Act 2018 of any help. The employer can, in terms of the regulations promulgated thereunder,[1227] allege penury and apply for exemption from the application of the provisions of the Act. Except where provided in the contract between the actor or musician and the particular production or publishing company, these workers do not, as yet, qualify to receive compensation for injuries and diseases that are associated with the kind of work they are employed to do.[1228]

5.3 Ubuntu and maternity leave as a benefit for female workers

Pregnancy is a period of time that often precedes the joyful birth of a child into a family. It usually symbolises hope, promise and growth for the parents and their extended family. However, maternity leave is, in the context of South Africa, accompanied by anxiety, frustration and trepidation for female workers.[1229] This is particularly the case for those workers who fall outside the protective insulation that is provided for in labour legislation, relevant correlative forums and collective and bargaining agreements. The female workers who fall into this category, as matter of law,[1230] forgo a portion of their wages for exercising their constitutional right as it pertains to their reproductive capacity.[1231] As indicated above, the common law contract of employment often incorporates the 'no work, no pay' clause, either as an express, implied or tacit term.[1232] This gap in the law continues to exist despite

1226 It is hoped that, when it is promulgated, the Performers Protection Bill (2016), will serve one of its intended objectives, which is 'to provide for royalties or equitable remuneration to be payable when a performance is sold or rented out; to provide for recordal and reporting of certain acts and to provide for an offence in relation thereto'. The main objective of the Bill is to repeal the Performers Protection Act 11 of 1967, by deleting certain terms and replacing them, in line with the developments in the industry, and protect the financial interests of 'audiovisual performers'.

1227 In terms of Reg 3 (2) (b) of the National Minimum Wage Regulations, 2018 (GN 42124).

1228 In terms of the Occupational Injuries Diseases Act 130 1993.

1229 There is a view that it is the duty of women to bear and look after children. Hence, the distinction between 'gender' and 'sex'. While 'sex' refers to sexuality and similar biological functions, 'gender' is a social construct on the basis of which the male-dominated world assigns roles to human beings, on the basis of their biological and physical disposition.

1230 See Grogan *Workplace Law* 81-2, 166; Nagel CJ & Kuschke B *Commercial Law* (2019) 689-90.

1231 After all, the common law contract of employment was originally intended to benefit the employer, at the expense of the worker – see Nagel & Kuschke 644-5; see also Van Niekerk & Smit 92-93.

1232 On the difference between these contractual terms, see Van Huyssteen et al. 325-332; see also Kerr 337-41.

maternity leave being a basic condition of employment in South Africa.[1233] The Sesotho/Setswana maxim, on the *humane*[1234] treatment of animals, would be a good mantra for employers in this regard. Its real import is that one should not knowingly or deliberately make another person's predicament worse than it already is. In this context, it refers to an employee who needs each and every Rand of his or her wage.

One would have expected conditions to have improved significantly in the South African workplace. Not only is South Africa a constitutional democracy, with a Constitution that has a justiciable Bill of Rights ensconced in it, but it is also a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, 1993 (CEDAW).[1235] As a State Party in terms of the CEDAW, South Africa has, inter alia, the obligation to make maternity leave a statutory basic condition of employment by 'safeguarding the function of reproduction' of female employees.[1236] Even though maternity leave is now regulated by section 25 of the Basic Conditions of Employment Act (BCEA),[1237] there are many industrial agreements[1238] which predate the BCEA, which also regulated maternity leave. Unfortunately, neither CEDAW nor the BCEA makes maternity leave a fully-fledged labour right.[1239] It still remains a conditional or inchoate right. Religious and cultural influences could be the reason for the ever-present patriarchy in all the spheres of life all across the world.[1240]

1233 See s 25 of the Basic Conditions of Employment Act 75 of 1997. Many women who fall outside of the statutory framework do not enjoy the protection and benefits that instruments such as collective agreements provide. A collective agreement is, in terms of s 213 of the Labour Relations Act, a written agreement between a trade union or federation of unions and employers (organisations of employers) that stipulates the terms and conditions of employment and other matters of mutual interest.

1234 It is rendered as '*O seke wa e nametsa thaba e tlhotsa*': 'do not drag an injured horse up a mountain'.

1235 The Convention was adopted on 18 December 1979 in terms of General Assembly Resolution GA Res 34/180. However, it came into force on 3 September 1981.

See article 11(f) of the Convention.

1237 Act 75 of 1997.

1238 These agreements are now referred to as 'collective agreements'.

1239 See 23 of BCEA; see also Van Niekerk & Smit 105.

1240 For a comparative survey of how the different countries have dealt with patriarchy and other sociological dynamics, see Sinclair JD *The Law of Marriage* (1996) 16-40.

The inescapable conclusion that one can draw from the totality of available legislative enactments (or lack thereof), in this regard, is that women in South Africa do not deserve any recompense for performing and fulfilling the duty imposed by God – of multiplying and replenishing the world.[1241] It is also true that a female worker cannot be dismissed merely on the basis of pregnancy or any other reason related thereto.[1242] However, unlike sick leave and annual leave, maternity leave still remains an unpaid form of leave in South Africa. Practically, this means that, in the absence of any agreement, the only saving grace for a pregnant worker would be to approach the local office of the Department of Labour to claim unemployment insurance benefits in terms of the Unemployment Insurance Act.[1243] This is a glaring legislative oversight; and it is open to constitutional attack. Until it that oversight is cured, some female workers will continue to be unfairly discriminated against on the grounds mentioned in section 9(3) of the Constitution and section 6 of the Employment Equity Act.[1244] These grounds are sex, gender, pregnancy, maternity, marital status or family responsibility.[1245] Because the Constitution itself and the Employment Equity Act are founded on the values of *ubuntu* (social justice, fairness and equity), this *lacuna* cannot continue to exist indefinitely. It is definitely inimical to *ubuntu* for some female workers to continue to be remunerated during accouchement, while others, in the same position, are denied this right merely because of the sector they are employed in.[1246]

Moreover, CEDAW, an international instrument which is coterminous with *ubuntu* in its letter, spirit and purport, enjoins State Parties like South Africa 'to take all appropriate measures to eliminate discrimination against women in the field of

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1241 The role played by biblical and other religious texts in their thinking cannot be underplayed. For the Christian and Jewish perspective, see Genesis 3:16, where the Bible says the following: 'I will greatly multiply your sorrow and your conception; in pain you shall bring forth children; your desire shall be for your husband, and he shall rule over you.'

1242 See 187 (1) of the Labour Relations Act.

1243 Act 63 of 2001.

1244 Act 55 of 1998.

1245 Act 45 of 1998.

1246 See Grogan *Workplace Law* 48-9

employment'.[1247] As indicated above, one inhibiting factor is a lack of adequate education among South African workers, particularly those whose contracts are regulated by the common law. To them, relief only comes when they approach a government functionary or the Commission for Conciliation Mediation and Arbitration, or the courts.[1248] Therefore, one of the solutions would be to constantly create awareness within this demographic – through the media and other means – of all the labour-related and the constitutional rights of vulnerable workers. The objective should be to make the employers of this cohort of vulnerable workers to understand and appreciate the significance of the Bill of Rights and *ubuntu*. They will have to understand that they cannot, by mere contractual agreement, exclude the application of the provisions of the Constitution. The common law contract of employment should be interpreted and implemented in accordance with the spirit, purport and objects of the Bill of Rights. Moreover, any piece of legislation that seeks to advance the provisions of the Bill of Rights, in this context, should be read into the common law contract of employment.[1249] If that contract infringes any of the worker's constitutional rights to human dignity, equality and freedom from unfair discrimination, freedom and security of the person, and the right to decide on her reproductive capacity, it should be declared null and void.[1250] There is even ample room for the courts, on a case-by-case basis, to develop the common law in this regard in accordance with the spirit, purport and objects of the Bill of Rights.[1251]

5.4 Restraint of trade clauses and the workplace

A restraint of trade agreement or clause is a legal arrangement in terms of which an employer seeks to restrict his employee from leaving his employment to join his or

1247 Article 11

1248 As it happened in the case of 'Kylie'.

1249 See Du Toit D *Bill of Rights* 4B15-4B16; see also s 3 (b) of the Labour Relations Act which requires that the LRA be interpreted in accordance with the provisions of the Constitution.

1250 If it is brought to the attention of one of the officials in the Department of Labour, it should be brought before the Commission for Conciliation Mediation and Arbitration or the Labour Court, on application, for an appropriate order. One such order would be for the declaration of nullity of such a contract.

1251 See section 39 (2) of the Constitution.

her competitors, and so revealing the business methods that have brought him or her the success he or she may be enjoying at a particular time.[1252] There often comes a time, in any employee's life, when he or she decides to leave a particular place of employment for another. In many instances, this could be a place where the worker will be performing the same kind of work or interacting with the same customers or clients as he did whilst with his erstwhile employer. According to the common law, it is in the public interest for every person to be gainfully employed, and to utilise their God-given talents, skills, qualifications and experience to earn a living.[1253] It is also in the public interest that the commercial and material interests of the employer be protected.[1254] The interests of the employer may include manufacturing methods, trade secrets and the names of important customers and suppliers of goods and services.[1255] In certain instances, these interests could include custom, goodwill, the trade-name reputation of a new - or well-established - enterprise that he would like to protect.[1256] And, in order to protect the interests of the one or both parties, the parties often include a restraint-of-trade clause whose purpose it is to restrict the one party from engaging in an activity or enterprise that is covered by the clause.[1257] The inclusion of this clause is an acknowledgment that the duty on both parties to act in good faith towards each other ends when the employment relationship itself is terminated. As indicated above, they stand in a position of trust and confidence in relation to each other.[1258]

5.4.1 The law as applied in the United Kingdom

1252 See Van Niekerk & Smit 90; see also Van Huyssteen *et al*. 234.

1253 He or she could be a mechanic or panel-beater at a car-dealership, or a hair-stylist or nail technician at a beauty salon.

1254 See Van Niekerk & Smit 90; see also Kerr 204-205.

1255 In this regard, the dispute could be between a hair-stylist or a nail technician and a beauty salon, or a mechanic or an auto-electrician and an auto-repairs shop. The leading cases in this regard are *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Sunshine Records (Pty) Ltd v Frothing and Others* 1990 (4) SA 780 (A); *Basson v Chilwan and Others* 1993 (3) SA 742 (A), and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) 486 (SCA).

1256 Kerr 204-205; Van Niekerk & Smit 90.

1257 Kerr 204-205; Van Niekerk & Smit 90.

1258 Van Niekerk & Smit 89.

There used to be a great deal of debate in South Africa as to the validity and enforceability of restraint of trade clauses, and if legal, where the onus actually lay. The source of the first problem pertained to the country's legal history as it concerned mercantile law. This branch of the country's law is British in origin, and English law sources are often relied on where they have not been modified or abolished by statute.[1259] In England such clauses were, and still are, regarded as *prima facie* unenforceable, in that they unfairly restrict a person's right to earn a living.

Recently, in *Quantum Advisory Ltd v Quantum Actuarial LLP*,[1260] the Welsh Commercial Court dealt with the legal nature of a restraint of trade in the United Kingdom and the attendant principles. This case involved three companies that were, over time, spawned by the original one, Quantum Advisory. In 2000, it was agreed among the shareholders that another entity, Renaissance Pension Service (RPS), be formed to render similar activities, including administrative and actuarial services in relation to the pensions of their clients. The agreement was that RPS would help attract the clients of some of the shareholders of RPS. It was also the shareholders' understanding that the two entities would merge after three years.

It is important to note that, in 2000, a third entity, Quantum Financial Consulting Limited, was set up to perform pension consultancy and administrative work which had previously been performed by Quantum Advisory. The new entity would have used the same brand name, premises and equipment. It was also agreed that the goodwill of Quantum Advisory would be protected and Quantum Advisory would retain all their clients, despite henceforth being serviced by Quantum LLP. Some of the terms of the agreement – the Service Agreement[1261] – were that (a) the new entity would be servicing the new clients, not for itself, but on behalf of Quantum

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1259 See De la Rey EM 'Mercantile Law' Hosten WJ; Edwards AB; Bosman F & Church J *Introduction to South African Law and Legal Theory* (1995) 863-867; see Van Heerden & Neethling (1995) 1-4; 24-6, 262-3, *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

1260 [2020] QBD para 61-2; 95 -108. As to whether good faith is determinative of validity and enforceability, see 3.3.1. With regard to bargaining power, for instance, Keyser J said that the parties were educated and sophisticated businesspeople.

1261 Clause 2.2 thereof.

Advisory; and (b) all the fees received in that connection would be paid over by Quantum LLP to Quantum Advisory. However, as time went on, the shareholders disagreed on the business model. There was resentment on the part of the shareholders of Quantum LLP, the reason being that they were performing most of the work on behalf of Quantum Advisory, at great cost to Quantum LLP, for very little in return.

Quantum LLP continued to deal with the erstwhile clients of Quantum Advisory, in apparent breach of the agreement between these entities. Quantum Advisory approached the court, 'seeking a declaration that the Services Agreement remains in full force and effect as between the parties, and an injunction to restrain the LLP from acting in breach of the Services Agreement or its duties of loyalty and good faith that are said to arise as a consequence of it'. Quantum LLP, in response, contended that had it not been for the clauses of the agreement under consideration, it would have been able to conduct business with anyone it pleased; that such an agreement was, by nature, unreasonable; and that for it to be enforceable, it has to be reasonable in respect of the interests of the parties to the agreement and those of the public. The question to be decided by the court was whether the said agreement was unenforceable on the basis that it was a restraint of trade.

The case law in the he United Kingdom, on this point,[1262] suggest that the inquiry into the enforceability of such a contract or clause can be crystallised into the following questions: First, does the clause amount to a restraint of trade in accordance with the restraint of trade doctrine?[1263] This question is important because ordinary commercial contracts, by their very nature, do impose some form of restriction, albeit limited, on the parties that may be involved.[1264] By definition, a contract often creates duties for one of the parties – for instance, to pay some

1262 These authorities include *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229; *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] FSR 16; *One Money Mail Ltd v RIA Financial Services* [2015] EWCA Civ 1084, and *CJ Motorsport v Bird* [2019] EWHC 2330 (QB) [2019] IRLR 1080.

1263 See *Petrofina (Great Britain) Ltd v Martin* 328-9.

1264 See *Quantum Advisory 61-62; see also Petrofina (Great Britain) Ltd v Martin* 298-9.

money to someone or entity, or to behave in a particular way or to refrain from behaving in a particular manner.[1265] Secondly, if such a contract or clause is, indeed, what the doctrine is intended to proscribe, then the next question is whether the clause is reasonable, in that it is in the interest of the parties themselves and that of the public in general – and therefore enforceable.[1266]

However, it is important to bear in mind that in the United Kingdom, contracts or clauses in restraint of trade are regarded as being against public policy and unenforceable.[1267] Anyone who intends to enforce them or any of the clauses thereof (the covenanter), bears the onus to demonstrate to the court that the contract or clause is reasonable and is enforceable in the circumstance of the particular case. Therefore, the covenantee has to show that the provisions of the contract that he intends enforcing are not in conflict with the 'doctrine of restraint': that the contract is not aimed at sterilising the covenantor's power to engage in lawful economic activity and earn a living, but merely to absorb it temporarily, in a reasonable manner, in order to protect the legitimate interests of the covenanter.[1268] In other words, the covenantee is being prevented from entering into another contract – with a third party – which is intended to prejudice or interfere with his lawful business interests as the covenantor. But there is no closed list or specific category of contracts to which the doctrine of restraint exclusively applies, and the courts rely on 'a broad and flexible rule of reason'[1269] to resolve whatever dispute may arise in those circumstances.[1270] Therefore, the determination of reasonableness and enforceability of this kind of contract is not about the 'niceties

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1265 *Quantum Advisory* 61-62; see also *Petrofina (Great Britain) Ltd v Martin* 298-9.

1266 *Quantum Advisory* 61-62; see also *Petrofina (Great Britain) Ltd v Martin* 298-9.

1267 *Quantum Advisory 61-62; see also Petrofina (Great Britain) Ltd v Martin* 298-9.

1268 In *Petrofina* 169 Lord Denning MR said the following:

> Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest.

1269 *Quantum Advisory* 61-2 and the authorities cited therein.

1270 *Quantum Advisory* 61-2.

and complexities of law';[1271] it is a practical, factual inquiry which calls for a consideration of all the relevant circumstances.

The court held that the clients that LLP had been servicing were, indeed, the clients of Quantum Advisory and Renaissance Pension Service, and that that is how both parties had treated them. For that reason, the court also held that Clause 22 of the agreement did not constitute an unenforceable restraint-of-trade clause because the doctrine of restraint of trade did not apply to them; and that if the doctrine did apply, the restraints would be reasonable in the circumstances of the case. It is important to note that the courts in the United Kingdom have resisted the temptation to lay down rigid rules, thereby dicing up the restraint clauses themselves into categories.[1272] However, those restraint of trade clauses that are likely to be hit by the doctrine of restraint require some justification on the part of the covenantee, in order to satisfy the court that the restriction that the contract seeks to impose on the covenantor is reasonable.[1273]

5.4.2 The South African position

It was in the *locus classicus*, *Magna Alloys & Research SA (Pty) Ltd v Ellis*,[1274] that the modern South African legal parameters were set out. The court was faced with the conundrum of striking a balance between two seemingly conflicting principles of contract. On the one hand, there is the *pacta servanda sunt* principle; on the other, there is the freedom to contract with whomsoever one pleases.[1275] The latter concept also entails one putting one's labour or personal services at the disposal of anyone of their choosing.[1276] *Pacta servanda sunt* requires that all contracts that have been entered into seriously and deliberately should be enforceable. As indicated above, it is in the public interest that contracts be enforced, provided such enforcement is not in conflict with the provisions of the Constitution. In other words, there is a great deal of social utility in having such contracts enforced. However, the

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1271 See *Quantum Advisory* para 68, and the authorities cited therein particularly *Panayiotou* 298-331.
1272 See *Quantum Advisory* para 68.
1273 See *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 565.
1274 1984 (4) SA 874 (A); see Van Heerden & Neethling 24-9; 262-4.
1275 See chapter 3 above; see also *Barkhuizen v Napier p*ara 15; 30.
1276 Van Niekerk & Smit 85-6.

right to dignity, which the freedom to contract (and individual autonomy is a reflection of), should not be protected at the expense of the other party's constitutional rights.[1277] In its judgment, the Appellate Division stated that restraint of trade clauses were *prima facie* enforceable;[1278] and that the onus was on the person who sought a court order declaring it unlawful to prove that it was, indeed, unenforceable.[1279]

The courts developed the contractual jurisprudence in this regard in the circumstances of the time, and relied on public policy (such as it was) in order to strike a balance between the interests of the affected parties. The process of determining the reasonableness and compliance of the contract with public policy involved the following factors, as crystallised in *Basson vs Chilwan*:

1) whether there is at the time of the termination of the contract of employment an interest deserving of protection;
2) whether that particular interest is being threatened (by the conduct of the other party);
3) if so, how does that interest weigh up, qualitatively and quantitatively, against the interests of the other party not to be economically inactive and unproductive, and
4) whether there is any other fact of public policy not having anything to do with the parties which requires that the restraint should be enforced or disallowed.[1280]

The golden thread that runs throughout the common law on this point is that a restraint contract, or clause, ought not to be used to unduly prevent another person, including a former worker, from participating in a legitimate economic activity.[1281] It would also seem as though in *Kwik Copy (SA) (Pty) Ltd v Van Haarlem* 1991 (1)

1277 See *King NO v De Jager* para 202-3.

1278 *Magna Alloys v Ellis* 886-92.

1279 *Magna Alloys v Ellis* 893; see also Van Huyssteen *et al.* 234.

1280 *Basson v Chilwan and Others* 1993 (3) SA 742 767; see also see *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) 486 (SCA) para 17, and *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) 782 (A) 794 where the court said that there are two main considerations in this regard: (1) that it is in the public interest that contracts that have been entered into freely, even if they should be unreasonable or unfair, should be complied with; and (2) that the interest of society require that all persons, as far as is permissible, be allowed to engage in economic activity, and that it would be against public policy if any unreasonable fetter were to be placed on an individual's right to engage in economic activity.

1281 *Basson v Chilwan and Others* 767.

SA 472 (W),[1282] the Witwatersrand Local Division (now the South Gauteng High Court, Johannesburg) sought to add another factor when Wunsch J said another question to be asked is: *'Gaan die inkorting verder as wat nodig is om die belang te beskerm?'*[1283] However, it does not seem to have been accepted as an additional, independent factor, by the courts.[1284] Besides, it appears to be already subsumed under (3) and (4) above. Also, these factors, on their own, only have a bearing on the question whether the dominant party seeks to stifle lawful or fair competition; and on the nature of the activity that the respective parties are engaged in. Any attempt at inhibiting lawful competition is viewed as being against public interest.[1285] In *Highlands Park Football Club v Viljoen and Another*,[1286] the court said that the common law on this point 'does not justify a provision that requires [a worker] to remain unproductive and out of a job for a period other than that which is stipulated in respect of the first job itself'.[1287]

The other important considerations to be taken into account in this regard are (a) the geographical area covered by the clause or contract; (b) and the duration it is sought to operate for. In an attempt to ensure fairness and justice in these cases, the courts have had to determine whether the particular clause can be restricted or severed from the contract without affecting the validity of the entire contract. For instance, in *Magna Alloys v Ellis*, the Appellate Division said that *'die Hof nie daartoe beperk is nie om te bevind dat die beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n bepaling afdwingbaar of onfadwingbaar is nie'*.[1288] An example of this phenomenon is what happened in *Basson v Chilwan,* where the Supreme Court of Appeal reduced the radius of the geographical area but left the five-year period intact. In other words, a party who wishes to have either the area in respect of which the clause

1282 484.

1283 'Does the restriction go further than what is necessary to protect the affected interest?' (own translation).

1284 See Van Huyssteen *et al.* 240.

1285 See Van Huyssteen et al. 245.

1286 1978 (3) SA 191 (W).

1287 200.

1288 The Appellate Division said that 'the court is not necessarily limited to finding that a restraint clause is, in its entirety, unreasonable or unreasonable, but it also has the power to declare a portion of that clause reasonable or unreasonable' (own translation).

applies, or the period of its operation reduced, would have to make out a case for it.[1289] This approach has allowed the courts 'to do plastic surgery, as well as amputations, but does not permit them to produce Frankenstein monsters'.[1290] They are, therefore, not supposed to produce a clause 'radically different from that agreed to [by the parties]'[1291] Nor should such a clause be used to prevent international competition when it is, in fact, intended to protect local business interests.[1292]

5.4.3 The interim Constitution

After about four centuries of racial discrimination and economic exclusion, the Constitution of South Africa Act (the interim Constitution)[1293] conferred basic constitutional, human rights to *everyone*. These rights were no longer to be dependent on the generous or purposive approach of the individual judge to the interpretation of legal instrument, but on the Constitution itself.[1294] Included in the catalogue of rights provided for in the interim Constitution were those contained in sections 26 and 27. While section 26(1) provided that every person 'shall have the right freely to engage in economic activity and pursue a livelihood anywhere in the national territory',[1295] section 27 was intended to ensure fair labour practices in the workplace. However, because the courts continued to rely on the authority of *De Klerk v Du Plessis*[1296] that the interim Constitution was completely vertical in its operation, there was little room to manoeuvre and interpret its provisions purposively.[1297] The courts applied the provisions of the Constitution only indirectly, and relied much more on the common law principles of contract, particularly public policy, in order to determine the reasonableness of a particular restraint clause.[1298]

1289 See *MacPhail (Pty) Ltd v Janse Van Rensburg and Others* 1996 (1) 594 (T) 599.
1290 See Christie RH *The Law of Contract in South Africa* (2001) (4 ed) 425.
1291 See *MacPhail v Janse Van Rensburg* 599.
1292 *MacPhail v Janse Van Rensburg* 599.
1293 200 of 1993.
1294 Du Toit *et al.* 46-7.
1295 For the interpretation and parameters of the provisions of section 26, see *S v Jordan and Others* 2002 (6) 642 (CC) para 23-26 (per Ngcobo J (as he then was) for the majority), and 54-56 (per O' Regan and Sachs for the minority).
1296 1996 (3) SA 850.
1297 Para 62, that the constitution was vertical in operation, and that there was no need to apply it to private individuals or entities; see also Kerr 207-8.
1298 See Currie & De Waal 469-70; see *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 SA 507 (O); see also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) 486 (SCA) para 17.

For that purpose, the judges continued to examine the following factors: (1) the bargaining power of the parties; (2) the interest of the party wishing to enforce the clause; (3) the radius within which the clause should operate; (4) the time it may remain in operation; and (5) whether the clause is merely intended to stifle competition.[1299]

The approach seems to have remained the same even under the interim Constitution. This was in spite of the fact that the interim Constitution made specific reference to *ubuntu* being the foundational value of that epoch-making document.[1300] The prevailing judicial and academic view[1301] was that the common law concept of public policy should be determinative of the issues in this regard. The legal position was that every individual has the freedom to order his or her affairs whichever way he or she preferred.[1302] Public policy has remained the determinant of whether, in the particular circumstances of the case, the clause was not against public interest in the manner in which it restricts another person's right to earn a living.[1303] It is for that specific reason that the important question of the onus in this regard was ignored. It was as if there had never been any constitutional transformation – at least at formal level. The view was that a restraint of trade clause that fitted into that mould was not inconsistent with the provisions of section 26. Also, the *dicta* on the reviewability of the common law, on this point, seemed

1299 Van Niekerk & Smit 91; see also Kerr 213-29, and *Reddy v Siemens Telecommunication* para 17 where the court said that if the clause should, in its effect, go further than the interest it is supposed to protect, then that would be against public policy.

1300 See the postamble to the interim Constitution.

1301 See Kerr 208; see also *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 (2) 651 (W) 657-71 where the Supreme Court said the Constitution 'does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their foolhardy or rash decisions'. It is submitted that if the organising constitutional principle of *ubuntu*, and its underlying values, were taken into account by the courts, the commercial and material interests of all the vulnerable parties to contracts, would have been better served and protected.

1302 Kerr 208; see also *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 (2) 651 (W) 657-71.

1303 See Currie & De Waal 469-70; see also *Reddy v Siemens Telecommunication* para 17; *Labournet (Pty) Ltd v Jankielsohn and Another* (JA48/2016) [2017] ZALAC 7 where the Labour Appeal Court said that if 'an employer spent time and effort and money to train or '*skill* an employee in a particular area of work the employer has no proprietary hold [on him or her]'. For a comprehensive examination of the authorities on this point, see *Aquatam (Pty) Ltd v Jansen Van Vuuren and Another* (2017) 38 ILJ 2730 (LC).

tentative and speculative.[1304] But, it should be borne in mind that all the rights (and duties) created by the interim Constitution were subject to reasonable and justifiable limitation. And, as with s 36 (1) of the Constitution, only a law of general application could achieve that purpose.[1305] Clearly, the expression 'law of general application' does not extend to the stipulations of a contract as between two or more persons.[1306] In other words, the Constitution is the supreme law of the land; and all contractual stipulations should comply with it (including *ubuntu* that undergirds the Constitution).[1307]

5.4.4 The Constitution

The Constitution clarified and improved on the rights in the interim Constitution. It also contained the freedom to choose freely a trade or occupation, one which may be regulated by law (section 22), and the right to fair labour practices (section 23).[1308] For instance, *Highlands Park v Viljoen*[1309] involved Bobby Viljoen, a prolific striker in his day. He was informed by his club that his services were no longer needed. He then attempted to join another club, Dynamos Football Club. However, Highlands Park applied for an urgent interdict to prohibit him from playing for Dynamos, arguing that Viljoen had bound himself contractually the terms that he would not, for a period of three years after the expiry of the contract between himself and Highlands Park, play for any other club without prior written permission of Highlands Park. The Witwatersrand Local Division (now the Gauteng High Court Local Division, Johannesburg) applied the principles of contract pertaining to

1304 See *Knox D'Arcy* 657.
1305 See s 36 (1) of the Constitution.
1306 *Barkhuizen v Napier* para 15, 30.
1307 See s 2 thereof; see also Rautenbach para 28, and the authorities cited therein.
1308 As indicated above, every law is now subject to the Constitution – see Cloete R *Introduction to Sports Law in South Africa* (2005) 158-164; see also *Eastham v Newcastle United Football Club Ltd and Others* [1963] 3 All ER 139 145 where the court agreed with counsel for the player, George Eastham, and described the limitation on the freedom of movement of the players as a 'relic from the Middle Ages' and seemed inhuman 'and incongruous to the spirit of national sport'.
1309 1977 (3) SA 191 (W). As will be apparent immediately below, the decision in that case remains relevant for the present purposes; and the principles enunciated there are not inimical to the provisions of the Constitution.

restraint of trade clauses, reaching the conclusion that the clause (clause 12 of the agreement) was unreasonable and therefore void and unenforceable.[1310]

However, the last word still has to be spoken on the constitutionality, or otherwise, of restraint clauses under the Constitution. Nor has the question of the onus been authoritatively resolved in these matters. The approach, as indicated in *Labournet (Pty) Ltd v Jankielsohn and Another*,[1311] to the unreasonableness and unenforceability of restraint of trade clauses is still examined by looking at the common law principles of the freedom to contract and public policy.[1312] As Kerr puts it:

> Restraints of trade do restrain trade; but they are not, by virtue of this alone, inconsistent with the provisions of section 22 of the present Constitution and therefore invalid. This is a matter to be determined by the application of the usual rules whether or not the enforcement of a particular restraint is or is not against the public interest or against public policy Many restraints are reasonable and valid.[1313]

But, as discussed above, courts are often called upon to restrict the ambit of these clauses – without necessarily creating a completely different contract for the parties – in order to ensure contractual fairness, and that only legitimate interests are protected.[1314] However, it is important to note that the provisions of section 22 refer to citizens' 'right to choose their trade, occupation or profession freely'. It would seem as though foreign nationals who work in South Africa cannot rely on section 22 should they wish to defend or protect their rights where a restraint of trade

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1310 194-200. This case is almost on all fours with *Coetzee v Comitis and Others* SA 2001 (1) SA 1254 (C). The only difference is that, in the latter case, South Africa had become a constitutional democracy, and the Constitution, the supreme law, which promotes the values of freedom and equality. For that reason, the court examined the provisions of the Constitution on the right to human dignity (s 10), prohibition on slavery, servitude and forced labour, freedom of movement and that right to choose one's trade, occupation or profession freely, provided such trade, occupation or profession was regulated by law (s 22). The court found the rules of the NSL – which permitted the clubs to insist on being paid compensation before issuing a 'clearance certificate' to the affected player – to be unlawful, unconstitutional and invalid.

1311 See (JA48/2016) [2017] ZALAC 7 para 39-44.

1312 Kerr 208. See *Troskie en 'n ander v Van Der Walt* 1994 (4) SA 545 (O) 552-7.

1313 See Van Heerden & Neethling 27 (fn 84).

1314 See *MacPhail v Janse Van Rensburg* 599.

clause or contract is involved. There appear to be four factors that ought to be considered.

First, the right that is created by section 22 is, as with any other right in the Bill of Rights, subject to reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom.[1315] Also, the Constitution permits the enactment of laws (or the adoption of other measures) in order 'to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination (during colonialism and apartheid in South Africa)'.[1316]

Secondly, like all other states, South Africa is not obliged to admit foreign nationals onto its territory (country).[1317] However, should they be admitted into the country, there are certain international standards below which the functionaries of the state dare not go in their treatment of foreign nationals.[1318] As already indicated, the provisions of the Constitution permit that once they have entered the country in accordance with applicable laws and regulations, foreign nationals are as free to engage in any trade, occupation or profession as the laws of the country allow them, depending on their skills or qualifications.[1319] Should any such law or regulation discriminate against them unfairly, such a law will be challenged and declared invalid.[1320] As already indicated, a mere contract – much less a restraint of trade

1315 Section 36 (1) of the Constitution.

1316 See s 9 (2) thereof.

1317 See article 13 of the International Covenant on Civil and Political Rights, 1966 (UN General Assembly No 2200A (XX); see Dugard (2011) 299.

1318 See *Nyamakazi v President of Bophuthatswana* 1992 (2) SA 440 (B) 597; see also See *Minister of Home Affairs v Watchenuka* 2004 SA 326 (SCA) para 25.

1319 See Dugard 299-300.

1320 See 167 (5); see also Dugard (2011) 299-300; *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 53-4. That case involved Mozambican nationals who came to South Africa as a result of the civil war in their country of birth. They were admitted to South Africa and granted permanent residence. When they applied to the Department of Social Development for 'social assistance' by way of a grant, such an application was rejected on the grounds that such a benefit was available to citizens of the country only. In the course of her judgment, Mokgoro J, for the majority, said that 'differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There *must be a rational connection between that differentiating law and the legitimate government purpose* it is designed to achieve' (emphasis added). Ngcobo J, for the minority, emphasised that the provisions of the Act were intended for the benefit of 'everyone' – not just South African citizens.

clause – cannot be used to limit an employee's human rights as enshrined in the Constitution.[1321]

Thirdly, even South African citizens themselves cannot, in all honesty and sincerity, claim to have been 'equally' disadvantaged under colonialism and apartheid.[1322] In reality, there were varying levels and degrees of racial discrimination and economic exclusion in the country.[1323] This is a point to be borne in mind whenever ameliorative laws are enacted, implemented and applied in this regard. Section 22 ought to be considered, not in isolation, but cumulatively with other provisions of the Constitution, particularly the Bill of Rights. It is preceded by very important provisions – such as s 9 (on the right to equality, and not to be discriminated against); s 10 (on the respect for human dignity);[1324] 14 (on the right to privacy); s 18 (on freedom of association), and 21(1) (on freedom of movement).[1325]

In other words, a purposive or generous interpretative approach would have to be adopted in order to ensure that restraint of trade contracts or clauses are not relied on by employers in order to unduly restrict any person's right to earn an honest living.[1326] The contrary would be in complete dissonance with the underlying value of *ubuntu*, which is about the interconnectedness of humanity - irrespective of race, geography or background. South African courts are now enjoined to do justice

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1321 See section 36 (1) of the Constitution; see *Barkhuizen v Napier* para 23.

1322 *Motala v University of Natal* 1995 (3) BCLR 374 (N) 383. In that case, Motala, a prospective student of Indian extraction, had applied to be admitted to and enrolled with the Faculty of Medicine of the University of Natal (now the University of KwaZulu-Natal). She obtained five distinctions in her matric examination, but her application was refused on the basis that there was no longer room for additional Indian students at the University. She was told by the officials of the University that the remaining places were reserved for black students. In the course of its judgment, the court said:

> While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which the African pupils were subjected under the 'four tier' system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of the [Constitution].

1323 Motala v University of Natal 383.

1324 See *Nyamakazi v President of Bophuthatswana* 579; *Minister of Home Affairs v Watchenuka* 339 where Nugent JA said: '[H]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are *human*' (emphasis added).

1325 See, in particular, section 9. 10, 13, 21 and 23 of the Constitution.

1326 See 5.4.4 above

between contracting parties by, inter alia, taking into account the legal convictions and normative values of the entire South African society at a particular time.[1327] In reality, most of the provisions of the South African Constitution, mimicking *ubuntu* as they do, should actually be constitutive of any contract that is entered into - or has force and effect - within the country.

It is also clear that, in certain circumstances, such a contract or clause would amount to an unfair labour practice in terms of section 23 of the Constitution.[1328] In other words, the common law principles of contract should be applied only when they are consonant with the provisions of the Constitution, particularly the Bill of Rights.[1329] Put otherwise, workers and professional sportspersons cannot be contractually compelled to do what is prohibited by the provisions of the Constitution.[1330] Nor should the courts accept, wholesale, foreign principles and concepts without carefully considering local conditions. The South African economic conditions, financial systems and political history are markedly different to those of other jurisdictions such as Germany, the United Kingdom and the United States of America.

As the Constitutional Court stated in *PE Municipality*, judicial function is not just about court management, but about infusing 'the elements of grace and compassion into formal structures of law'.[1331] Sachs J, who handed down the judgment of the court, said that *ubuntu* 'suffuses the whole constitutional order'.[1332] In this context, therefore, the dictum means that *ubuntu* could be used as a catalyst in promoting economic activity, encouraging entrepreneurship, and creating employment opportunities. Obviously, the court would have to be guided by the pleadings and

1327 See *Standard Bank of South Africa v Wilkinson* 1993 (3) SA 822 (C) 828. It would seem the Cape Provincial Division was anticipating that, with the advent of constitutional democracy, public policy would be viewed through the legal convictions of the entire population, not just a section of it. That is, indeed, what *ubuntu* behoves every judicial officer to do.

1328 The provisions of section 23 are amplified by the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997.

1329 However, cf. *Troskie v Van der Walt* 552-7.

1330 Ibid. This is because workers have the right to be economically active and productive, particularly in a country like South Africa where there is so much poverty and penury – see *Labournet* 42; see also *Basson v Chilwan and Others* 767.

1331 Para 37.

1332 Para 37.

contentions by counsel. The process might lead to transformative adjudication which, itself, might lead to greater absorption of unemployed people into the general economy.[1333] The judgment in *Coetzee v Comitis and Others*[1334] hinged on the constitutionality of the rules of the National Soccer League (a commercial wing for both amateur and professional soccer in the country). In terms of these rules, a player was, among other things, required to remain at the club for three more years, even after the end of the contract between the parties. This was intended to ensure that the club could be compensated in some way. Traverso DJP (with Ngwenya J concurring) examined the relevant provisions of the Constitution, and came to the conclusion that the rule in the statutes of the NSL amounted to a restraint of trade clause and that it led to soccer players being treated like goods or chattels who were at the mercy of their clubs.[1335] Her Ladyship also referred, with approval, to the judgment in *Bosman v Belgian Football League*,[1336] on how the laws of the European Union-[1337] as they pertained to freedom of movement and the freedom of association of the players as workers – were to be interpreted.[1338] The learned deputy judge president proceeded to point out that there was no legitimate connection between the rule and the purpose that the NSL sought to achieve, namely that clubs be compensated for the services of the player (ostensibly on the basis that they invest in the training of the players).[1339] The rule, and the 'compensation regime' it provided for, was declared unlawful for being against public policy and contrary to the provisions of the Constitution. The court brought the full spectrum of constitutional values to bear on the matter, but it stopped just short of referring to *ubuntu* and its full import in this regard. That is what the essence of the

1333 See Mbeki *Advocates for Change* 6.

1334 2001 (1) SA 1254 (C).

1335 Para 40.

1336 *Sub nom Union Royale Belge Des Societes de Football Association (ASBL) and Others v Jean Marc Bosman [1996] 1 CMLR 645 (ECJ).*

1337 Article 39 (now 45) of the Treaty on the Functioning of the European Union. The article restricted the movement of persons across borders within the territorial limits of the European Union (1958).

1338 The European Treaty is not just a foreign law in respect of which judges have the discretion to apply it or not. It is, in reality, part of international customary law, which is an integral part of the law of the country, and the judges are obliged to take it into account in reaching their decisions. It is further submitted that it is resonant with the ethos of *ubuntu* – see section 39 (1) (a) (b) and 232 of the Constitution.

1339 Para 40.

judgment was about: treating employees humanely,[1340] not as mere cogs in a machine.

The manner in which the question of the onus of proof has been dealt with is, as in many other instances, the product of the *juridicum bellum* or *broedertwis* that existed at the time when the judgment in *Magna Alloys* was handed down.[1341] There is no clear legal or philosophical basis on which English law was not suitable for this purpose. Nor has it ever been clearly stated why restraint clauses are *prima facie* enforceable or why English jurisprudence was wrong in this regard.[1342] The conundrum of the onus of proof in relation to restraint clauses has only been dealt with tangentially in recent times.[1343] It would seem as though the dictum in *Magna Alloys* still stands: clauses of this nature are *prima facie* valid and enforceable.[1344] Any person who seeks to challenge this type of contract or clause, bears the onus to indicate to the court that the clause is against public policy and therefore unenforceable. Public policy serves as a means of resolving the apparent clash between two basic principles of contact: (1) the freedom to contract, and (2) the sanctity of contracts where restraint clauses are concerned.[1345] The courts have tended to move from the premise that it is in the public interest that the terms of a contract be fulfilled, however harsh those terms may be to one of the parties.[1346] Put otherwise, a person cannot be compelled to enter into a contract with another. However, if he or she does enter into one, it will, in certain instances, be difficult for him or her to terminate it.[1347] The reason is that, as indicated above, there is undue emphasis on commercial certainty at the expense of contractual justice.[1348]

1340 See in general, *S v Makwanyane* para 300-308; see also *Dikoko v Mokhatla* para 112-3.

1341 See Bennett *An African Equity* (2011) 45; see also *AB v Pridwin* para 129-131, and Edwards AB 'Source of South African Law' in Hosten et al. (eds) *Introduction to South African Law and Legal Theory* (1995) 435.

1342 In this regard, see Edwards 427-36.

1343 See Currie & De Waal 470; see also *Sunshine Records* 794, and *Basson v Chilwan* 776-7.

1344 891-8.

1345 See Edwards 433.

1346 However, see Kerr 212.

1347 See Van Huyssteen *et al*. 12.

1348 See Lewis *An Uneven Journey* 92-4. However, cf. *Combined Construction v Arun* 238-241.

However, with *ubuntu* as the foundational value of the Constitution, the focus seems to have changed. As indicated in chapter 4,[1349] the test now is whether the contractual term in question has the tendency or likelihood to be unfairly prejudicial to the interests of one of the other parties.[1350] The Constitutional Court has been leading the way in this regard, by advocating a direct, horizontal application of the provisions of the Constitution to those areas of the law that tended to be insulated from its provision.[1351] This development includes infusing all the formal structure of law 'with grace and compassion' and taking into cognisance that the foundational value of *ubuntu* 'suffuses the whole constitutional order'.[1352] Public policy, as inspired by *ubuntu*, would, like the 'discarded' English law on this point,[1353] allow everyone the freedom to engage in any legitimate economic activity. By definition, such an activity would be in the public interest, and would help to improve the economy of the country and the well-being of the entire population. It is submitted that without *ubuntu* being taken into cognisance in this context, contracts (or clauses) in restraint of trade would lead to unfairness, with one of the parties selfishly pursuing his or her economic interests to the detriment of those of the other.[1354]

5.5 Sex workers and employment law

Another example on how the current labour dispensation can be infused with *ubuntu* is the status and position of sex workers in South Africa.[1355] This is the category of

1349 See *AB v Pridwin* para 104.

1350 See Kerr 212; see also *Barkhuizen v Napier* 104, 140-1, and *AB v Pridwin* para 61.

1351 See *PE Municipality* para 37; see also *Everfresh* para 71-72; *AB v Pridwin* para 67, and *Beadica v Oregon Trustees* para 206 where Victor AJ said that characterising *ubuntu* 'as a substantive constitutional value in the law of contract leads to a more context-sensitive basis in its adjudication and facilitates a constitutionally transformative result'. It is submitted that *ubuntu* is such a 'substantive constitutional value'.

1352 *PE Municipality* para 37; see also *Everfresh* para 71-2, and *Beadica v Oregon Trustees* para 206.

1353 See Edwards 435; see also *Viljoen v Highlands Park (Pty) Ltd* 193-4, and Van Heerden & Neethling 1-4; 24-6, 262-3.

1354 See *Botha v Rich NO* para 46.

1355 With regard to the illegal nature of sex work and the perils that sex workers experience on a regular basis in South Africa, and how such constitutional rights as the right to equality, dignity, privacy are implicated, see *S v Jordan and Others* 2002 (6) SA 642 (CC) para 21-9; para 54-56. The thrust of the judgment is that, despite the provisions of section 26(1) of the interim Constitution being broad and ambiguous in their import, 'economic activity' was to be subject to all the laws of the country.

individuals whose work has never accorded them any dignified appellation or title.[1356] They have been vilified and denigrated. Despite there being about 200,000 male and female workers involved in this industry and working a full- or part-time basis to support their dependants, sex work remains illegal in South Africa.[1357] It was in *S v Jordan and Others*[1358] that the criminal character and constitutionality of sex work were considered and pronounced upon. In the case, the Constitutional Court was called upon to determine the constitutionality or otherwise of section 20(1)(aA) of the Sexual Offences Act 23 of 1957 which, inter alia, provides that 'any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person *for reward* … shall be guilty of an offence' (emphasis added). After examining the relevant provisions of the interim Constitution, particularly section 26, the Court held that sex work was not the kind of economic activity that was envisaged by the interim Constitution. The Constitutional Court also declined to confirm the judgment of the Pretoria High Court – declaring the provisions of section 20(1)(aA) of the Sexual Offences unconstitutional – and dismissed the appeal. But, despite this kind of work still being illegal, there are people who, for a myriad reasons, continue to ply their trade under harsh and unfavourable conditions and restrictions. Some of these restrictions take the form of a contract or clause in restraint of trade.[1359]

5.5.1 An international overview

It would seem as though sex work is as old as the Bible itself,[1360] and is likely to be one of the ways of earning an income and a living until eternity. Many countries in the world, and their respective governments, are trying to regulate this form of work

1356 'Sex work' has been defined as 'any agreement between two or more persons in which the objective is exclusively limited to the sexual act and ends with that and which involves preliminary negotiations for a price' – see Evans D & Walker R (eds) 'The Policing of Sex Work in South Africa: A Research Report on the Human Rights Challenges Across Two South African Provinces' *Sonke Gender Justice and SWEAT Report* (2017) 5.

1357 See the *Sonke Gender Justice* Report 8.

1358 2002 (6) SA 642 (CC).

1359 In the sense discussed above, albeit under nefarious circumstances.

1360 There are three well-known prostitutes in the Bible, Rehab, Mary Magdalene, Gomer, the harlot, and the unfaithful wife of Prophet Hosea. There are even 47 references to prostitution in the Bible - '47 Bible Verses about Prostitution: Knowing Jesus', available at https://47 Bible verses about Prostitution (knowing-jesus.com) (Accessed 30.10.21); see also Genesis 38:15-16, Joshua 2:1, Hosea 1:3 and 1 Corinthians 6: 12-20.

and the accompanying remuneration and rewards.[1361] In some countries, such as Denmark, prostitution has been decriminalised, and in others, like Finland, it has been completely legalised.[1362] Legalisation means that a particular activity (or substance) becomes legal and acceptable in terms of the laws of the country and will not be followed upon by any penal sanction.[1363] Decriminalisation means that the rules and regulations remain intact even though no one will be prosecuted in terms of them.[1364]

5.5.2 Sex work and the courts in South Africa

It is not easy to predict how sex work would be regulated in South Africa. The Constitutional Court has deferred to Parliament to enact a piece of legislation to regulate it and the industry in which it takes place.[1365] For that reason, sex work still remains unregulated – and is still illegal in the country.[1366] However, there seems to be a glimmer of hope for this and other categories of workers. In '*Kylie' and Van Zyl t/a Brigittes*',[1367] the limits of the country's laws in this regard were tested and constitutional vistas sought to be extended. The case is discussed below as a foil to indicate how judicial pronouncement are shaping sex-work jurisprudence.

5.5.2.1 The Commission for Conciliation Mediation and Arbitration

1361 See *https://www.nswp.orsites/nswp.org/files/policy_brief_sex_work_as_work_nswp_-_2017.pdf* (accessed 30.10.2021).

1362 The other countries are Australia, New Zealand and Costa Rica. See Bhattacharya R 'Countries with Legal Prostitution', available at *https://www.scoopwhoop.com/inothernews/countries-with-legal-prostitution* (accessed 30.10.21).

1363 See Bhattacharya R 'Countries with Legal Prostitution', available at https://www.scoopwhoop.com/inothernews/countries-with-legal-prostitution.

1364 See Bhattacharya R 'Countries with Legal Prostitution', available at https://www.scoopwhoop.com/inothernews/countries-with-legal-prostitution.

1365 *S v Jordan and Others* 2002 (1) SA 797 (T).

1366 Decriminalisation has been recommended for South Africa, and it is suggested that it includes repealing laws that prohibit consenting adults to buy or sell sex, as well as laws that otherwise prohibit commercial sex, such as laws against 'living off the earnings' of prostitution or brothel-keeping [and] ensuring the civil and administrative offences (in terms of municipal by-laws) such as 'loitering' and 'public nuisance' are not used to penalise sex workers – see *Sonke Gender Justice* Report

1367 (2008) 28 ILJ 470 (CCMA).

In '*Kylie' and Van Zyl t/a Brigittes*, 'Kylie' worked at a massage parlour where she rendered 'sexual services' to the patrons for a reward. The question to be determined was whether sex workers were employees in terms of the labour dispensation of South Africa, and if so, whether they were entitled to any remedy in instances where their dismissal was found to be unfair. The matter was first dealt with in the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner was of the view that 'Kylie' was not an 'employee' in terms of the Labour Relations Act, and that the kind of work that she was engaged in was illegal and was prohibited in terms of the Sexual Offences Act.[1368] The Commissioner concluded that the CCMA had no jurisdiction to hear such a matter, particularly because the definition of 'employee' in section 213 of the Labour Relations Act was not wide enough to cover someone who had not entered into a valid contract of employment with his or her employer.[1369]

5.5.2.2 The Labour Court

'Kylie' then approached the Labour Court, which accepted that section 23 of the Labour Relations Act was wide enough to include persons who find themselves in her position, and that despite her work being illegal, there existed an employment contract between the parties. However, the question that remained was whether, as a matter of policy, the courts and other tribunals should sanction illegal contracts by enforcing their rights under the statutes and the Constitution.

The Labour Court held that a contract for the performance of illegal activities was *contra bonos mores* and was therefore void and unenforceable.[1370] Cheadle AJ was influenced by the common-law rule that no claim can be founded on a tainted cause of action: *ex turpi causa non oritur actio*.[1371] This rule prohibits the enforcement of

1368 Act 23 of 1957.

1369 Section 213 defines an 'employee' as:

a) any person, other than an independent contractor, *who works for another person* or for the State and who receives, or is entitled to receive, any remuneration; and
b) any other person who in *any manner assists in carrying on or conducting the business of an employer* (emphasis added).

1370 Para 7.

1371 Para 7.

an immoral or illegal contract.[1372] A contract is illegal if it is against public policy, and it is against public policy to enter into a contract which is illegal or immoral.[1373] The acting judge said that even though section 213 of the Labour Relations Act was wide enough to cover a person in 'Kylie's' position, the provisions of section 185(a) did not provide such a person with protection against unfair dismissal.[1374] His view was that the courts had a constitutional duty to uphold the rule of law and not to sanction or encourage illegal activity.[1375] Cheadle AJ said that even if 'Kylie' had such a right, that right was subject to limitation by the provisions of the Labour Relations Act, a law of general application which is itself an amplification of the provisions of the Constitution.

'Kylie' then took the matter on appeal to the Labour Appeal Court.[1376] The Labour Court emphasised that the purpose of the Labour Relations Act is to promote economic development, social justice and labour peace, and that section 23 of the Constitution is there to protect vulnerable employees such as 'Kylie'.[1377]

5.5.2.3 The Labour Appeal Court

In the Labour Appeal Court, the appellant's starting point was section 23 of the Constitution, which provides that everyone has the right to fair labour practices.[1378] The LAC accepted that 'everyone', as used in section 23, 'was a term of general import and had an unrestricted meaning',[1379] and that it was supportive of 'an extremely broad approach to the protection of the right guaranteed in the Constitution'.[1380] The Labour Appeal Court also emphasised that section 23 required

1372 See para 7; see also *Jajbhay v Cassim* 1939 AD 537.
1373 See para 7; see also *Jajbhay v Cassim* 1939 AD 537.
1374 Para 3.
1375 Para 3.
1376 *Kylie v CCMA and others* [2010] 7 BLLR 705 (LAC); 2010 (4) SA 383 (LAC).
1377 Para 40.
1378 Para 16.
1379 See para 17 where Davis JA cited with approval the dictum of Ngcobo J (as he then was) in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111, in regard to a contextual interpretation of 'everyone' in the Social Assistance Act 59 of 1992 in terms of which the word could not be interpreted so as to exclude non-citizens from that kind of social assistance.
1380 See *Discovery Health Limited v CCMA and Others* (2008) 29 ILJ 1480 (LC) para 32-4, 54-5;

that every employee, including one in 'Kylie's' position, should be treated with dignity by his or her employer.[1381]

Having accepted that 'Kylie' was an employee in terms of the Labour Relations Act, Davis JA held that 'Kylie' was an employee and entitled to appropriate legal protection.[1382] In other words, even though the employment contract she had entered into with her employer was illegal or immoral, it did not leave the courts without any discretion,[1383] and that the *pari delictum* rule (which tampered with the rigidity of the *non oritur actio*) was not inflexible, and gave the courts some discretion.[1384] This, the court said, was a question that could be appropriately determined with particular reference to public policy, which in turn could be sourced to the Constitution.[1385] The judge of appeal held that 'Kylie' was entitled to all the constitutional rights, including the right to human dignity, and that the criminalisation of the sex work 'Kylie' was engaged in did not mean that she forfeited all the rights provided for in section 23 of the Constitution and amplified by the Labour Relations Act.[1386] The judge of appeal was of the view that the Constitution and the applicable labour dispensation were intended to preserve the dignity of vulnerable persons such as sex workers and that there were implications for parties to such a relationship.[1387]However, the Labour Appeal Court held that 'Kylie' was not entitled to all the rights that other dismissed employees were entitled to – and that ordering that she be reinstated would be against public policy.[1388] The view

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see also *Khosa v Minister of Social Development* para 53-4. This case involved two Mozambican nationals who had come to South Africa as a result of the civil war in their country of birth. Both of them had been admitted to the country and granted permanent residence in South Africa. They had also applied for a state social grant in terms of the Social Assistance Act 59 of 1992.

1381 Para 22-6.

1382 See para 20 where the judge of appeal said:

> [The] illegal activity of sex workers does not per se prevent the latter from enjoying a range of constitutional rights. By contrast, the test is rather what constitutional protections are necessarily removed from a sex worker, given the express prohibition of their employment activities in terms of the (Sexual Offences) Act.

1383 Para 37.

1384 Para 37.

1385 Para 37.

1386 Para 39.

1387 Para 46.

1388 Para 55.

was that 'Kylie' was entitled to some remedy, albeit short of reinstatement, and her employer was ordered to pay her compensation in lieu of reinstatement. It is important to note that the court was influenced by international instruments such as CEDAW.

Clearly, the final word on the matter has not been spoken: the Supreme Court of Appeal and the Constitutional Court have not been called upon to pronounce on it. However, there are some questions that this case raises: What would happen to the employee's dependants in the event that she died while still being employed at an establishment such as a 'massage parlour'? In the case of injury, would she be able to claim for loss of earning capacity? What does *ubuntu* (compassion, empathy and social justice) demand in such a situation, given the fact that it now influences how public policy should be determined?[1389] And, what are the implications of section 22 of the Constitution, particularly on non South Africans? At face value, the provisions appear to be promoting unfair discrimination against this class of workers.[1390]. However, it is important to note that even the old Appellate Division always reiterated the need for the courts to strive for justice between man and man.[1391] That principle is consonant with the ethos of *ubuntu*: that in each case, the degrees of turpitude (unlawfulness), should be considered.[1392] Put otherwise, what needs to be determined in each instance, is whether the unlawfulness of the conduct of the particular worker outweighs the injustice which may result if he or she is denied an appropriate legal remedy.[1393]

1389 See 4.3 above.

1390 See 5.4.4 above.

1391 See *Jajbhay v Cassim* 1939 AD 537.

1392 547.

1393 See Kerr 196; see also *Kylie v CCMA and others* (LAC) para 20, and *Discovery Health v CCMA* which involved a dispute between the applicant, Discovery, and Lazentta, the third respondent, an Argentinian national, with Discovery alleging that it terminated the employment contract with Lazentta after having learnt that he did not have a valid work permit. In the CCMA, Discovery argued that, because there was no valid contract between the parties, there was no employer-employee relationship. Discovery also contended that, because of the illegality of the purported contract of employment, there was no dismissal to speak of. The Labour Court agreed with the Commissioner that the employer-employee relationship transcends (does not depend on) the existence of a valid contract; and that there was, indeed, such a relationship between the parties in terms of the provisions of section 213 of the Labour Relations Act – para 32-4, 54-5.

Ubuntu, as a relational, communitarian ethic, favours the integrity of the family structure, and the enhancement of healthy human relations that are not unduly harmful to the social fabric of the community which, in turn, ensures increased productivity and economic activity. 'Kylie's' position is not dissimilar to that of someone who operates a shebeen[1394] as opposed to a tavern. A patron who owes such a person for his or her services may not successfully avoid a legal claim against him merely on the basis that a shebeen is an illegal operation in terms of the Liquor Act.[1395] The court would, in its quest to do justice between (wo)man and (wo)man, consider the fact that the turpitude involved in running such a business is almost negligible and that many children in South African townships and elsewhere were raised or put through school and university on proceeds earned through these operations. As indicated above, the mores of the South African society have changed fundamentally in the past three decades or so. Sexual acts and relations which were viewed with opprobrium now enjoy a great deal of tolerance from South African society.[1396] More than a century ago,[1397] a degree of legal turpitude was lifted from adultery. That crime – founded on extra-marital sexual intercourse – was abolished.[1398]

It is also not easy to predict what the justices at the apex court are likely to rule. However, one point is clear: sex workers are 'employees' in terms of section 213 of the Labour Relations Act. From the '*Kylie*' judgment, it is clear that for as long as a person is in gainful employment as a sex worker, he or she should be accorded all the constitutional, contractual and rights that the country's dispensation provide. In other words, such a person is only likely to experience difficulties when he or she approaches the courts for reinstatement. Also, he or she can apply for an interdict in order to prevent their employer from dismissing and terminating their status as an employee.

1394 These are establishments in respect of which the owner has no valid licence from the local town council to sell liquor and other similar beverages.

1395 Act 59 of 2003. The different provincial legislatures have also enacted pieces of legislation dealing with their sphere of governance. For example, in Gauteng, there is the Gauteng Liquor Act 2 of 2003.

1396 See *DE v RH* 2015 (5) SA 83 (CC) para 17-26.

1397 *Green v Fitzgerald* 1914 AD 88.

1398 *DE v RH* para 26.

5.6 The prognosis

It is clear that some workers in South Africa are compelled by circumstances and conditions beyond their control to perform tasks and duties that are so demeaning and dehumanising as to render the contracts between them and their employers illegal, unlawful, invalid and unconstitutional. The jurisprudence on which the common law of employment is founded is resistant to change.[1399] Economic power is still in the hands of a few, most of whom are white, or in the hands of entities in which they have financial interests. Thankfully, the Constitution, and the value of *ubuntu* that undergirds it, is now the supreme law of the land.[1400] It protects the workers' right to life,[1401] the right to dignity, and the right to engage in a trade, occupation or profession of their choice.[1402] It also guarantees their right to 'fair labour practices', and protects them from violence.[1403] One other way of dealing with the conundrum would be for the legislature to enact a law – or add a provision in the existing legislation – that allows the parties to fashion a contract styled 'friends with benefits', with *ubuntu* as the overriding principle. The contract would have to be shorn of all the rigours, strictures and formalities that are generally associated with the law of contract.[1404]

In this context, 'friend' would have to be defined as 'any person, whatever his or her race, sex, gender, social background or religion who receives or offers any benefits and services that are available, made available or sold at the parlour. 'Service' and 'parlour' or any other related name would have to be defined. This would, in turn, mean that the terms and conditions are written and explained in a language that is spoken and readily understood by the worker.[1405] It would also

1399 Du Plessis 16-7.
1400 Section 2 of the Constitution.
1401 Section 11 of the Constitution.
1402 Section 22 of the Constitution.
1403 Section 12 (2) of the Constitution.
1404 In the same way as Roman Law was 'informalised' and rendered more flexible in order to ensure equity and justice between citizens of Rome and other persons – Kaser *Roman Private Law* 31-33; see also Naude T & Lubbe L 'Exemption Clauses – A Rethink Occasioned by Afrox Healthcare v Strydom Bpk' (2005) *SALJ* 441 446-53.
1405 The Credit Agreements Act 34 of 2005 is significantly different. It states that documents that

ensure that the worker is not compelled to perform tasks and duties that are so dangerous and demeaning as to render his or her constitutional and contractual rights nugatory. The worker should be allowed to report for work at a convenient time for both parties. The relevant factors to be considered in this regard would be (1) the time when or within which the work is to be done, taking into account that there is no reliable public transport system in South Africa and that car prices are exorbitant for an average worker;[1406] (2) the circumstances and conditions under which such work should be done; and (3) the provision of appropriate or protective clothing for the work or task to be performed. There should be a Ministerial Determination that provides for adequate protection of this category of worker. This could be effected by inserting a clause that provides that 'the provisions of the Bill of Rights and all the Labour Laws of the Republic of South Africa shall, subject to necessary modifications, apply to this contract'. Alternatively, the parties could, with the help of the local office of the Department of Labour and Employment, pre-empt what Parliament intends to do and incorporate the anticipated legislative changes into the contract.[1407] This would help ensure that there is improved productivity on the part of the workers and sustained economic development for the country.

The office could be an office in the Department of Labour and Employment, named and styled the Office of the Ombudsman for Vulnerable Workers, that would deal with the category of workers that are discussed in this chapter, the conditions under which they work, their terms of employment, and compliance with the Constitution and all the other laws that are intended to protect their fundamental rights. These are workers who, for some reason, are not covered by the formal labour law safety net. They include actors, stuntmen and -women, singers, roadies and make-up artists. The jurisdiction and authority of the Ombudsman could be made concurrent with that of the CCMA or be 'housed' within the latter's purview.[1408] This

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the credit provider delivers to the consumer should be in the official language that the consumer can read and understand – s 61 (3); see also *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD), and Otto & Otto 65.

1406 Average price of the cheapest second-hand car, in January 2020 – see 'This is how much the average South African joe public pays for a new and used car', available at https://busineestech.co.za/news/banking/128960-this-is-how-much-the--average-South-African-joe-public-pays-for-a-new-and-used-car (accessed 26.03.2020).

1407 See *Barkhuizen v Napier* para 176-7.

1408 This could entail an amendment to section 142 of the Labour Relations Act 66 of 1995.

arrangement would mean that the substantive jurisdiction of the Ombudsman could be limited to cases of physical and sexual abuse and financial exploitation. The role and functions of that Office would have to include inspections and investigations that are followed by compliance notices and remedial sanctions. As in the case of the Small Claims Court,[1409] there should be no legal representation at all during the proceedings before the Ombudsman. There could, of course, be exceptions, particularly when the matter involves complex legal issues and technicalities. For instance, in the CCMA, legal representation is only permitted during arbitration, and not during conciliation. Even during arbitration, it is not permitted in respect of all disputes.[1410] This approach is intended to ensure that the proceedings are not 'legalistic and expensive'.[1411]

The purpose of this exercise or development would be to ensure that (1) the conditions under which the worker is required to work are safe (including being provided with appropriate clothing); (2) there is some reasonable correlation between the work that the worker is expected to do, or has done - and the wage that is ultimately paid to the worker; and (3) that there has been some hearing in accordance with the rules of natural justice, before he or she is dismissed.[1412] The outcome would be to prevent the exploitation of the workers by their employers, who give very little by way of remuneration whilst demanding much in terms of physical exertion on the part of the workers.[1413] *Ubuntu*, therefore, is the transformative corrective that is needed in this sphere of economic activity; in order

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1409 See section 7 of the Small Claims Court Act 61 of 1984. Section 7(2) specifically provides that parties 'shall appear in person before the court …and shall not be represented by any person during proceedings'. Section 7(4) states that a company shall be represented 'by its duly nominated director or other officer'.

1410 Rule 25 (1) (b) of the Rules of the Commissioner for Conciliation, Mediation and Arbitration.

1411 See Van Niekerk & Smit 456.

1412 This would include (a) the *audi alteram partem* rule (hear or listen to the other side); (b) *nemo debet in sua causa* (no one should be a judge in his or her own case), and (c) the application of the legitimate expectation doctrine: that every person has a reasonable expectation that rules will be applied in a transparent and consistent manner to all employees. These common law rules are in line with the Constitution – see section 33 and 34; see also Hlophe J 'Legitimate Expectation and Natural Justice: English, Australian and South African Law' (1987) *SALJ* 165 166-169; see also Boulle L; Harris B & Hoexter C *Constitutional Law and Administrative Law* (1989) 322-338, and Wiechers M *Administrative Law* (1985) 210 -228

1413 See Washington JM (ed) *Martin Luther King Jr I Have A Dream: Writings & Speeches that Changed the World* 177 where he laments that capitalism 'forgets that life is social' and overlooks the economic exploitation that goes with it.

to right the contractual wrongs that were visited on the uneducated and unsophisticated South Africans. So, in interpreting these often informal, verbal contracts, the courts (and government functionaries) must consider the historical background to these wrongs – which have encompassed economic exclusion of black people, and the reduced absorption of this demographic into certain industries of the country.[1414]

5.7 Conclusion

It is clear from the *dicta* in *Everfresh Barkhuizen v Napier* and *AB v Pridwin and King NO v De Jager*[1415] that, where a case is properly pleaded and clearly made out, *ubuntu* might be the stonemason in the creation of new remedies, in line with the specifications of the current constitutional edifice. In these ground-breaking judgments, the Constitutional Court has continued to locate, and give content to, *ubuntu* as the foundational value of the Constitution. In the court's view, *ubuntu* demands that all the structures of law be infused with grace and compassion, going beyond the mere philosophy, or niceties, of law. Section 8(2) and (3) of the Constitution are not to be interpreted to mean that some branches of the law are insulated from constitutional scrutiny. In effect, that means that the common law contract of employment – including restraint clauses – should be compliant with the provisions of the Constitution. Contracts would cease to be the means by which employers violate the basic constitutional rights of the workers. These rights include the right to privacy and human dignity, and to follow a trade, occupation or profession of one's choice.

Except for the limited statutory protection that domestic workers enjoy, there is no specific law that protects some of the other vulnerable workers in this group. What they earn depends on the goodness of the employer's or producers' heart or generosity. The National Minimum Wage Act is indicative of a positive indication of an *ubuntu*-conscious legislature. However, the weakness of the Act lies in its 'exemption provisions' and regulations. It is a legislative paradox: it allows

1414 See Mbeki *Advocates for Change* 6; see also Dugard *Legal Order* 41-2.

1415 Mathopo J said as much in *Mohamed Leisure Hotels v Sun International* para 30.

employers to give very little in wages, while demanding more from often-overworked individuals. In many instances, these workers are subjected to assaultive and weaponised, dehumanising language. As for actors and musicians – the audiovisual workers – the only source of motivation for them is the media exposure and the fame that comes with the work.

Insofar as restraint clauses are concerned, *ubuntu* will have to be a primary consideration in determining their validity and enforceability. They also cannot be relied on to unduly inhibit the otherwise legitimate endeavours of foreign nationals to earn a living. Failing that, contractual injustice will persist in this area of the law. As indicated in 5.5.2.3. above, sex work should be freed from the moral and legal shackles of a bygone age.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

6.1.1 Introduction

As indicated in the previous chapters, any change in the politico-legal edifice of a country requires historical honesty. In the South African context, it demands an honest look at the history of the country, its institutions, laws and resultant jurisprudence.[1416] In South Africa, customary law – together with all the accompanying normative values – was stunted, ossified and distorted, and excluded from recognition as an authentic source of law.[1417] Along with that development, *ubuntu* was excluded, and the constitutional and legal system was deprived of a significant source of societal, moral, religious, ethical and juridical values. It is for that reason that, with the advent of democracy, South Africa needed a unifying and organising norm, and *ubuntu* was that norm. This sub-Saharan, multi-faceted ethic was reintroduced into the country's constitutional lexicon. As stated in *PE Municipality*,[1418] the whole South African politico-legal edifice needs to be suffused with all the juridical values that *ubuntu* represents. The courts have, indeed, started making some tangential reference to *ubuntu*, without necessarily demonstrating what it really is in a practical sense. No rules, procedures and processes have been developed that carry the stamp *ubuntu*. Moreover, places of work that fall outside the labour legislative framework, including collective bargaining, are clamouring for *ubuntu*-inspired changes. Such changes would ensure that there is practical and meaningful transformation on the shop-floor or in the entire workplace.

6.1.2 The theoretical foundations of ubuntu*, its meaning and content*

There is a lot of myth and mysticism around *ubuntu* as a concept. This problem has been exacerbated by deliberate ignorance, for purposes of political expediency.

1416 See 1.2 (n 5) above.
1417 See *Gumede v President of South Africa* para 16-8.
1418 Para 35-37. See also *Dikoko v Mokhatla* 68-9, 112-3.

Though etymologically Zulu in origin, it is a sub-Saharan African phenomenon which seeks to make all human beings conscious of the fact that they are all children of the same God, the Creator. As His children, all human beings, have the same fundamental features, wants and needs; hence the common isiZulu greeting, '*Sawubona'*. It contains no reference to race or origin: it is about individuals of equal personhood and humanity exchanging pleasantries.

Although *ubuntu* is not very dissimilar to other normative values, such as those espoused in the Bible and other philosophical or religious treatises, it does possess some distinct elements that give it its unique humanistic character.[1419] And, the main reason behind the resuscitation *ubuntu* in the South African context, seems to have been to remove all forms of discrimination that bedeviled the pre-democracy constitutional system and its accompanying jurisprudence. As stated in *Dikoko v Mokhatla*, everyone should be reminded of the need not to rupture relations and livelihoods, but to nurture and sustain them.[1420] *Ubuntu*, which emphasises the 'interconnectedness of humanity', is necessary for real, perceptible juridical and economic transformation in the law of contract.[1421] Unlike what happened in many other countries in Africa, where, after independence, the revived version of *ubuntu* only served political or sociological interests, in South Africa it is intended to percolate through the whole constitutional and legal system. Hence the need to clarify its import and nuances, and graft them on to an already-existing and recognised set of principles, maxims, procedures and processes. The ultimate purpose would be to ensure equity, fairness, social justice and industrial peace.

Unfortunately, as discussed in chapter 2, emerging literature seems to be propounding a contrived, attenuated and Westernised version of *ubuntu*. Like living customary law, of which *ubuntu* is part, the literature on this point should not just be about philosophical aesthetics and esoterica but be reflective of the South African reality. The significance of African maxims and some of the practices cannot be over-emphasised. The common feature among these practices is their resonance

1419 See Dlamini 6A4; see also Himonga & Nhlapo 18, and Rautenbach 28- 30.
1420 Para 112-3.
1421 See *Beadica v Oregon Trustees* para 207-12; *King NO v De Jager* 202-7.

within black communities in South Africa. These features help to confirm the aspirational nature of the country's Constitution (and the spirit, purport and objects of the Bill of Rights entrenched in it). Grounded on *ubuntu* as they are, they can help in introducing contractual and economic justice through the country's financial sector. For instance, *stokvel* and *mafisa* – or species thereof – could be relied on to transform the South African banking and credit industries.[1422] That could be done by structuring and repurposing certain of the bank's credit facilities and related products for the benefit of pensioners and bereaved customers, or those persons who find themselves in ruinous circumstances.[1423]

6.1.3 The value of ubuntu to the South African law of contract

As indicated above,[1424] all right-thinking South Africans are hoping for a body of contract law that reflects the values that are embodied in the Constitution which include *ubuntu*. But, because this branch of the country's law was afflicted by the ideology and politics of racial segregation and economic exclusion, its accompanying principles and attendant processes were perverted to suit that objective. There was, therefore, a need for a common unifying principle. The common law principles on the contract of employment were regarded as a cloistered, untouchable treasure trove.[1425] Sadly, they still are.[1426] There is both academic and judicial resistance to the constitutional transmogrification – constitutionalisation - of this specific area of the law.[1427]

This inertia has taken various forms.[1428] One these forms has been near-rejection of the direct application of the provisions of the Constitution and the Bill of Rights in the private-law sphere. Under the guise of enforcing the *stare decisis* rule, judges of provincial divisions of the High Court have been reprimanded and chided for daring to insist on the applicability of the Constitution.[1429] However, Victor AJ, in

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1422 See 2.7 for a detailed discussion of these practices.
1423 By way of loans and interest rates.
1424 See 3.1 above.
1425 See Du Toit 4B3-4B4; 4B15-4B6.
1426 See Du Toit 4B3-4B4; 4B15-4B6; see also Lewis C 91-4.
1427 See Du Toit 4B3-4B4 and the authorities cited therein.
1428 See Afrox Healthcare 27-9.
1429 See *Afrox Healthcare* para 31 where Brand JA admonished the Western Cape High Court for

Beadica v Oregon Trustees, reminds all concerned that 'the time has come to vindicate African jurisprudence'[1430] and that *ubuntu* 'must be reconceived into the transformative space which the Constitution provides'.[1431]

And, as stated in *AB v Pridwin*, section 8(2) and (3) do not prevent the application of any of the provisions of the Constitution in the private-law sphere.[1432] Nor they prohibit the infusion of *ubuntu* into all or some of the common law principles.[1433] The difference only lies in the mechanics of how each of the provisions should be applied in that sphere. It bears repeating that the Constitutional Court is now the highest court in respect of all matters – not only the constitutional ones.[1434]

The fact that pre-Constitution precedent is tainted seems to escape some of the judges of the Supreme Court of Appeal; and that has led to the judicial discord that has already been alluded to above.[1435] However, the more courageous of these judges have given back as much as they got.[1436] They have, in many ways, set the precedential record straight.[1437] There has also been an insistence that judges rely, inordinately, on pre-Constitution precedent of the law to ensure 'economic certainty'[1438] - an oxymoron if ever there was one. In the words of Davis J in *Combined Construction v Arun*, matters of economic development are best left to the economists and politicians.[1439] South Africa's nascent constitutional

following the minority judgment in *Eerste Nasionale Bank van Suidelike-Afrika Bpk v Saayman N O* 1997 (4) SA 302 (SCA) 318; see also Wallis 465-8.

1430 Para 212.

1431 Para 212.

1432 Para 67.

1433 Para 67.

1434 See section 167 (3) of the Constitution (as amended by the Constitution Seventeenth Amendment Act of 2012).

1435 See Bennett *African Equity* 50-1; see also Coleman 23-9.

1436 See *Combined Construction v Arum* 240; see also Louw 71-2.

1437 See the dictum of Davis in *Combined Construction v Arum* para 240 where the judge cautions his (senior) colleagues from venturing into commercial and economic matters they know nothing about.

1438 See *Beadica v Oregon Trustees* (SCA) para 39; see also Lewis C, and Wallis M 565-8 who says that judicial law-making should be undertaken with great caution. However, it is difficult to take heed of this kind of advice where emerging, nascent concepts are involved and require elaborate exposition to provide the broadest possible protection to litigants, particularly vulnerable ones.

1439 See Combined Construction v Arun 240.

jurisprudence requires generous and elaborate exposition. In other words, tautology and verbosity are often necessary for this purpose – and for posterity.[1440] What is even more worrisome is the academic ambivalence that this approach has spawned. Some commentators, its adherents, have characterised concepts such as public policy, reasonableness, fairness and equity, not as substantive, but 'creative', 'controlling' 'floating' concepts.[1441]

Sadly, *ubuntu* – the very foundation of South Africa's seminal democratic instrument – is treated with the same contempt, as a mere appendage to colonial and apartheid concepts.[1442] The reasons for this near-impregnability of the South African law of contract (and the continued judicial and academic support it enjoys) are not hard to find. This branch of the law lies at the core of economic power, which is far greater than political power. Whenever constitutional and juridical shifts appear on the horizon, they threaten to disrupt centuries of wealth, status and privilege.[1443]

The contract law of South Africa appears to be just one Constitutional Court judgment away from full juridical emancipation, and be freed from judicial shackles. That judgment would help to nurture to full growth, the transformative precedential seed that was planted by Nkabinde J in *Botha v Rich NO*.[1444] Olivier JA too played no small part in his judgment in *Eerste Nasionale Bank*.[1445] In his minority judgment, the judge of appeal questioned the precedential value and authority of *Bank of Lisbon v Ornelas* on the purported abolition of the *exceptio doli generalis*. By so doing, he brought forward the realisation of contractual justice, economic emancipation and industrial peace in South Africa.

1440 See Bilchitz 50-55 where he criticises the judges for their reticence on human rights issues. However, cf. Wallis 456-60 who suggests quite the opposite. It is important to note that contract law is a human rights' issue in South Africa and that and its principles should be extensively ventilated and clarified. In reality, the law of contract determines whether someone will be employed, and be able to buy the food, clothes or receive adequate medical and dental care.

1441 *York Timbers Limited* para 27; *Potgieter v Potgieter* para 31-4.

1442 In this regard see *Everfresh* para 23. However, cf. Wallis 558-60.

1443 See Louw 57.

1444 Para 64.

1445 323-4.

It should be emphasised that *ubuntu* is the organising principle, *Grundnorm*; or the foundational value of South Africa's Constitution. It is an apposite metaphor for the kind of republic and constitutional order that all right-thinking South Africans have always sought for themselves and their descendants. For that reason, many principles of this branch of the law are yearning for rejuvenation or complete resuscitation. Some of the somewhat redeeming features of the common law – such as good faith and public policy – had been tainted by racial and ideological considerations. Just as *ubuntu* suffuses South Africa's new constitutional edifice, the law of contract cannot escape being infused with the values that *ubuntu* embodies. Not only is it founded on the equal worth of all men and women and the connectedness of humanity, but it is also flexible enough to enable the courts to ensure an equitable outcome in all these situations. It also helps to serve the interests of all human beings found within the borders of South Africa. It is only under those circumstances that all denizens of the country can speak of everything that Steve Biko, Professor Pityana and their friends were striving for: pride and confidence in oneself, self-reliance, self-sufficiency, and respect for human dignity.[1446]

However, there is still a missing link: a full precedential judgment on contractual justice, fairness and *ubuntu* as substantive concepts. Minority judgments in *Everfresh*; *AB v Pridwin*; *Beadica v Omega Trustees* and recently, *King NO v De Jager*[1447] should be viewed as the harbinger of that eventuality. Except for the descriptive expressions of what *ubuntu* is, at a philosophical, esoteric level, the courts have not explained, exactly, what the concept's juridical content and meaning really is. Nor has there been any concrete suggestions on how new, correlative procedures and processes should be fashioned in response to that development. Where there is a new, resuscitated or modified right,[1448] there should be a corresponding remedy. That would also prevent those rights from becoming hollow

1446 See Biko; (1996) 96-108; see also Biko (2019) *Africa Reimagined* 82-90.

1447 These are all minority judgments which might, in due course, form the basis of a decisive, epoch-making, majority judgment.

1448 See Bilchitz where the author demonstrates how the Constitutional Court, almost fortuitously, created the right to an adequate supply of electricity. This, he argues, the court did by extending the meaning of 'adequate housing' in s 26 (3) of the Constitution.

concepts. For instance, all black people in South Africa have the right to speak a language of their choice,[1449] but the laws that regulate the economy of the country, and the commercial intercourse that results from it, do not reflect that as a constitutional reality.[1450] Some commentators have even suggested that customary law, *ubuntu*, is not suited for international commerce.[1451] That view cannot be supported, fully. And, as indicated above,[1452] the contention by Bernard-Naude[1453] cannot be accepted without more: that good faith is the new 'master-signifier' that has begun - and will continue - to transform the old socio-legal patterns that have, up until fairly recently, defined the South African law of contract.[1454] He contends that these patterns 'are new in a fundamental and constitutive sense and this means that they are *transforming*' (emphasis provided).[1455] It is submitted, however, that the learned author's characterisation of good faith in this context, only befits *ubuntu*. Good faith lacks humanistic essence which gives *ubuntu* its content, character and meaning.

However, it submitted that *ubuntu* will, in the fullness of time, be an important catalyst where some aspects of both the South African law of contract and international law are concerned. The first port of call should be the southern African judicial, arbitrarial or adjudicatory forums.[1456] When that happens, the charging of unreasonable, usurious interest, in respect of both local and international business or financial transactions, will be a thing of the past. Also, extinctive prescription will not even be a feature of these transactions. Customary law – and *ubuntu* its subset – eschews and abhors interest, particularly the usurious, rapacious kind.[1457] Lastly, there would be the abolition of prescription, in accordance with the maxim *icala aliboli*.[1458] A lapse of time is not extinctive of one's liability for a crime or delict – or

1449 S 30 of the Constitution.
1450 See Bennett *Customary Law* 42.
1451 Coleman 34.
1452 See 3.3.1 above.
1453 See Barnard-Naude 248.
1454 See Bernard-Naude 248.
1455 See Barnard-Naude 248.
1456 In a recent decision, the Lesotho High Court considered the values of *ubuntu* in determining whether a personal injury claim had prescribed – see *Limo v Lesotho General Ins. Co Ltd* (Unreported 24 October, 2013).
1457 See in general, *Maisela v Kgoloane NO* 2002 (2) SA370 (T).
1458 See Himonga & Nhlapo 188; Rautenbach 38, 45; see also in general, *Maisela v Kgoloane NO*

a civil or commercial claim.[1459] In terms of customary law, any dispute between the parties has to be prosecuted until satisfactorily resolved, either by conciliation or imposition of fine.[1460] The third one would be to have *ubuntu* as a general, non-derogable term in respect of all contracts that fall outside the purview of consumer protection law, a *ius cogens* of sorts.

The effect of this would be to (1) elevate good faith, reasonableness and fairness to being substantive principles of contract; (2) infuse empathy, compassion and sympathy into all contracts that have the tendency to infringe one of the parties' rights to equality, dignity, privacy and the free choice of a preferred trade or profession; and (3) require the parties to provide compelling reasons why *ubuntu* (and its accompanying values and ethos)should be departed from. The sum total of this development would be an increase in fair and equitable contractual terms and outcomes; contractual justice would be an undeniable constant; there will be an equitable distribution of wealth and other resources; and industrial peace shall prevail in the country.

6.1.4 Ubuntu and the possible resuscitation and reconfiguration of old common law remedies

There are many common law principles that have, over the years, been abrogated by disuse or discarded by the judges. For instance, in *Green v Fitzgerald*,[1461] the Appellate Division (now the Supreme Court of Appeal) abolished adultery as a crime. However, some important principles – and remedies – were judicially abolished by the then apex court. The most well-known of these are *exceptio doli generalis* and the *laesio enormis*. As indicated above,[1462] the motives for the abolition were more ideological than juridical. They did not fit in snuggly with the politico-legal framework of the time.

2002 (2) SA370. A principle that can be extrapolated from that judgment is that there will be instances where the common law would not be appropriate in adjudicating a particular matter, and vice versa.

1459 Himonga & Nhlapo 209.

1460 See Himonga & Nhlapo 208-9.

1461 1914 AD 88.

1462 See 4.3 above.

It is submitted that black people, *en bloc*, would have benefited immensely from the retention or non-abolition of these remedies. The original, cumulative purpose of the two remedies was to protect the weaker, and poorer, of the parties from unfair, oppressive and unconscionable terms. There would not have been the need for the Constitutional Court to make a bold attempt at carving out a precedential place for the 'proportionality principle' in the country's constitutional, legal masonry.[1463] Nor would there have been any rationale for the enactment of the Alienation of Land Act,[1464] or an attempt at creating a law out of the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Bill.[1465] The *exceptio doli generalis*, as the name suggests, was a very broad and general remedy in these circumstances. Given its qualities of equity and flexibility, and the fact that it is an integral part of the Constitution – ubuntu is the only concept that can extricate the South African law of contract from this morass.[1466] Besides, its historical legal roots were blurred or distorted in *Bank of Lisbon v Ornelas*.[1467] its resultant abolition by the Appellate Division was based on thin, questionable authority.[1468] Roman Law, on this point, favoured justice, fairness and equity.[1469]

6.1.5 The workplace, ubuntu and the common law on employment

Except for the limited statutory protection that domestic workers and farmworkers enjoy, there is no specific law that protects some of the other vulnerable workers in this group, which includes musicians, actors and roadies.[1470] What they earn depends on the goodness of the employer's or producer's heart or generosity. In many instances, they are expected to work their fingers to the bone, and against the clock. In the case of actors and musicians, it is the media coverage that some

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1463 See *Botha v Rich NO* para 45-6.
1464 Act 68 of 1981.
1465 Which is still to be promulgated. As the name suggests, its *ratio legis* is to prohibit the inclusion of unreasonable, unconscionable or oppressive terms into contracts.
1466 See *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 4 SA 16 (CC); see also Louw 61-2.
1467 See Kerr 638 (n 20); see also Eerste Nasionale Bank v Saayman 323-4, and Crown Restaurant para 3 (fn 1).
1468 See Kerr 638 (n 20); see also *Eerste Nasionale Bank v Saayman* 323-4, and *Crown Restaurant* para 3 (fn 1).
1469 See Kaser 642-6.
1470 See 5.2.3 above.

of their work receives and the ever-present promise of better future prospects - that keeps them motivated.[1471] These legal -and industrial - problems could be ameliorated by insisting that the contracts incorporate all the relevant provisions of the Constitution and other pieces of legislation that seek to amplify it[1472] – such as the Labour Relations Act and the Basic Conditions of Employment Act[1473] and the Employment Equity Act.[1474] And, because such provisions would have been imposed by operation of law (*ex lege*),[1475] the parties would be obliged to act fairly towards each other.[1476] Failing that, the common law on this point – which does not impose a duty on the employer to act fairly - would have to be developed in accordance with the provisions of s 39 (2) of the Constitution. Moreover, s 23 (1) thereof provides that 'everyone has the right to fair labour practices'. That development would ensure that production houses are not exempted from the provisions of minimum-wage ministerial determinations.[1477] The equitable division of labour – according to the physical, mental and cognitive strengths of the different workers – not just the commercial interests of the employer or standing of his enterprise – can play no small part in ensuring contractual justice and industrial peace in the workplace.[1478]

Even under the common law, restraint of trade clauses (or contracts) were tested for validity and enforceability on the basis of reasonableness and public policy.[1479] Therefore, workers could not unreasonably be prevented from putting to good use their qualifications, skills and experience in order to earn a decent living.[1480]

1471 See 5.2.3 above.

1472 As implied terms which are, by nature, binding on the parties – see Grogan 28-9; see also South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA) para 11-6, 31-5

1473 Act 75 of 1995.

1474 Act 66 0f 1995.

1475 Act 55 of 1998.

1476 Grogan 28.

1477 The Ministerial Determination could take the inverse form of Reg 3(2) of the National Minimum Wage Regulations: that this category of workers shall not be mulcted in wages or salary by their employers.

1478 See 5.2.1 above; https://biography.yourdictionary.com/abd-al-rahman-ibn-muhammad-ibn-khaldun.

1479 *Highlands Park v Viljoen and Another 1978* (3) SA 191 200; *Basson v Chilwan and Others*1993 (3) SA 742 776-7 (A), and Van Niekerk & Smit 90.

1480 See *Highlands Park v Viljoen* 200; *Basson v Chilwan and Others*1993 (3) SA 742 776-7 (A), and Van Niekerk & Smit 90.

Competition has never been regarded, without reason, as unlawful.[1481] Everything hinges on the nature and effect of the clause or contract. Any contract or clause whose sole purpose it was to stifle or 'sterilise' competition, has always been unlawful – and unenforceable.[1482] However, some pre-Constitution decisions on this topic should be approached with caution. They over-emphasise freedom of contract and individual autonomy. Nor is it to be readily accepted that the common law principles in this regard are in line with the Constitution.[1483] The infringement of different constitutional rights will be the ultimate test thereof. Moreover, *ubuntu* – South Africa's foundational, constitutional value and organising principle – demands that all able-bodied people be free to engage in any economic activity of whatever description. This would be in line with maintaining (financially) all familial and business relations intact and not 'rupturing' them. For that reason, the position as it holds in the United Kingdom is preferable for South Africa.[1484] Anyone who seeks to prevent another person from starting a business enterprise – and creating employment opportunities for others – must bear the onus of showing that the clause or contract is valid and enforceable in the particular circumstances of the case. This is another example where the direct application of the provisions of the Constitution (particularly the Bill of Rights) – a reflection of *ubuntu* – is required.[1485] There is a need to protect all human rights that are likely to be implicated by these contractual terms: the right to equality (and not to be discriminated against); and human dignity and to engage in a trade, occupation or profession of their choice.[1486] Moreover, it is in the interest of the public that there be healthy, lawful and conscionable competition among entrepreneurs.[1487]

1481 See Van Huyssteen et al. 234-5, 245; see also *Sunshine Records v Frohling and Others* 1990 (4) SA 782 (A) 794.

1482 *Highlands Park v Viljoen and Another 1978* (3) SA 191 200; see also Van Hyssteen *et al*. 245.

1483 See Van Huyssteen *et al*. 236-7.

1484 See 5.4.1 above for authorities on this point.

1485 However, see Van Huyssteen et al. 57 who refer to *ubuntu* as a mere 'constitutional value' and 'not a ground for relief that a party can rely on' in court. As indicated above, the time is ripe for *ubuntu* to take its rightful place as a substantive principle of contract.

1486 See *King NO v De Jager* 227-232.

1487 *Highlands Park v Viljoen* 200.

Sex workers continue to find themselves in an even more precarious situation. Because their work is not regulated by law and is illegal, they do not enjoy all the protection that the *law* has to offer. Except for the right to engage in the trade, occupation or profession of their choice,[1488] they are entitled to all the other constitutional rights that everybody else – every citizen – is entitled to. Happily, all the judgments in the *Kylie* case point to section 23 being applicable to sex workers as well, albeit in a limited manner.[1489] The cumulative effect is that, at least constitutionally, sex workers are entitled to engage in their chosen economic activity, and they are, if already employed, entitled to be treated fairly by their employers.[1490] Although their economic activity is recognised as 'work', in South Africa – and they themselves as 'workers' – sex work still remains unregulated and illegal.

Until it is legalised, reliance on *ubuntu* seems to be the only salvation for this class of workers. Without that, they will not be unable to claim for loss of income or loss of earning capacity in case of injury. Nor will their dependants be able to make out a case for loss of support in case of death, as demonstrated in *Dhlamini v Protea Assurance Co Ltd*;[1491] *Booysen v Shield Insurance Co Ltd*;[1492] and *Ferguson v Santam Insurance Ltd*.[1493] The significance of appropriate legislation in this regard cannot be overstated. Based on the statistics referred to in the *Sisonke* Report above, many individuals and families depend on this class of workers for their livelihood. These people include the worker's own parents, children, employers and service providers (hair-stylists, nail technicians, doctors and pharmacists). As indicated above, they can object to, or challenge their dismissal, during an internal hearing or at the CCMA, arguing that their dismissal was not based on any substantive objective facts and there were no compelling reasons for it.

1488 In terms of s 22 of the Constitution.
1489 See 5.5.2 above.
1490 S 23. See also section 27 of the interim Constitution.
1491 1974 (4 SA 906 (A).
1492 1980 (3) SA 1211 (E).
1493 1985 (1) SA 207 (C).

6.2 Recommendations

6.2.1 Recommendation 1

Although *ubuntu* is of African provenance, it is of *human* significance. It may be rooted in sub-Saharan Africa, and encapsulated in its traditions and folklore, but its appeal is universal. It enjoins all human beings to be *humane* and considerate to one another. For that reason, the courts should not shrink from their judicial duty and the responsibility of developing the law of contract in its totality. The law of contract should not be treated as a cloistered area of the legal system to which only a privileged minority can have ready access. It is part of the South African legal system which is, itself subsumed under the Constitution. *Ubuntu* may have been introduced into the country's constitutional framework through an epilogue, but it is its centre-piece, not just an appendage. The country's constitutional edifice would crumble and collapse if, as suggested by Barnard-Naude, good faith were to supplant *ubuntu* were to (which he calls the 'master-signifier') were to supplant the Constitution and the values it embodies.[1494] Good faith, is, like public policy, fairness and reasonable, but minute, but significant manifestation of *ubuntu*.

6.2.2 Recommendation 2

All the courts of the country have to acknowledge and learn all the relevant African maxims. When germane to the case, judges and magistrates should always invite attorneys or counsel to address them on the meaning, import and nuances of a particular maxim. There is also nothing constitutionally reprehensible with judicial officers raising these matters *mero motu* with the view to invigorating and enriching the law on a particular point. That is what the Constitutional Court should have done in the *Crown Hotel* case[1495] and invited senior counsel, such as Jeremy Gauntlet SC, Ishmael Semenya SC, Matthew Chaskalson SC and Vincent Maleka SC, to prepare heads of argument on the *exceptio doli generalis*. The alternative would have been for counsel to argue the matter as a 'stated case'[1496] in terms of section 167(6)(a)

1494 See Barnard-Naude 256.
1495 Para 3.
1496 This is a formal written statement of the facts of a particular case. It is submitted to the

of the Constitution, and Rule 27 of the Uniform Rules of Court. The uncertainty concerning the historical and juridical value of this Roman law remedy would have been put to bed once and for all. That development would help to speed up the process of incorporating these pillars of African jurisprudence into the court judgments. It would also help to juridicalise and constitutionalise all of them, not just the oft-quoted *umuntu ngumuntu ngabantu*. Even that hackneyed maxim should not itself just be used as a verbal crutch.[1497] The orders which emanate from the courts of the country should demonstrate that fact in a practical sense. That would also ensure the continued existence of familial, social and economic bonds such that they are not unjustifiably ruptured in pursuit of ever-elusive economic certainty. In other words, the achievement of social justice, equity, fairness and industrial peace – above all, *humanity* – should be the ultimate goal. Adherence to pre-Constitution Appellate Division precedent should not even come into the reckoning.

After all, justice requires a measure of mercy, empathy, social cohesion and justice. As Sachs said in *PE Municipality,* courts should 'go beyond their normal function and engage in active judicial management according to equitable principles'.[1498] In the context of the law of contract, it means that the courts – and all the parties involved – should begin to understand that human beings do not cease to be *human* merely because there is a commercial transaction involved; and money, or its value, is being exchanged. There should be a non-derogable, general implied clause, whose purpose and purport would be to prevent commercial and industrial exploitation. The implied term will make it very difficult for wealthy people to continue making their wealth off the ignorance and lack of sophistication of others.

court by the parties, and is restricted to questions of law. It is another way of curtailing the proceedings and saving costs. In this regard, see also Rule33 of the Uniform Rules of Court.

1497 See *PE Municipality* para 36; *Dikoko v Mokhatla* para 112-3. However, see Wallis 455-60.

1498 Para 37.

6.2.3 Recommendation 3

The common features of customary-law practices discussed in 2.3 above, reflective of the ethos of *ubuntu* as they are, can help in introducing contractual and economic justice through the country's financial sector. As has happened with the *stokvel*,[1499] some financial products and facilities could be fashioned based on *mafisa* as well. For instance, there could be loan-interest arrangements which are specifically suited to the needs of pensioners, the disabled and the bereaved. There could be a form of interest product or structure, styled 'pensionable interest', in terms of which more interest is paid on the investments made by senior citizens and the disabled, and less levied against their loans. There could be similar considerations in the case of the bereaved or those who are in trouble as the result of some calamity.[1500]

6.2.4 Recommendation 4

Given the nature, import and nuances of *ubuntu*, as discussed above, many areas of the law of contract need fundamental transformation. As already indicated, the common law is not 'the supreme law' of South Africa; it actually derives its force from the Constitution. The Constitution is itself undergirded by *ubuntu*. This organising principle should be the foundation on which the validity and enforceability of all common law contracts in South Africa are grounded. It could take the form of a 'universal implied contractual term' – a species of the *exceptio doli generalis* – to be incorporated into all contracts. Such incorporation would ensure that all non-statutory contracts impose a non-derogable duty on every party: not to insert any term or condition that has the potential to financially harm the weaker of the parties and their families or business enterprises. As the Sesotho/Setswana maxim commands: '*O se ke wa e nametsa thaba e tlhotsa'* (do not drag an injured, limping horse up the hill). In a sense, Nkabinde J juridicalised and constitutionalised this maxim in *Botha v Rich NO*. Despite commentaries to the

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1499 As happened with creation of the 'Club Account' by the major banks of South Africa in concert with the National Stokvel Association of South Africa (NASASA), an organisation steeped in black economic empowerment and self-reliance – see https://nasasa.co.za (accessed 02.12.2021).

1500 Particularly those whose circumstances are not covered by the provisions of the National Credit Act 34 of 2005.

contrary – by Wallis, Brand and Wallis – it is hoped that her Ladyship's dictum will be given appropriate precedential worth. *Ubuntu* should also be utilised to resurrect, and craft back into the *corpus* of South Africa's unwritten law, all those discarded remedies that are, by their very nature, compliant with the values enshrined in the Constitution and are encapsulated by *ubuntu*: the *exceptio doli generalis*, *laesio enormis*, and the *amende honorable*. If the law of contract in South Africa does not undergo a constitutional metamorphosis – and an *ubuntu*-inspired juridical transformation – all the centuries-long agitation for socio-political and economic change, by all right-thinking South Africans will have been in vain.

6.2.5 Recommendation 5

There are many remedies, procedures and processes that were sacrificed at the altar of political expediency. The result has been the economic subjugation of the majority by the minority, through court rules and processes that were intended primarily to keep the wealth and resources of the country within the same community that has always had its hands on it.[1501] The rules that regulate the delivery of court process should be improved or completely overhauled in order to protect the constitutional rights of those on whom it is served. There should no longer be any room or tolerance for the affixing summons, or any other process, to the main entrance of a dwelling if there is no one to serve it on. Nor should persons whose contracts fall outside of the ambit of section 90 of the National Credit Act 34 of 2005 be under any contractual pressure to consent to judgments where there is no judicial supervision and intervention.[1502] They should also not be made to 'consent' to the jurisdiction of a court that falls outside of their place of residence, employment or business.

1501 See Otto & Otto 2.

1502 See s 45, 57, 58 and 66 of the Constitution; see also *University of Stellenbosch v Minister of Justice* para 25-32 for an exposition of the statutory scheme in the light of the provisions of the National Credit Act 34 of 2004.

6.2.6 Recommendation 6

All those workers whose trade, occupation or profession is not covered by the relevant labour legislation[1503] should not be unduly prejudiced merely on the basis of an absence of such legislative protection. The relevant common law which regulates the contractual relationships that they have with their employers, should be interpreted in such a way as to incorporate, by reference, the provisions of the Constitution and other *ubuntu*-inspired pieces of legislation. In other words, section 39 of the Constitution should be relied on for this purpose. That would ensure that all the denizens of South Africa are accorded contractual and work-specific justice.

The rules of natural justice can always be resorted to, insofar as they have not been incorporated into the Promotion Administration of Justice Act.[1504] These are the (1) *audi alteram partem* (the other side must be heard before an adverse decision is taken); and (2) the *nemo judex in sua causa* (no one should adjudicate on a matter he or she has an interest in). There is also the legitimate expectation doctrine (everyone expects that reasonable established practices, procedures and processes be adhered to in resolving disputes).[1505] These rules, and the doctrine, are in accord with the values on which the Constitution is founded – the most important of which is *ubuntu*.

6.2.7 Recommendation 7

Ubuntu or *ubuntu*-inspired principles of contract,[1506] such as good faith, fairness and reasonableness, should be the determinant of enforceability of restraint clauses or contracts. The unique South African socio-economic and political conditions should be taken into account when developing the law in this regard. Rather than adopting either a strictly British or South African approach, the courts should instead adopt a fair and equitable middle course. Such a course would ensure that everyone is free to engage in a trade, occupation or profession of his or her choice; and that

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1503 Such as the Labour Relations Act 66 of 1996 and the Basic Conditions of Employment Act 75 of 1997.

1504 Act 3 of 2000.

1505 See Boulle *et al.* 322-38; Wiechers 208-58.

1506 See *King NO v De Jager* para 202-3.

only those whose commercial activity is patently unlawful are restrained from continuing with such activity. On the basis of that approach, all contracts (or clauses) of this nature would be rendered unlawful only if they have the potential to 'sterilise' economic activity and productivity and retard the attainment of all the developmental goals of the country. As was stated in *Magna Alloys v Ellis*,[1507] *MacPhail v Janse Van Rensburg,*[1508] and *Basson v Chilwan*,[1509] the courts would have to insist on the litigants and their lawyers making a clear case for the reduction – or even extension – of the periods for which the restraint contracts or clauses are to apply, or the radius over which they ought to be extended. Counsel would be well advised to fashion his or her court papers based on the dictum of Traverso DJP in *Coetzee v Comitis*.[1510] That approach is likely to enable them to come up with persuasive contentions and arguments on the constitutionality of this type of clause or contract – and probably find favour with the judges or magistrates.

No tangible or cogent reasons were proffered in *Magna Alloys*[1511] for not following the English Law, completely, on this point. The motivation and thinking behind the need to shift the *locus* of the onus (of proof), in these matters, is not difficult to fathom. The was a need to pull the proverbial rug from under the feet of the covenantor and place it under those of the covenantee. The covenantee has often been in a stronger position; and the covenantor, also, needed to be liberated (freed up), economically, and not stifle his entrepreneurial endeavours. That objective could only be achieved by rendering restraint contracts or clauses *prima facie* unlawful. And, as already pointed out above,[1512] the current South African position is akin to punishing the poor – those who are of an entrepreneurial bent – for trying to make a legitimate living. For that reason, it is submitted, the onus should be on the party who wishes to enforce such a contract or clause to 'justify' its validity and enforceability in a court of law. Continued economic disparities in South Africa make

1507 898.
1508 598-9.
1509 768.
1510 Para 16-7, 28-30.
1511 891-8.
1512 5.4.4.

it unfair and inequitable to insist on a rigid application of the twin principles of individual autonomy and freedom of contract.[1513]

6.2.8 Recommendation 8

The Constitutional Court has not, as yet, been called upon to pronounce on the catalogue of rights that sex workers – *qua* employees – are entitled.[1514] Nor is it easy to predict what the justices' pronouncement is likely to be. However, as indicated in 5.4.4 above, sex workers are now recognised as 'employees' in terms of section 213 of the Labour Relations Act, as interpreted by the Labour Court, and confirmed by the Labour Appeal Court. Sex workers are included in the definition of 'employee', in terms of section 213 of the Labour Relations Act, which is wide enough to include sex workers; and the right contained in section 22 encompasses this category of employees. Thus, the work that they perform qualifies as a 'trade', 'occupation' or 'profession'.[1515] But, because s 22 of the Constitution is expressly intended to apply to 'citizens' only, its provisions would, therefore, have to be interpreted contextually and purposively.[1516] And, that would ensure that foreign nationals who have duly been admitted to the country - and refugees or asylum-seekers whose status has been properly regularised – enjoy the most comprehensive amount of protection that the Constitution can possibly provide.[1517] Moreover, South Africa's declared aspiration is 'to take its rightful place as a sovereign state in the family of nations'.[1518]

A reasonable amount of judicial activism may help to cut this Gordian knot. As was the case in the 'Kylie' matter, counsel should rely on the workers' right to dignity (section 10), privacy (section 14) and fair labour practices (section 23, which applies to 'everyone'). They can, it is submitted, rely on section 22 itself, and depend on the change in the mores of society, and what the courts have already said about

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1513 See *Beadica v Omega Trustees* para 207-8; see also *King NO v De Jager* para 202-5.

1514 However, see the judgment of O' Regan J and Sachs J and in *S v Jordan and Others* para 51-84.

1515 See *Kylie v CCMA and Others* para 16-7.

1516 See Currie & De Waal 138-41.

1517 See *Khosa v Minister of Social Development* 111; see also *Nyamakazi v President of Bophuthatswana* 579, and *Minister of Home Affairs v Watchenuka* para 25.

1518 As per the preamble to the Constitution.

the relationship between public policy, the Constitution and *ubuntu,* to persuade the judicial officers.[1519] After all, it is counsel's role to help the court fashion new laws for new conditions and circumstances. Where, for instance, the Sexual Offences Act, the Liquor Act or any other similar piece of legislation applies, the provisions of section 39 (2) would be much more apposite. But where the common law is applicable, *ubuntu* might provide some relief, particularly if all the relevant African maxims, as discussed above, are put to full use. The individual worker could indicate, or argue at the CCMA or Labour Court that: (1) the fact that he or she is a sex worker does not make him or her less of a human being who is not entitled to enjoy basic human rights; (2) he or she should not be dismissed without his or her side of the dispute having been heard; (3) his or her situation should not, unreasonably, be made more unbearable than it already is – physically, mentally and financially; (4) and, no compelling grounds have been proffered to justify his or her dismissal. The law of contract in general, and the common law on employment in particular, should be infused with *ubuntu*, and should be the catalyst for a palpable, *humane* transformation of the South African population – *by agreement*.

1519 See *Barkhuizen v Napier* para 28-35; see also *DE v RH* 2015 (5) SA 83 (CC) para 17-26, and *Green v Fitzgerald* 88.

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